[redacted]

Terry OTTENS *v.* STATE of Arkansas

CR 93-765 871 S.W.2d 329

Supreme Court of Arkansas
Opinion delivered February 14, 1994

Q. Byrum Hurst, Jr., for appellant.

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

STEELE HAYS, Justice. Terry Ottens was convicted in municipal court of Driving While Intoxicated. He filed a timely notice of appeal to the circuit court but failed to file the record within thirty days of the judgment appealed from. The state moved to dismiss the appeal for failure to comply with Inferior Court Rule 9(a) and the appeal was dismissed by order of the circuit court.

Ottens now appeals to this court, invoking our jurisdiction pursuant to Rule 1-2(3) of the Rules of the Supreme Court and Court of Appeals, presenting an issue involving an interpretation of a rule of the inferior courts. Finding no merit in his argument, we affirm the order of dismissal.

Appellant was charged with Driving While Intoxicated in violation of Ark. Code Ann. § 27-23-113 (1987) in the Ashdown Municipal Court. He was convicted on December 9, 1992. He

filed a Notice of Appeal with the Circuit Court of Little River County on January 7, 1993. The record of the Municipal Court proceeding was certified by the Ashdown Municipal Court Clerk on February 12, 1993. However, the record was not filed with the circuit court until February 16, 1993. On May 26, 1993, the State of Arkansas (appellee) filed a motion to dismiss for failure to file a record of the municipal court proceeding within thirty (30) days from the entry of judgment in compliance with Rule 9 of the Arkansas Inferior Court Rules.

Appellant filed a response to the motion to dismiss on June 7, 1993, requesting that the motion be denied for the following reasons: (1) the record was timely filed pursuant to Rule 6 and the states computation of the thirty (30) days is incorrect; (2) the oversight of the clerical staff or a miscomputation should not deprive a defendant of his day in court; and (3) the appellant has a constitutional right to appeal his previous conviction. On June 8, 1993, the circuit court filed an order dismissing the appeal. The appeal was certified to this court on October 1, 1993.

The timely filing of an appeal from a Municipal Court is governed by Inferior Ct. R. 9 which provides in relevant part:

> (a) Time for Taking Appeal. All appeals in civil cases from inferior courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within thirty (30) days from the date of the entry of the judgment.
>
> (b) How Taken. An appeal from an inferior court to the circuit court shall be taken by filing a record of the proceedings had in the inferior court. It shall be the duty of the clerk to prepare and certify such record when requested by the appellant and the appellant shall have the responsibility of filing such record in the office of the circuit clerk.

We have stated that Rule 9 is applicable in both criminal and civil proceedings. *Allred* v. *State*, 310 Ark. 476, 837 S.W.2d 469 (1992).

Appellant maintains that the appeal was timely since the notice of appeal was filed within thirty (30) days of the judgment. He argues that under Rule 9 the record had to be filed by February 7, 1993. We disagree. In order to appeal, the appellant was required to file the municipal court record in circuit court within

thirty days as provided in Rule 9. Since his conviction occurred on December 9, 1992, he had until January 7, 1993, to file the record.

Filing a notice of appeal within thirty (30) days of the conviction does not suffice to perfect an appeal. In fact, a notice of appeal is not required in an appeal from municipal court to circuit court. *McBride* v. *State*, 297 Ark. 410, 762 S.W.2d 785 (1989). Rule 9 expressly provides that the appealing party file the record of the inferior court proceeding within thirty (30) days in order to bring an appeal. *See Lowe* v. *State*, 300 Ark. 106, 776 S.W.2d 822 (1989).

Appellant argues that Ark. Code Ann. § 16-96-505 (1987) places the burden of filing the record on the municipal court official. He contends this is appropriate because many appeals from municipal court are filed by *pro se* litigants. We note that the appellant makes this argument for the first time on appeal, as it was not a part of his response to the motion to dismiss below. We do not address issues raised for the first time on appeal. *Green* v. *State*, 313 Ark. 87, 852 S.W.2d 110 (1993). However, we take this opportunity to reaffirm our holding in *Bocksnick* v. *City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992), in which we stated that the provision relied upon by the appellant, Ark. Code Ann. § 16-96-505 (1987), has been superseded by Rule 9(a) of the Inferior Court Rules. We also note the holding in *Edwards* v. *City of Conway*, 300 Ark. 135, 777 S.W.2d 583 (1989), where we concluded that the duty to perfect an appeal rests upon the counsel of the appealing party. In keeping with *Edwards* and *Bocksnick*, Ark. Code Ann. § 16-96-505, has been codified as superseded. Ark. Code Ann. § 16-96-505 (Supp. 1993).

We except to the argument that pro se litigants should not have the burden of following Inferior Court Rules. To the contrary, we have stated that *pro se* litigants must conform to the rules of procedure, including the timely perfecting of an appeal. *Bragg* v. *State*, 297 Ark. 348, 760 S.W.2d 878 (1988); *Peterson* v. *State*, 289 Ark. 354, 289, 711 S.W.2d 830 (1986). Recently, in *Sullivan* v. *State*, 301 Ark. 352, 784 S.W.2d 155 (1990), we again rejected an argument that the circuit clerk had the duty of perfecting an appeal to this court by filing the record. In *Sullivan*, the litigant was a self-described "incarcerated indigent layman." In this case appellant is not acting *pro se*. Our Model Rules of Professional Conduct require that counsel, like *pro se* litigants, conform to procedural rules.

Next, appellant contends the circuit court erred by entering an order dismissing the appeal without conducting a hearing. However, our rules do not require a hearing on a motion to dismiss and the motion in this case was clearly warranted on the face of the record.

Finally, appellant offers a theory of laches for reversal. He asks us to excuse his failure to comply with Rule 9 because the State did not file the motion to dismiss until after the filing period had expired. He explains that because of the delay, he had begun preparation for trial.The argument overlooks the fact that when the time for filing an appeal is fixed by a rule or statute, the provision which limits the time is jurisdictional in nature. *See Maxwell* v. *State*, 298 Ark. 329, 767 S.W.2d 303 (1989); *Searcy County* v. *Holder*, 257 Ark. 435, 516 S.W.2d 901 (1974). Because jurisdiction is the power or authority of a court to hear a case on its merits, it may be raised at any time. *Head* v. *Caddo Hills School District*, 277 Ark. 482, 644 S.W.2d 246 (1982). Jurisdiction may even be raised for the first time on appeal. *Simpson* v. *State*, 310 Ark. 493, 837 S.W.2d 475 (1992). Consequently, the argument that preparation for trial had begun prior to the filing of the motion to dismiss on jurisdictional grounds is without merit.

Affirmed.

Kimberly GREEN *v.* NATIONAL HEALTH LABORATORIES, INCORPORATED; Fort Smith Medical Laboratory; Dr. Gerald A. Stoltz, Jr., M.D.; and Dr. Craig A. Ferris, M.D.

93-599 870 S.W.2d 707

Supreme Court of Arkansas
Opinion delivered February 14, 1994

Joel W. Price, for appellant.

Hardin, Jesson, Dawson & Terry, by: *Robert T. Dawson* and *Carol Woods Frazier*, for appellee National Health Laboratories.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *Charles R. Ledbetter* and *Gill A. Rogers*, for appellee Stolz.

Bassett Law Firm, by: *W. Dale Garrett*, for appellee Ferris.

DAVID NEWBERN, Justice. This is a medical malpractice case. Kimberly Green appeals from a summary judgment in favor of an entity named "National Health Laboratories, Incorporated," a Delaware Corporation, which uses the fictitious name, "Fort Smith Medical Laboratory." For the remainder of this opinion we will refer to that appellee as "the Laboratory." Also sued were Doctors Gerald A. Stolz, Jr., and Craig A. Ferris. Summary judgment was also entered in favor of each of the doctors, and they are also appellees. The summary judgment was based on the statute of limitations for medical malpractice, Ark. Code Ann. § 16-114-203 (Supp. 1993). We hold the evidence presented on

the issue of whether the statute of limitations barred the claim did not entitle the defendants to a summary judgment.

Affidavits, discovery responses, and pleadings before the Trial Court revealed these facts. In April 1990 Ms. Green, aged 19, visited Dr. Durmon who performed a pap-smear. The doctor sent slides from this examination to the Laboratory for evaluation. Dr. Ferris, on behalf of the Laboratory, reported a need for further examination. Dr. Durmon then performed a colposcopy on Ms. Green, and the results were forwarded to the Laboratory for evaluation.

The results of the colposcopy were examined by Dr. Stolz who concluded the colposcopy detected signs of microinvasive squamous cell carcinoma. Dr. Stolz conferred with Dr. Ferris, his colleague at the Laboratory, who on April 27, 1990, agreed with Dr. Stolz's opinion. The doctors also agreed to recommend a more invasive conization biopsy of the cervix be performed in order to evaluate the degree of cancer present.

The one-page document stating the diagnosis and recommendation is dated "4-26-90," and it also has this notation at the bottom of the page, "D/T: 4-30-90 CH." The record suggests that "D/T" means "date of transcription." The record does not show when the report was mailed to Dr. Durmon; however, there is evidence that he received it on May 1, 1990.

Ms. Green underwent a conization biopsy of the cervix in May 1990. The results of this biopsy showed the diagnosis from the preceding examinations was in error. No carcinoma was present. Ms. Green, who has since married, alleges the conization surgery was unnecessary and will prevent her from becoming pregnant or from sustaining pregnancy.

The record shows that counsel for Ms. Green gave the Laboratory and Doctor Stolz notice by a letter dated July 25, 1991, that unless a satisfactory settlement could be had he planned to file suit on Ms. Green's behalf, but suit was not filed until April 30, 1992. The defendants each moved for summary judgment, contending the two-year limitation provided in § 16-114-203(a) expired before April 30, 1992, and thus Ms. Green's cause of action was barred. The Trial Court granted the motions.

1. Summary Judgment

A party moving for summary judgment must show "the pleadings, depositions, answers to interrogatories and admissions on file, together with 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). All proof must be considered in a light most favorable to the non-moving party, and any doubts or inferences must be resolved against the moving party. *Tullock* v. *Eck*, 311 Ark. 564, 845 S.W.2d 517 (1993).

The sole issue before us is whether the evidence showed that Dr. Stolz, Dr. Ferris, and the Laboratory were entitled to judgment as a matter of law because the claim against them was barred by the statute of limitations.

2. The statute

Section 16-114-203 provides, in pertinent part:

> (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.
>
> . . .

"Medical injury," as defined by Ark. Code Ann. § 16-114-201(3) (1987), includes "any adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical care provider, whether resulting from negligence, error, or omission in the performance of such services . . . ."

We have consistently interpreted the limitation in § 16-114-203 strictly, commencing the two year period from the date of the act of alleged malpractice. *See Tullock* v. *Eck, supra; Treat* v. *Kreutzer*, 290 Ark. 532, 720 S.W.2d 716 (1986). While we have adopted the continuous treatment doctrine, *Lane* v. *Lane*, 295 Ark. 671, 752 S.W.2d 25 (1988), we have refused to recognize other doctrines which would ameliorate the strictness of the requirement. *See Owen* v. *Wilson*, 260 Ark. 21, 537 S.W.2d 543

(1976)(rejection of the continuing tort theory); *Williams* v. *Edmondson*, 257 Ark. 837, 520 S.W.2d 260 (1975)(rejection of the discovery rule).

To address this appeal we need not consider those doctrines. Ms. Green contends Dr. Stolz and Dr. Ferris negligently made an erroneous recommendation of the surgery which she contends injured her after an erroneous reading of the results of the colposcopy. When, in the language of the statute, did this alleged "wrongful act" occur?

While the allegedly negligent reading of the specimen occurred, according to the proof, on April 26 and 27, 1990, it was apparently not transcribed or mailed until thereafter. The recommendation for the additional surgery, according to the report, was to aid in the diagnostic process. The language of the "comment" portion of the report was as follows:

> In the biopsy specimen from the 11 o'clock area of the cervix, original and deeper sections show at least the presence of microinvasive squamous cell carcinoma. The possibility of a deeper degree of invasion is suggested in one of the sections. A cervical conization is recommended prior to definitive therapy to evaluate the depth of actual invasion.

The conization, which allegedly caused the injury, was done, and the resulting tissue was evaluated by a pathologist at St. Edward Mercy Medical Center. No carcinoma was found. That finding was confirmed by a pathologist at Massachusetts General Hospital.

In addition, evidence was presented that Dr. Stolz, in a telephone conversation with Dr. Durmon which must have occurred after May 1, 1990, the date Dr. Durmon received the report, discussed the matter further and reported that, like Dr. Durmon, he was surprised by the diagnosis contained in his report but had confirmed it with his "partners."

Under these circumstances, we regard the allegedly negligent recommendation and the communication of it as being part of the "act" of the pathologists in the "course of providing the professional services being rendered" which allegedly injured Ms. Green. As the evidence showed that the communication of

the recommendation occurred less than two years prior to the filing of the action, we cannot say the action is barred and that, in the words of Rule 56(c), the defendants were entitled to a judgment as a matter of law.

Reversed and remanded.

CORBIN, J., concurs.

HAYS, J., dissents.

DONALD L. CORBIN, Justice, concurring. I agree with the majority opinion. I concur only to emphasize that the doctrine of continuing treatment, which we adopted in *Lane* v. *Lane*, 295 Ark. 671, 752 S.W.2d 25 (1988) requires the accountability of pathologists and other diagnostic disciplines upon which a treating physician relies. For persuasive authority directly on point, I refer the reader to *Fonda* v. *Paulsen*, 363 N.Y.S.2d 841 (N.Y. App. Div. 1975).

STEELE HAYS, Justice, dissenting. I believe appellant's asserted cause of action for medical malpractice had expired under the provisions of Ark. Code Ann. § 16-114-203 (Supp. 1991) when suit was filed on April 30, 1992. Appellees were notified of the claim on July 25, 1991, some nine months before suit was filed, but for some unexplained reason the action was not filed within the time allowed. I believe the trial court ruled correctly and should be affirmed.

Timothy J. LEATHERS, Commissioner of Revenue for the State of Arkansas *v.* W.S. COMPTON CO., Inc.

93-774 870 S.W.2d 710

Supreme Court of Arkansas
Opinion delivered February 14, 1994

Karen W. Hathaway, for appellant.

Walter Skelton and *Charles J. Buchan*, for appellees.

DAVID NEWBERN, Justice. The issue in this appeal is whether the Chancellor erred in enjoining the Commissioner of Revenue,

who is the appellant, from releasing information about the cigarette "stamp deputy allowance." Cigarette wholesalers place tax stamps on packages of cigarettes before they are sold to retailers. In return, they receive a commission, known as the "stamp deputy allowance," from the Revenue Department. The McLane Company, Inc., a wholesale company operating elsewhere, requested from the Commissioner figures showing how much commission had been paid to each wholesaler in Arkansas. All of the Arkansas companies in the wholesale cigarette business sought the injunction. They are the appellees. The Chancellor held that, because it would confer "advantage" upon a competitor, the release of the information was precluded by the applicable statute and thus to be enjoined. The decision is affirmed.

1. The statute

Arkansas Code Ann. § 26-18-303 (Supp. 1993) deals with the disclosure of tax information. It provides for nondisclosure of certain items of tax information but, in subsection (b)(11), exempts from nondisclosure commissions paid to taxpayers for stamp sales. In subsection (b)(11)(Q), however, the following appears:

> . . . . Provided, however, information which is subject to disclosure under the provisions of subdivision (b)(11) shall not be disclosed if such information would give advantage to competitors or bidders, or such information is exempt from disclosure under any other provision of law which exempts specified information from disclosure under any such law.

Subsection (g) then provides:

> (1) The director shall promulgate such regulations as are necessary to establish a reasonable procedure for making requests for and release of information under subdivision (b)(11) of this section, for allowing a taxpayer reasonable notice in advance of the release of the requested information, for a period of time up to seven (7) days from the date a request for information is made to provide notice and make necessary determinations, and to provide the methods by which the director shall determine if the information requested is subject to disclosure under Arkansas law.

> (2) The provisions of the section shall solely govern the release of information under subdivision (b)(11) and the release of information shall not be subject to the Freedom of Information Act of 1967, § 25-19-101 et seq.

The Commissioner's brief analogizes to, and cites cases interpreting, the Freedom of Information Act. In view of the clear statutory provision that the Freedom of Information Act is inapplicable, the argument and citations are not apt.

Just as the Chancellor, we are relegated to deciding the meaning of that part of the language of § 26-18-303 which says, ". . . shall not be disclosed if such information would give advantage to competitors or bidders." We have not had any previous occasion to interpret that language.

When the language of a statute is plain and unambiguous, we give the language its plain and ordinary meaning. *Omega Tube & Conduit Corp.* v. *Maples*, 312 Ark. 489, 850 S.W.2d 317 (1993); *City of Fort Smith* v. *Tate*, 311 Ark. 405, 844 S.W.2d 356 (1992). If a statute is clear and unambiguous, the primary concern is with what the document says and not what its drafters may have intended. *Omega Tube & Conduit Corp.* v. *Maples, supra; Mourot* v. *Arkansas Bd. of Dispensing Opticians*, 285 Ark. 128, 685 S.W.2d 502 (1985).

The Commissioner has interpreted § 26-18-303(b)(11)(Q) in Revenue Regulation 1991-7, which is entitled "Disclosable Tax Information." It states that the information will not be released unless the taxpayer shows release of the information would result in "substantial harm to the taxpayer's competitive position."

If the language of a statute is ambiguous, the manner in which it has been interpreted by executive and administrative officers is to be given consideration and will not be disregarded unless it is clearly wrong. *Omega Tube & Conduit Corp.* v. *Maples, supra; Morris* v. *Torch Club, Inc.*, 278 Ark. 285, 645 S.W.2d 938 (1983); *Walnut Grove Sch. Dist. No. 6* v. *County Bd. of Education*, 204 Ark. 354, 162 S.W.2d 64 (1942). The language in § 26-18-303(b)(11)(Q), is, however, not ambiguous and thus must be given its plain and ordinary meaning as written. *Mourot* v. *Arkansas Bd. of Dispensing Opticians, supra.* If the General Assembly had meant to add to the simple language "would give

advantage to competitors," it could easily have done so. *See Amason* v. *City of El Dorado*, 281 Ark. 50, 661 S.W.2d 364 (1983).

[redacted] We affirm the Chancellor's ruling that "advantage to competitors" means "any advantage" as it is simply not otherwise limited.

2. Competitive advantage

The Chancellor found that using the information in conjunction with other available information would give valuable information to a competitor. There was evidence before her that a competitor could use the information sought to gain an advantage enabling it to determine whether it would be worthwhile to target a particular wholesaler for competition. The Commissioner argues that release of the stamp deputy allowance information alone would not give a competitive advantage to McLane. We disagree and affirm the Chancellor's finding that release of the information would confer advantage on a competitor.

[redacted] We review chancery cases *de novo* but will not reverse the findings of fact by the Chancellor unless they are clearly erroneous. *Brasel* v. *Brasel*, 313 Ark. 337, 854 S.W.2d 346 (1993). We give due regard to the superior position of the Chancellor to judge the credibility of the witnesses. Ark. R. Civ. P. 52(a); *Brasel* v. *Brasel, supra.* We consider the evidence in the light most favorable to the appellee. *Guaranty Nat'l Ins.* v. *Denver Roller, Inc.*, 313 Ark. 128, 854 S.W.2d 312 (1993). The burden is upon the appellant to show that the findings are erroneous. *Burson* v. *Day*, 284 Ark. 515, 683 S.W.2d 917 (1985).

[redacted] Bob Douglas, an Arkansas wholesaler, testified that McLane is a large, strong company in the business of wholesaling cigarettes. The profit margin on cigarettes is small and thus dependent on volume. The stamp deputy allowance information could be used by McLane in conjunction with other reports to determine the market share of a wholesaler in a particular area. By a process of extrapolation McLane could learn the share of a wholesaler's gross profits attributable to cigarette sales. Having that information, McLane could know the extent of a wholesaler's business attributable to other items such as candy and thus know what it would take to undercut prices on those other items sufficiently to take away customers or run the wholesaler out of

business. Mr. Douglas's testimony was not refuted by any other witnesses, and we hold it sufficient to support the Chancellor's decision.

Affirmed.

Kenneth KELLY *v.* STATE of Arkansas

CR 94-97 871 S.W.2d 331

Supreme Court of Arkansas
Opinion delivered February 14, 1994

Keith Watkins, for appellant.

No response.

PER CURIAM. Appellant, Kenneth Kelly, by his attorney, Keith Watkins, has filed a motion for a belated appeal and for a Rule on the Clerk. The record was refused when tendered to the clerk because the notice of appeal was not timely filed.

Appellant's attorney, Keith Watkins, admits that the failure to give a timely notice of appeal was due to his personal neglect.

We hold that such an error, admittedly made by the attorney for a criminal defendant, constitutes ineffective assistance of counsel and is good cause to grant the motion. *See Weaver* v. *State*, 304 Ark. 77, 798 S.W.2d 925 (1990).

A copy of this order will be forwarded to the Committee on Professional Conduct.

Terry Wayne SWANIGAN *v.* STATE of Arkansas

CR 93-1127 870 S.W.2d 712

Supreme Court of Arkansas
Opinion delivered February 21, 1994

[redacted]

William R. Simpson, Jr., Public Defender, by: *Sandra S. Cordi*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, Terry Wayne Swanigan, raises a single point on appeal from his criminal conviction of the offense of first-degree murder and his sentence of life imprisonment, contending that the trial court erred in failing to exclude the testimony of a witness for violation of Ark. R. Evid. 615. His argument has no merit, and the judgment of the trial court is affirmed.

Swanigan was charged with capital murder in the December 1992 shooting death of Lewis Allen, a fourteen-year-old. The State waived the death penalty, and, following a jury trial, Swanigan was found guilty of first-degree murder and was sentenced to life imprisonment.

Evidence presented at trial indicated that, before the murder, Swanigan and the victim, Allen, encountered each other on a street near The Meat Store, a Little Rock butcher shop and grocery store. According to Tim Henderson, a friend who was walking with Allen and Andre Williams, another youth, to the store, the trio saw Swanigan talking to someone in a truck. He pulled off his jacket and walked toward them as if he wanted to fight.

When Swanigan approached the three youths, witness Henderson testified, Allen put his hand in his coat, as if he had a gun (although the witness claimed never to have seen one), and said to Swanigan, "I don't think that you want to step." Another witness, Everett Lauderdale, testified that after the confrontation, Swanigan went to his house, which was near The Meat Store.

Meanwhile, Allen, Henderson, and Williams entered the shop. They were soon followed by Swanigan, carrying a pistol, which, according to Henderson, Swanigan pointed in Allen's face, saying, "What's up, n_____? What's up now? Where your gun at now?" According to another witness, Cody Nelson, an employee of The Meat Store, a struggle ensued over the gun. At that point, Nelson testified, he heard Swanigan say to Allen, "Punk, I'll kill your m_____-f_____ ass." In the scuffle, Allen fell backwards, and Swanigan fired at him. Witness Henderson stated that three shots were fired in the store and that Allen attempted to escape through the front door. He collapsed on a sidewalk outside and died from a gunshot wound in the chest.

I. Violation of Ark. R. Evid. 615

On appeal from his first-degree murder conviction, Swanigan argues that the trial court committed reversible error in denying the defense motion to strike the testimony of prosecution witness Cody Nelson for violation of Ark. R. Evid. 615, the witness-exclusion rule. That rule provides, in relevant part: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion."

During cross-examination of witness Nelson, who was working in The Meat Store at the time of the shooting, defense counsel inquired about the presence of other people near the meat counter:

Q Were there other people working back there?

A Yeah.

Q Who was?

A Antoine Young.

Q Antoine Young. Is there anyone else working back there?

A No.

Q All right. Didn't you have a customer there?

A Yeah.

Q Okay.

A That's not— He said this, that's what I heard, but I'm not sure.

Q Okay. So you—

A He told me he had a customer, but I wasn't—

Q When did he tell you that?

A He told me— Well, he told me today.

Q Today?

A Yes.

Q When were y'all discussing the testimony about this?

A It was probably when we went to lunch.

Q When you went to lunch? Okay.

At that, the defense attorney requested permission to approach the bench, and the following discussion occurred:

> MR. SALLINGS: Your Honor, the Court instructed the witnesses this morning not to discuss the case or the testimony, and I would move to strike this witness' testimony based on discussing it with other witnesses back in the Witness Room against the Court's order.
>
> THE COURT: Has there been any change in the testimony? Has there been any prejudice in this regard?
>
> MR. SALLINGS: I believe there's already evidence that he's testified to some things that he— not necessarily what he knew, but what someone told him back there.
>
> THE COURT: Counsel, that'll be denied. As for striking the testimony, as for a petition for a continuance, if you want to file that later, we'll consider that, but your Motion to Strike his testimony is going to be denied.

Although Antoine Young had apparently been subpoenaed as a potential witness, he was never called to testify.

This court had the occasion, in *Blaylock* v. *Strecker*,

291 Ark. 340, 724 S.W.2d 470 (1987), to examine Ark. R. Evid. 615 and to address its operation and application exhaustively. There we held that a trial court has very narrow discretion to exclude the testimony of a witness for noncompliance with an exclusion order pursuant to Rule 615. A trial judge can exercise that narrow discretion to exclude a witness's testimony only when the noncompliance is had with the consent, connivance, or procurement of a party or his attorney. *Id.* The violation by a witness of the rule of sequestration through no fault of, or complicity with, the party calling him, should go to the credibility rather than to the competency of the witness. *Id.*

In the *Blaylock* opinion, we cited *Norris* v. *State*, 259 Ark. 755, 536 S.W.2d 298 (1976), and *Williams* v. *State*, 258 Ark. 207, 523 S.W.2d 377 (1975), for the controlling rationale regarding the rarely exercised discretion to exclude testimony for noncompliance with Rule 615. We stated that, with the offending witness subject to punishment for contempt and the adverse party free to raise the issue of credibility in argument to the jury, the party who is innocent of the rule's violation should not ordinarily be deprived of the testimony.

The standard of narrow discretion, we noted in *Blaylock* v. *Strecker*, "remains as it has been for many years." 291 Ark. at 345, 724 S.W.2d at 473. We have not changed our stance in subsequent decisions, nor do we see any reason to change it now. *See Porter* v. *State*, 308 Ark. 137, 823 S.W.2d 846 (1992); *Ford* v. *State*, 296 Ark. 8, 753 S.W.2d 258 (1988); *Daniels* v. *State*, 293 Ark. 422, 739 S.W.2d 135 (1987).

There are three possible methods of enforcement of an exclusion order that are available to a trial judge: (1) citing the witness for contempt; (2) permitting comment on the witness's noncompliance in order to reflect on his credibility; and (3) refusing to let the witness testify. *Blaylock* v. *Strecker, supra.* In the following portion of cross-examination, which occurred directly after the trial court refused to strike witness Nelson's testimony, defense counsel pursued the possibility of further noncompliance with the rule and raised the issue of credibility:

> Q Okay. Who else did you talk with about your testimony at lunch?

A Nobody.

Q Nobody else? Anything that you've testified to on direct examination that maybe you didn't really remember, but someone told you since the date this happened?

A No. No.

Q Okay. So, you don't remember if there was another person there at the counter or not?

A No.

Defense counsel was not only able to comment, in the course of his questioning, about the reliability of witness Nelson's testimony, but he was also able to establish the fact that the witness did not remember whether another person was present at the meat counter. This court has held that even when there has been a clear violation of Rule 615, the trial court does not abuse its discretion in permitting the witness's testimony when exercising its option of allowing comment on the witness's violation in order to reflect on his credibility. *See Graham* v. *State*, 296 Ark. 400, 757 S.W.2d 538 (1988). Indeed, the trial court's discretion is more readily abused by excluding the testimony than by admitting it. *Ford* v. *State, supra.*

Clearly, witness Nelson's violation of the rule was not accomplished through the consent, connivance, or procurement of the State. His testimony regarding his noncompliance was elicited on cross-examination by the defense attorney, who immediately, upon the court's refusal of his motion to strike, repaired whatever damage may have been done by inquiring about other aspects of testimony that witness Nelson "didn't really remember" and by securing the witness's acknowledgment that he didn't remember if another person was standing by the meat counter. (Subsequently, the defense counsel devoted considerable attention on recross-examination to inconsistencies in witness Nelson's statements about what he actually saw at the time of the shooting.)

As the trial court specifically noted by its question addressed to counsel at the time the motion to strike was made, there was no showing of prejudice. Other witnesses testified to essentially the same sequence of events, though there was some dispute as to whether Lewis Allen actually threatened Swanigan

with a gun during the encounter on the street. It is the jury's province to resolve any contradictions, conflicts, and inconsistencies in a witness's testimony. *Franklin* v. *State*, 308 Ark. 539, 825 S.W.2d 263 (1992); *Abdullah* v. *State*, 301 Ark. 235, 783 S.W.2d 58 (1990).

In short, the trial court did not err in refusing to strike the testimony of witness Nelson for noncompliance with Ark. R. Evid. 615.

II. Compliance with Supreme Court Rule 4-3(h)

The State, in compliance with Rule 4-3(h) of the Rules of the Arkansas Supreme Court, has searched the record for objections decided adversely to the appellant and has included one pertaining to an objection made by the Deputy Public Defender during the State's closing argument concerning a negative reflection on defense counsel's credibility. Other objections are covered in the appellant's abstract. None involves prejudicial error.

Affirmed.

Jim C. PLEDGER, Director, Arkansas Department of Finance and Administration *v.* C.B. FORM COMPANY

93-844 871 S.W.2d 333

Supreme Court of Arkansas
Opinion delivered February 21, 1994

Ricky L. Pruett, for appellant.

Kinard, Crane & Butler; and *Woodward & Epley*, by: *Michael G. Epley*, for appellee.

ROBERT H. DUDLEY, Justice. This case involves the interpretation and construction of the Arkansas Gross Receipts Act of 1941, as amended.The chancellor ruled that the taxpayer's manufacture of forms, or molds, is exempt from the gross receipts, or sales, tax. We affirm.

The taxpayer, C.B. Form Company, manufactures plaster and cardboard forms for sale to its sole customer, American Fuel Cell and Coated Fabrics Company, or Amfuel. Amfuel utilizes the forms to build fuel cells that fit into a cavity in the wing and fuselage of military and commercial aircraft. In manufacturing the fuel cells, Amfuel applies a precut rubber sheeting or coated

fabric to the exterior surface of the form. Two or more plies may be used. This creates an uncured, or green, fuel cell. The green cell and the form inside it are placed in a large autoclave to complete the adhesion process and make one integral unit of the rubber coated fabric. The heat and pressure of the autoclave, in combination with the form within the fuel cell, cause the uncured cell to acquire its permanent physical shape and characteristics. After curing, the cell and its form are submerged in a hot water vat to soften the interior plaster or cardboard form. The form is removed piece by piece through openings in the cell for fuel lines or refueling portals. The cardboard or plaster form is completely destroyed during removal and is hauled to a landfill as unusable waste. The interior of the fuel cell is inspected and packaged for shipment to the customer.

The taxpayer thought that its forms were exempt from the sales tax under that part of the machinery and equipment exemption that provides an exemption for molds and dies, and filed a claim under the Arkansas Tax Procedure Act for a sales tax refund of slightly more than $86,000. The Revenue Legal Counsel of the Department of Finance and Administration denied the claim for refund. The taxpayer filed suit in chancery court and alleged that the Department had erroneously denied its claim for the refund. The case was submitted to the chancellor on a stipulation of facts. The chancellor ruled that the forms came within the exemption that provides for "molds . . . that determine the physical characteristics of the finished product." *See* Ark. Code Ann. § 26-52-402(c)(2)(B)(i) (Repl. 1992).

Our standard of review of these cases is well settled. The taxpayer must establish an entitlement to an exemption from taxation beyond a reasonable doubt. *Pledger* v. *Baldor Int'l*, 309 Ark. 47, 827 S.W.2d 646 (1992). A strong presumption operates in favor of the taxing power. *Ragland* v. *General Tire & Rubber Co., Inc.* 297 Ark. 394, 763 S.W.2d 70 (1989). Tax exemptions are strictly construed against the exemption, and we have written that "to doubt is to deny the exemption." *Baldor*, 309 Ark. at 33, 827 S.W.2d at 648. We review tax cases *de novo*. *Pledger* v. *Easco Hand Tools, Inc.*, 304 Ark. 30, 800 S.W.2d 690 (1990).

The chancellor based his ruling on the following subparts of the applicable statute, Ark. Code Ann § 26-52-402:

> There is specifically *exempted from the tax* imposed by this act, the following:
>
> (1)(A) Gross receipts . . . derived from the sale of tangible personal property consisting of *machinery and equipment* used directly in producing, manufacturing, fabricating . . . articles of commerce at manufacturing . . . plants . . . in the State of Arkansas. . . .
>
> (2)(B) *Machinery and equipment 'used directly' in the manufacturing process shall include*, but shall not be limited to, the following:
>
> (i) *Molds and dies that determine the physical characteristics of the finished product* or its packaging material.

Ark. Code Ann. § 26-52-402(a) (Repl. 1992) (emphasis added).

The Department makes four assignments of error. The first of these is essentially a non-issue. In it, the Department argues that the forms do not qualify for an exemption as items of tangible personal property sold for resale under Ark. Code Ann. § 26-52-401(12)(a) (Supp. 1993). The chancellor did not rely on this subsection of the statute, and the taxpayer readily concedes the point. Instead, the taxpayer seeks to claim the exemption under the "mold and die" exemption quoted above. We address the point only to make clear the distinction between the two statutes.

[redacted] Section 26-52-401 exempts from the collection of sales or use tax, gross proceeds on products that are sold for resale. The purpose of this statute is to prevent double taxation. *Hervey* v. *Southern Wooden Box*, 253 Ark. 290, 486 S.W.2d 65 (1972). Subsection (12)(B) allows property sold for use in manufacturing to be classified as having been sold for resale if the property "becomes a recognizable, integral part of the manufactured . . . product." Items that are destroyed or disposed of in the manufacturing process do not qualify for this exemption because if they are destroyed there is no possibility of double taxation. *See Ragland* v. *General Tire & Rubber Co.*, 297 Ark. 394, 763 S.W.2d 70 (1989). The forms manufactured by the taxpayer in this case do not become a "recognizable and integral" part of the finished fuel cell. If the taxpayer were claiming an exemption under this statute, it would be denied.

A different section, section 26-52-402, provides the exemption for machinery and equipment used directly in the manufacturing process. The purpose of this "machinery and equipment" statute is "to encourage capital investment in industrial, utility and manufacturing enterprises" for the "industrial development of the State." *See* Act 113 of 1967 (codified at Ark. Code Ann. § 26-52-402 (Repl. 1992)) (emergency clause). Section 26-52-402(a)(2)(C) provides that the machinery and equipment exemptions are "incentives to encourage the location of new manufacturing plants in Arkansas, the expansion of existing manufacturing plants in Arkansas, and the modernization of existing manufacturing plants in Arkansas through the replacement of old, inefficient, or technologically obsolete machinery and equipment." The taxpayer contends it is entitled to the exemption under the subsection of this statute that exempts from taxation "molds and dies that determine the physical characteristics of the finished product." Ark. Code Ann. § 26-52-402(c)(2)(B)(i) (Repl. 1992).

The heart of the Department's appeal lies in its second assignment of error. It argues that the taxpayer is not entitled to an exemption under the mold and die exemption, at section 26-52-402(c)(2)(B)(i). There is no dispute about the facts. The parties stipulated that the "words 'form' and 'mold' are used interchangeably in the industry," and the Department acknowledges that the forms "determine the physical characteristics of the fuel cells." The Department argues that the chancellor erred as a matter of law in ruling that the forms come within the exemption for "molds and dies that determine the physical characteristics of the finished product."

The Department contends that, pursuant to our cases, a mold must have continuing utility and be dynamic to qualify as machinery and equipment. It argues that since these molds are destroyed, they have no continuing utility, and are not dynamic and, therefore, do not qualify for the exemption. The argument misses the point that the forms come within the express language of the exemption for "molds and dies that determine the physical characteristics of the finished product."

The statute provides an exemption for molds that determine the physical characteristics of the finished product. It does not require that they be permanent. We have often written

that legislative intent must be gathered from the plain meaning of the language used in an act. *Roy* v. *Farmers & Merchants Inc. Co.*, 307 Ark. 213, 819 S.W.2d 2 (1991). The meaning of the words used in mold and die exemption is clear: There is an exemption for molds that determine the physical characteristics of the finished product. In addition, when the sentence in the subsection exempting molds is read in full, it appears that the Department's argument is contrary to the expressed legislative intent. The full sentence providing the exemption is "Molds and dies that determine the physical characteristics of the finished product *or its packaging material*" Ark. Code Ann. § 26-52-402(c)(2)(B)(i) (emphasis added). Packaging material would not ordinarily have continuing utility. There is no expressed legislative intent to construe the statute as proposed by the Department.

The Department's argument that equipment or machinery must have "continuing utility" had its genesis in our case of *Ragland* v. *Dumas*, 292 Ark. 515, 732 S.W.2d 118 (1987). In that case the trial court ruled that gravel, which was used as a base for a temporary road to an oil extraction project, was exempt under section 26-52-402 as "equipment" used directly in the process of extracting oil. We reversed and held that the term "equipment" did not include gravel used on a temporary road. We noted that the term "equipment" was not defined in the statute, and is "an exceedingly elastic term, the meaning of which depends on context." *Id.* at 520, 732 S.W.2d at 120. We then looked at definitions of the term and held that gravel did not fit within any of them. One of the reasons for this holding was that the gravel had no continuing utility after the oil-extraction project ended. *Id.* Unlike the statute applicable to that case, the subsection of the statute applicable to the case at bar specifically defines molds that determine the physical characteristics of the finished product as "machinery and equipment." Thus, under the language of the statute, it is not necessary that molds have a "continuing utility" to come within the statutory definition of equipment.

The Department similarly argues that molds cannot come within the mold and die exception unless they also fall within the definition of "machinery" that we set out in *Heath* v. *Research-Cottrell, Inc.*, 258 Ark. 813, 529 S.W.2d 336 (1975). In that case, the taxpayer sought an exemption for a cooling tower as machinery under section 26-52-402. The statute did not define the term

"machinery" and we construed it to mean something dynamic. Contrary to the statute involved in that case, the subsection of the statute applicable to the case at bar defines molds that determine the physical characteristics of the finished product as "machinery and equipment." Again, the forms at issue fit within the express language of the statute as "machinery and equipment."

The Department's third assignment is valid, but does not change the result of the case. In his letter opinion, the chancellor erroneously referred to section 26-52-402(c)(2)(B)(iv) as additional authority for his ruling in this case. The Director correctly points out that the subsection cited by the chancellor refers to an exemption for the machinery and equipment producing chemical catalysts and solutions, but not to the chemicals and solutions themselves. Thus, the cited subsection does not give an additional reason to support the chancellor's ruling. Even so, the result of the case is the same since we affirm the ruling on the ground that the taxpayer clearly comes within the mold and die exception as set out above.

In its final argument the Department contends that, even if the taxpayer's forms fit within the definition of "molds and dies," they still do not qualify for an exemption because the statute only exempts an initial purchase, or a complete replacement, of a machine or equipment. The Department's argument is correct in its assertion that only new or replacement machines or equipment are exempt, and that repairs are not exempt. *See* Ark. Code Ann. §§ 26-52-402(a)(1)(B) and (2)(A)-(B). Even so, the forms in this case clearly come within the language of the mold and die exception, whether they be classed as initial purchases or replacement molds.

In this same argument, the Department contends that the taxpayer is limited to an exemption for the initial mold, and not for replacement molds because *Arkansas Gross Receipts Tax Regulation GR-56* requires sellers of molds and dies to collect a tax upon replacement molds and dies that are sold to be used with power units. The director contends that since these molds are not part of a machine they "fail to satisfy an initial requirement for exemption" under the regulation. The argument is without merit for either of two reasons. First, the argument was not raised below, and we will not consider an argument for

the first time on appeal. Second, if the Department is seeking to use its power of regulation to impose a requirement that a mold be a part of a power unit in order to be exempt, it has exceeded its authority. An administrative regulation cannot be contrary to a statute. *See State* v. *Burnett*, 200 Ark. 655, 140 S.W.2d 673 (1940). The statute provides an exemption for the molds.

Affirmed.

HAYS and BROWN, JJ., dissent.

STEELE HAYS, Justice, dissenting. Admittedly, it is not entirely clear the legislature did not intend the words "molds and dies" to apply to the forms produced by C.B. Form Company (Company) and used by its sole customer, Amfuel, to produce fuel cells. But neither is it clear that the legislature *did* so intend and, unfortunately for the Company, that is the stringent test it must surpass to prevail in this litigation. In fact, in order to qualify for the exemption the Company must establish *beyond a reasonable doubt* that such was the intent of the legislature. *Ragland* v. *General Tire and Rubber Co.*, 297 Ark. 394, 763 S.W.2d 70 (1989); *Heath* v. *Westark Poultry Processing Corp.*, 259 Ark. 141, 531 S.W.2d 953 (1976). This case, perhaps more than any other in recent memory, illustrates the maxim applicable to taxation exemption: "to doubt is to deny the exemption." *Pledger* v. *Baldor International, Inc.*, 309 Ark. 30, 827 S.W.2d 646 (1992). I respectfully suggest the majority is resolving a doubtful issue against the taxing authority — the State of Arkansas — and strictly construing the exemption in favor of the Company, exactly the reverse of settled law.

In its haste to judgment the majority equates the words 'mold' and 'form' and effectively decides the case on that basis. The words may be used interchangeably in the industry, but that is not true of the Company, where the word 'form' is consistently used to refer to the disposable device now in dispute and the word 'mold' is used, in contradistinction, to refer to a reusable fiberglass structure utilized by the Company to produce the 'form.' I submit that the reusable device — the mold — meets the statutory test but that the nonreusable device — the form — does not.

If one looks no farther than the words "molds and dies that determine the physical characteristics of the finished product. . ."

the exemption might seem warranted. But to conclude that the form in this case is synonymous with 'mold,' as used in the statute, greatly over simplifies a complex issue.

The key words of the statute are "machinery and equipment" and "molds and dies." Certainly the 'form' in this case determines the physical characteristics of the finished product — the fuel cell. But is that conclusive of the issue being decided? I think not. I submit that a 'mold,' used in conjunction with the word 'die,' when strictly construed against the exemption, contemplates a device which has an ongoing function in the manufacture of a particular product, as opposed to a cardboard structure which, once used, is torn from the product piece by piece and discarded as unusable waste.

Admittedly, the statute does not require that molds and dies be permanent. But the two words are linked together in the conjunctive, suggesting a correlation, rather than in the disjunctive, and the word 'die' plainly contemplates an industrial device which is reusable over an extended life. The word is defined as "any of various devices for cutting or forming materials in a press or a stamping or forging machine;" "a hollow device of steel," "a steel block or plate." In this context it is far more plausible that by using the words "molds and dies" (under the broader heading of "machinery and equipment") the legislature was referring to devices characteristically similar and having a useful life in the manufacturing process. Indeed, we have recognized that the language used in our statute requires a "continuing utility" in order for the exemption to attach. *Ragland* v. *Dumas*, 292 Ark. 515, 732 S.W.2d 119 (1987).

Other states have interpreted the language of similar tax exemption statutes accordingly: *See,* e.g., *Midwestern Press, Inc.* v. *Commissioner of Taxation*, 203 N.W.2d 344, 295 Minn. 59 (1972) (lithographic plates custom made for particular printing jobs, usable for only a limited number of impressions and then scrapped, were not "machinery" for the purposes of tax exemption); *Hasbro Industries, Inc.* v. *Norbug, R.I.*, 487 A.2d 124 (1985) (the "machinery" tax exemption not applicable to clay models); *Great Western Sugar Co.* v. *U.S.*, 452 F.2d 1394 (1972) (metal plates with a cutting edge used to cut sugar beets into thin slices not entitled to tax exemption applicable to "machinery used in

the manufacture of sugar"); *Morgan County Feeders, Inc.* v. *McCormick*, 836 P.2d 1051 (Colo. App. 1992)(goods used in business are "equipment" when they have identifiable units and a relatively long period of use.)

Being unable to eliminate all reasonable doubt that the legislature intended the exemption in this instance, I would reverse.

BROWN, J., joins in this dissent.

William R. SMITH *v.* STATE of Arkansas

CR 91-294 870 S.W.2d 716

Supreme Court of Arkansas
Opinion delivered February 21, 1994
[Rehearing denied April 11, 1994.]

Keith Carle, for appellant.

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

ROBERT H. DUDLEY, Justice. On February 26, 1991, appellant was convicted in municipal court of a misdemeanor. On March 25, 1991, he filed a motion in circuit court and asked to prosecute a limited appeal to that court as a pauper. On May 10, 1991, the circuit court denied the motion. On May 30, 1991, more than ninety days after the date of conviction, appellant filed in circuit court his notice of appeal, along with the municipal court record. His appeal asked only that the circuit court review a motion to suppress evidence that he had filed in municipal court. The circuit court affirmed the municipal court's denial of the motion to suppress and affirmed the conviction. Appellant sought another limited appeal to the court of appeals. The Attorney General asked the court of appeals to dismiss the case for lack of jurisdiction. The court of appeals certified the case to this court. We dismiss the appeal. We address neither the merits of the case, nor the propriety of the limited appeal in circuit court.

Rule 9 of the Inferior Court Rules governs appeals from municipal court to circuit court. Subsection (a) of the rule provides that the appeal of a civil case from municipal court to circuit court must be filed in the circuit clerk's office within thirty days from the date of entry of the judgment. Subsection (b) provides that an appeal is taken by filing a record of the proceedings in municipal court. In this case, the necessary record would have included the information, the motion, and the judgment of the municipal court. *See* Inferior Ct. R. 9, Reporter's Note 2.

Appellant admits that Rule 9 governs appeals of civil cases to circuit court, but denies that it applies to criminal cases. We have previously held that the rule applies to criminal cases, *see, e.g., Ottens* v. *State*, CR 93-765 (Ark. February 14, 1994); *Bocksnick* v. *City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992), and we have said that the thirty days begins to run from the date the judgment is entered in the municipal court docket. *See West Apartments, Inc.* v. *Booth*, 297 Ark. 247, 760 S.W.2d 861 (1988). We have also ruled that the thirty-day requirement for filing the record is mandatory and jurisdictional. *Bocksnick; Edwards* v. *City of Conway*, 300 Ark. 135, 777 S.W.2d 583 (1989). Since appellant failed to timely file the municipal court record in circuit court, the municipal court judgment became final, and the circuit court never gained jurisdiction of the appeal.

Appellant contends that he substantially complied with Rule 9 when he filed a motion in circuit court asking to proceed as a pauper. We need not address the question of whether substantial compliance would suffice because the abstract does not reflect that any part of the record was tendered to the circuit clerk while the motion was pending, and it does not reflect that the motion to proceed as a pauper contained any part of the record. As reflected in the abstract, it contained only statements of the appellant. Thus, there was no compliance with the rule.

Appellant next contends that under Rule 36.22 of the Rules of Criminal Procedure, the time for appeal was stayed until the motion to proceed as a pauper was ruled on by the circuit court. Rule 36.22 stays time for appeal while specified posttrial motions are pending in the trial court. The motion to proceed as a pauper in circuit court was not one of the specified posttrial

motions, and it was not pending in the trial court. The trial court in this case was the municipal court, so a motion filed in circuit court cannot possibly come within the rule. We need not decide whether the rule is applicable to municipal courts. Finally, overriding each of appellant's enlargement of time arguments are our holdings that a circuit court has no authority to accept an untimely appeal, and a circuit court has no authority to grant a belated appeal. *Edwards* v. *City of Conway*, 300 Ark. 135, 777 S.W.2d 583 (1989).

Appeal dismissed.

Randall Thomas McARTY *v.* STATE of Arkansas

CR 93-1071 871 S.W.2d 346

Supreme Court of Arkansas
Opinion delivered February 21, 1994

McArthur & Finkelstein, by: *William C. McArthur*, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Appellant Randall Thomas McArty was charged with the first degree murder of Teresa Chamberlain. McArty was tried, convicted and sentenced to life imprisonment in the Arkansas Department of Correction. Two points for reversal are argued: it was error to allow the state to question a medical expert on matters beyond his experience and the evidence of guilt was not sufficient to support the verdict. As we cannot sustain the arguments, we affirm the judgment entered pursuant to the verdict.

The facts, related from the state's position, are these: At about 10:30 p.m., July 31, 1992, officers of the Clark County Sheriff's Department responded to an emergency at the Gurdon home which Randy McArty shared with Teresa Chamberlain. McArty had gone to a neighbor and the sheriff was called. When an officer asked McArty what the problem was, he answered, "I shot her. I shot her."

Inside they found the body of Teresa Chamberlain on the kitchen floor with a gaping wound in the left chest. She was lying just inside a door leading to the carport. A butcher knife was in her right hand. Buckshot pellets were embedded in the wall opposite the door. In the carport was a vehicle with the lights on. A .12 gauge shotgun and a box containing one shell were in the car. One expended shell was in the gun and one was in McArty's pocket.

Daniel Blasingame testified that he had been staying at the McArty residence for several days working on Teresa Chamberlain's car. On the afternoon of July 31 he and Teresa had gotten beer and tequila and had been driving around, using Randy's car. They had stopped at Lennie Richard's house when Randy arrived. There was an argument and Randy left. Blasingame and Mrs. Chamberlain came home later and Blasingame went to bed in a back room. Teresa went to bed in the bedroom and her ten-year-

old daughter, Amy, slept on a couch. Blasingame awoke to hear Teresa call for help. He heard a shot. When he came into the kitchen Teresa was lying on the floor and Randy was in the doorway holding the shotgun. Randy said, "I'm going to call an ambulance" and went next door.

The state's witnesses included Marcus Bragg, an acquaintance of Randy McArty from school days, who testified that he met McArty by chance on July 31, 1992. In their conversation McArty told him he wanted to kill this woman, but later said he wouldn't bother her. The next day Bragg heard she had been killed.

James Dillard testified that on the late afternoon of July 31, 1992, Randy McArty came into his store and bought five shotgun shells, No. 1 buckshot.

Tommy McMillan, a neighbor, testified that Randy came to his house that night, hollering that he had shot his girlfriend, that she had a big knife and was going to stab him. He heard Amy say her mother was after Randy with a knife and Randy shot her.

Randy McArty testified that he met Teresa in January of that year and she moved in with him four or five weeks later. He described episodes of physical violence between them including a time when Teresa had scalded him with the contents of a crockpot.

When he found Teresa and Dan at Lennie Richard's house he asked Teresa for the keys to his car and had to take them from her. As he was preparing to leave, Teresa cursed him and tried to strike him through the window. When he got home about 10:00 p.m. the house was dark. He switched on the light in the kitchen and Teresa was standing there. The argument resumed and Teresa tried to get at him with the knife. He raised the gun as she turned and it went off. She called to Dan to help her and Randy left to call an ambulance.

There was other proof from which varying inferences could be drawn. The state offered evidence suggesting that the knife was placed in Teresa's hand afterwards and that the shot was fired as Teresa was opening the kitchen door. Blasingame testified he saw no knife. These were issues for the jury.

The state called physician William Quinton Sturner, chief medical examiner of Arkansas, who performed the autopsy. The pellets entered her upper left chest at an angle, penetrated the aorta, and emerged behind the upper right arm and back. Dr. Sturner was asked about the trajectory of the pellets after leaving the body. Defense counsel objected on the grounds that Dr. Sturner was not an arms expert and was not qualified to say what would happen to the pellets after leaving the body. The objection was overruled and Dr. Sturner stated that the pellets "went out separated."

Citing *Wilburn* v. *State* 289 Ark. 224, 711 S.W.2d 760 (1986), McArty argues on appeal that the test for expert testimony is whether the witness has knowledge of the subject at hand which is beyond that of ordinary people. Appellant concedes that in *Farrell* v. *State*, 305 Ark. 54, 810 S.W.2d 29 (2991), we found no abuse of discretion by the trial court in allowing a nonexpert to testify concerning a firearm, but, he argues, in contrast to this case, the witness in *Farrell* had extensive experience with firearms.

First, we regard the issue as largely abstract, as appellant has not shown us how the pattern of the emerging pellets had any substantial impact on the trial. A.R.E. 103(d). Second, we think common experience would suggest the likelihood of some dispersion of shotgun pellets, even buckshot, entering the body at a slight angle near the upper chest and emerging behind the upper arm. The sternum and shoulder blade, even the soft tissues and cartilage, could hardly be expected to have no effect on the trajectory of shotgun pellets. Third, issues of this kind fall clearly within the discretion of the trial court and no abuse of that discretion is evident here. *White* v. *State*, 303 Ark. 30, 792 S.W.2d 867 (1990).

Turning to the sufficiency of the evidence, we need refer to only three segments of the proof: The testimony of Marcus Bragg that McArty spoke of killing the woman he was living with; the testimony of James Dillard that McArty purchased five shotgun shells around five o'clock that afternoon; and the fact that McArty had the loaded shotgun at his side when he entered the house. Obviously it cannot be said that evidence of intent was so lacking that a directed verdict was called for. *Taylor* v. *State*, 303 Ark. 587, 799 S.W.2d 519 (1990).

The record has been examined in accordance with Ark. Sup. Ct. R. 4-3(h), and the objections have all been abstracted and certified by the state. There are no other rulings adverse to the appellant which constituted prejudicial error.

For the reasons stated, the arguments presented on appeal are denied and the judgment of conviction is affirmed.

HOLT, C.J., not participating.

Jesse TAGGART *v.* NORTHEAST ARKANSAS REHABILITATION HOSPITAL

93-703 870 S.W.2d 717

Supreme Court of Arkansas
Opinion delivered February 21, 1994

Larry J. Steele, for appellant.

W. Ray Nickle, for appellee.

STEELE HAYS, Justice. Northeast Arkansas Rehabilitation Hospital (appellee) brought this action in the circuit court to recover for rehabilitation services rendered to Jesse Taggart (appellant). Since the interpretation or construction of an act of the General Assembly is in question, our jurisdiction attaches under Ark. Sup. Ct. R. 29(1)(c). The question we are asked to decide is whether a medical provider whose charges are disallowed by the Arkansas Workers' Compensation Commission as unreasonable or unnecessary may recover from the employee. The answer is yes.

Appellant Jesse Taggart sustained an injury to his right hand at the plant of Frolic Footwear, his employer. Taggart developed reflex sympathectomy dystrophy — a conversion disorder. He was referred by a treating physician to the Northeast Arkansas Rehabilitation Hospital, appellee, and came under the care of Dr. Russell Dixon. Frolic Footwear's carrier paid $5,649.30 toward the rehabilitation charges but refused to pay the additional $12,030.20. The Administrative Law Judge disallowed that amount as unreasonable and unnecessary. That ruling was affirmed by the Commission and by the Arkansas Court of Appeals.

The hospital filed suit against Taggart to recover the balance of its charges. Taggart moved to dismiss on the contention that the referral to the hospital was recommended by physicians selected by the employer and the hospital had continued to treat him notwithstanding the employer's objection. The trial court held that Taggart was indebted for the services and Taggart appeals on the single point that the trial court erred in denying his motion to dismiss the complaint. We affirm the judgment appealed from.

Taggart's argument on appeal is two-fold: 1) Dr. Dixon knew the claim was controverted but continued treatments; and, 2) Taggart was the beneficiary of an implied contract between the hospital and the employer to pay for the treatment.

We equate the first contention with estoppel, though

it is not labeled as such. We recently discussed the elements of estoppel in *Hope Education Association* v. *Hope School District*, 310 Ark. 768, 839 S.W.2d 526 (1992): 1) The party to be estopped must know the facts; 2) he or she must intend that his or her conduct shall be acted upon or must act so that the party asserting the estoppel has a right to believe the other party so intended; 3) the party asserting the estoppel must be ignorant of the true facts; and 4) the party asserting the estoppel must rely on the other party's conduct to his or her injury.

Of the scant evidence presented to the trial court, it might be said there was some basis for elements one and four, but none whatever for the other two. A waiver argument would meet the same result. *See Ingram* v. *Wirt*, 314 Ark. 553, 864 S.W.2d 237 (1993).

Turning to the other contention, we agree that a contract may arise by implication from the conduct of the parties [*see Steed* v. *Busby*, 268 Ark. 1, 593 S.W.2d 34 (1980)]; however, to be enforceable it must be definite and certain in its terms. *Welch* v. *Cooper*, 11 Ark. App. 263 (1984). Here, there is nothing to show that an agreement clearly arose. The only proof touching on who was responsible for payment came from the hospital, which introduced a Patient Consent Form executed at the time of Taggart's admission. The provisions includes the following:

> GUARANTEE OF ACCOUNT:
>
> In consideration of services rendered or to be rendered by Northeast Arkansas Rehabilitation Hospital, I agree to pay the Hospital the regular charges for all services ordered by the attending physician, patient or patient's family or otherwise rendered or to be rendered to the patient. Should the charges, or any part thereof, be referred to an attorney for collection, the undersigned shall pay reasonable attorney's fees and collections expense.

The form purports to bear the signature of Jesse Taggart. Taggart denied actually signing the form, adverting to his injured right hand, but acknowledged that the handwriting resembled that of his wife. He did not disclaim knowledge of the provision nor in any wise challenge her authority to sign in his stead.

We think this case is controlled by the case of *Savage* v. *General Industrials*, 23 Ark. App. 188, 745 S.W.2d 644 (1988). The claimant, Ms. Savage, appealed from an order of the commission refusing to declare that she was not personally responsible for payment of medical expenses found to be unreasonable or unnecessary under provisions of the Workers' Compensation Act then appearing in Ark. Stat. Ann. § 81-1311 (Supp. 1985) and now codified as §§ 11-9-508 and 11-9-513 (1987). Pertinent portions of those provisions read:

> § 11-9-508.
>
> (a) The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing service, and medicine, crutches, artificial limbs, and other apparatus *as may be reasonably necessary* for the treatment of the injury received by the employee. [Our emphasis.]
>
> § 11-9-513.
>
> All persons who render services or provide things mentioned in §§ 11-9-508 – 11-9-516 shall submit *the reasonableness of the charges* to the commission for its approval, and, when so approved, the charges shall be enforceable by the commission in the same manner as is provided for the enforcement of compensation payments. However, the provisions of this section relating to charges shall not apply where a written contract exists between the employer and the person who renders the service or furnishes the things. [Our emphasis.]

Ms. Savage's employer had approved $1,010 of her physician's total charge of $1,955, alleging the balance was unreasonable. Addressing that dispute, the Administrative Law Judge found $1,110 reasonable and necessary, but did not decide whether she was personally responsible for the balance. The Commission also held that it lacked that authority, notwithstanding its empowerment under *Hulvey* v. *Kellwood*, 262 Ark. 564, 559 S.W.2d 153 (1977), to determine the reasonableness of medical charges.

[redacted] On appeal Ms. Savage urged the Court of Appeals to hold that a worker who sustains a compensable injury is not per-

sonally liable for payment of medical expenses found to be unreasonable or unnecessary. The Court of Appeals carefully examined that issue and supportive authority. It noted that the collection from the employee of unreasonable medical fees is prohibited under some statutory schemes, but that other courts, interpreting statutes similar to ours, hold that the Commission has no power to disallow unreasonable or unnecessary charges. *See, e.g. Intermountain Health Care, Inc.* v. *Industrial Commission*, 657 P.2d 1289 (Utah 1982). We believe that holding is consistent with the palpable intent of our statutes.

For the reasons stated, the judgment is affirmed.

Vicki NANCE *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

93-736 870 S.W.2d 721

Supreme Court of Arkansas
Opinion delivered February 21, 1994
[Supplemental Opinion on Denial of Rehearing
April 18, 1994]

Kent L. Tharel, for appellant.

Kay West Forrest, for appellee.

Mark Lindsay, P.A., for David Nance.

Alene Cox, Guardian Ad Litem for Mary Lila Nance.

DAVID NEWBERN, Justice. Vicki Nance appeals an order of the Juvenile Court placing custody of her daughter with her former husband, Roy David Nance. The order is the result of juvenile court hearings which were extensive in number and duration. Ms. Nance has presented five points of appeal, the last of which contains several subpoints. The main question is whether a juvenile division of a chancery court, having found a child to be dependent or neglected, has the authority to make an award of custody of the child between competing parents. We find no error and affirm.

Vicki and Roy Nance were married in Texas in 1978. As a result of their divorce in 1982, Ms. Nance was awarded custody of their two children. Ms. Nance subsequently relocated to Fayetteville in 1986 with these children and a younger daughter.

While visiting her father in Texas during the summer of 1992, the oldest daughter, Mary Lila, then fourteen, allegedly stated she did not want to return to her mother. Mr. Nance failed to return her, and a custody battle ensued. Ms. Nance sought a contempt citation in Washington County Chancery Court. Mr. Nance moved to modify the custody award in a district court in Montgomery County, Texas. Each court dismissed for lack of jurisdiction. The Texas court ultimately ordered Mary Lila returned to her mother pursuant to Ms. Nance's petition for a Writ of Habeas Corpus.

Mary Lila's mother subsequently enrolled her in a boarding

school near Chicago for the 1992-93 school year. Very shortly after her arrival, Mary Lila began to exhibit psychological problems, and became incoherent. Ms. Nance removed her from the school, and they returned to Fayetteville.

On August 27, 1992, Ms. Nance was attempting to take Mary Lila to a doctor in Oklahoma and was involved in a serious car accident. Both Ms. Nance and Mary Lila were taken to Springdale Memorial Hospital. At the hospital, Mary Lila was catatonic, and at times hallucinated, thinking that a serpent was in her throat. A psychological evaluation was ordered. Ms. Nance demanded that her daughter be evaluated by a Christian psychiatrist. The hospital and Ms. Nance were unable to agree on a suitable doctor to perform the evaluation. By September 1, 1992, Mary Lila had still not had a psychological examination.

Ms. Nance allegedly attempted to remove her daughter from the hospital contrary to medical advice. As a result, the Washington County Department of Children and Family Services supervisor placed a 72-hour protective hold on Mary Lila and ordered a psychological examination.

The doctor performing the examination concluded that Mary Lila was suffering "acute adjustment disorder with psychotic thinking," and recommended in-patient psychiatric treatment as soon as possible. Brookhaven in Tulsa was recommended based on Ms. Nance's request for a Christian-affiliated facility. Brookhaven refused to admit Mary Lila because of lack of medicaid or insurance to pay for treatment. When Ms. Nance was unable to find another religiously affiliated psychiatric facility, Harborview in Fort Smith was suggested.

At this point doctors evaluating Mary Lila believed Ms. Nance was not willing to take Mary Lila to Harborview. They also believed Ms. Nance might remove her daughter from the facility before her treatment was completed.

As a result of these circumstances, the Department of Human Services (DHS) petitioned for emergency custody of Mary Lila, stating probable cause existed that she was dependent-neglected as defined by the Juvenile Code. The Washington County Juvenile Court granted custody of Mary Lila to DHS and notified Mr. and Ms. Nance of their right to counsel. Mary Lila was placed

in the Harborview facility for psychiatric treatment.

Subsequent to the emergency order, Mr. Nance petitioned to modify the custody aspect of his divorce decree in Washington County Chancery Court. On September 28, 1992, he moved to transfer the petition and consolidate it with the DHS case in juvenile court. The Juvenile Court declined to order the transfer.

Several hearings were held in Juvenile Court as the result of the emergency order. At the first hearing, the Juvenile Court concluded that probable cause existed that Mary Lila was in need of medical care that her family could not provide and ordered Mary Lila's continued custody with DHS.

During the next two hearings, the Juvenile Court heard testimony concerning Mary Lila and Ms. Nance's household. Additionally, the Court held an in camera discussion with Mary Lila in which she indicated her desire to move to her father's home after being discharged from Harborview. Although the Court concluded that both Mr. and Ms. Nance were fit to raise Mary Lila, he ordered that she be placed temporarily with her father upon her release from Harborview.

Subsequent hearings were held to monitor Mary Lila's progress and address visitation and child support issues presented by the parties. On June 30, 1993, the Juvenile Court ruled that it was in Mary Lila's best interest to be placed with her father, and dismissed the proceedings.

Ms. Nance appeals from that order.

1. Jurisdiction

Ms. Nance contends the Juvenile Court lacked jurisdiction to enter an order changing custody to Mr. Nance. Ms. Nance argues that custody may only be established pursuant to a divorce, and as Mr. Nance's petition to modify the custody order from his divorce was not transferred to the Juvenile Court, the Court lacked jurisdiction to enter an order of custody. Ms. Nance cites several cases following our ruling which originated in *Robins* v. *Arkansas Social Services*, 273 Ark. 241, 617 S.W.2d 857 (1981), to the effect that there can be no separate action for custody which must be established pursuant to divorce.

The *Robins* case, as well as the other cases cited, were decided before the enactment of the Arkansas Juvenile Code of 1989, Ark. Code Ann. § § 9-27-301 through 9-27-352. Section 9-27-305 states any juvenile within the State may be subjected to the jurisdiction of a juvenile court. Section 9-27-306(1) grants juvenile courts exclusive original jurisdiction of proceedings in which a juvenile is alleged to be dependent-neglected.

Section 9-27-334(a)(2) allows a juvenile court, pursuant to a finding that a juvenile is dependent-neglected, to transfer custody to DHS, another licensed agency, "or to a relative or other individual." From the language in § 9-27-334 it is clear that the Juvenile Court had the power to award custody of Mary Lila to Mr. Nance once DHS initiated dependency-neglect proceedings. While it does not apply to this case, we note that in 1993 the General Assembly made it clear that a juvenile court's custody order supersedes any existing court order and remains in effect until a subsequent custody order is entered by a court of competent jurisdiction. *See* §9-27-334(b).

Ms. Nance cites § 9-27-338(a), which lists disposition alternatives a juvenile court may consider in its 18-month review of dependency-neglect cases, pointing out that transfer of custody is not included. As the Juvenile Court's order in this case was not one made pursuant an 18-month review, we reject the argument, especially in view of the language of § 9-27-334(a)(2) and the General Assembly's subsequent expression of juvenile court priority in §9-27-334(b).

2. Dependency-neglect holding

The Juvenile Code requires proof by a preponderance of the evidence in dependent-neglected proceedings. Ark. Code Ann. § 9-27-325(h)(2) (Repl. 1993). We review a Chancellor's findings of fact *de novo*, and will not set them aside unless they are clearly erroneous. Ark. R. Civ. P. 52(a). Ms. Nance argues the Juvenile Court's holding in this respect was clearly against the preponderance of the evidence.

A dependent-neglected juvenile is one who "as a result of abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness is at substantial risk of serious harm." § 9-27-303(12). The Juvenile Code further defines

"neglect" as an act or omission by a parent which constitutes failure or refusal to provide "medical treatment necessary for a juvenile's well being, except when the failure or refusal is caused primarily by the financial inability of the person legally responsible and no services for relief have been offered or rejected." § 9-27-303(23)(B).

The record reflects a dispute between Ms. Nance and Mary Lila's doctors about a proper psychological examiner and that, but for DHS intervention, treatment could have been delayed even more than it was. The record also indicates that some of the doctors and social workers involved in this case were concerned Ms. Nance would not allow Mary Lila to remain at a psychiatric facility for the duration of her treatment. Under these circumstances we have little difficulty concluding the evidence of "neglect" was sufficient, even though it may have stemmed from parental motives which could not be characterized as neglectful in the sense of being intended to harm the child or not to care for her.

3. Former attorney's testimony

During July and August of 1992, Kelly Proctor represented Ms. Nance in her attempt to enforce the order granting custody of Mary Lila to her. Ms. Proctor was also Ms. Nance's house guest at that time.

The guardian *ad litem* for Mary Lila Nance subpoenaed Ms. Proctor to testify at an October, 1992, hearing. The testimony, which was unfavorable to Ms. Nance, concerned Ms. Nance's treatment of her children, and the conditions in the home, while Ms. Proctor was a guest there.

Ms. Nance's attorney at the hearing objected to the testimony and refused to waive the attorney-client privilege. The attorney argued that Ms. Proctor's testimony had to do with furtherance of Ms. Proctor's representation of Ms. Nance and was confidential. The Trial Court overruled the objection, limiting Ms. Proctor's testimony to her observations of conditions in Ms. Nance's home. Ms. Nance argues the testimony is barred by the Model Rules of Professional Conduct and Ark. R. Evid. 502.

Model Rule 1.6 concerns a lawyer's duty not to reveal

"information relating to representation of a client unless the client consents after consultation." According to the scope note accompanying them, the Model Rules of Professional Conduct were designed to regulate the practice of law, and to provide a mechanism for disciplining attorneys and not to form the basis of substantive law decisions. Nevertheless, we cite the Model Rules from time to time as having an effect on the outcome of litigation. For example, we cited Model Rule 1.6 in *Burnette* v. *Morgan*, 303 Ark. 150, 794 S.W.2d 145 (1990), in the process of deciding whether we should reverse a trial court decision on the ground that a participating attorney should have been disqualified.

We have some doubt whether Ms. Proctor's testimony about the conditions in Ms. Nance's home qualifies as information "relating to representation" of Ms. Nance. We need not dwell on Model Rule 1.6, however, as the matter of attorney-client privilege is clearly regulated by Ark. R. Evid. 502(b).

Rule 502(b) concerns the admissibility of information disclosed to an attorney by her client. It allows a client to prevent the disclosure of any confidential communications "made for the purpose of facilitating the rendition of professional legal services to the client." There is no evidence before us suggesting that Ms. Nance revealed or "communicated confidentially" anything about the conditions in her home to which Ms. Proctor testified.

4. Absence of attorney

On April 19, 1993, a hearing was held for the limited purposes of considering requests to modify visitation rights and child support. The hearing was scheduled for a date when Mary Lila would be present in Fayetteville to testify.

Ms. Nance's attorney failed to appear at the hearing. Ms. Nance informed the Trial Court her attorney believed the hearing had been continued to a later date. The Juvenile Court unsuccessfully attempted to contact the attorney. Attorneys for the other parties objected to a continuance due to the prospective difficulty of rescheduling Mary Lila's presence.

The Juvenile Court commenced the hearing, and allowed

Ms. Nance to represent herself. Mary Lila testified that her mother had acted in a very hostile and threatening manner during their last visit. After cross examining Mary Lila, Ms. Nance became frustrated and stated she was willing to place her daughter in Mr. Nance's custody. Ms. Nance stated that she was tired of the proceedings and had no money to continue further. The Court stated Ms. Nance would not be held to those remarks until she had talked to her attorney.

[redacted] Ms. Nance argues her right to due process of law was violated. Section 9-27-302(4) states the Juvenile Code is designed to protect a party's due process rights, and § 9-27-314(b) provides that a parent has a right to an attorney. We fail to see how Ms. Nance's rights were violated. She was notified of her right to counsel, and indeed had obtained counsel to represent her. Ms. Nance did not object to the hearing commencing, and neither did the attorney representing her at the subsequent hearing. She was clearly not denied the right to counsel, and the Court attempted to protect her interests.

5. Other statutory requirements

[redacted] Ms. Nance finally contends the Court erred by failing to require DHS to comply with the requirements of the juvenile code. She argues that the Juvenile Court failed to require a case plan aimed at reunification of Mary Lila with her mother in accordance with § 9-27-303(6)(G). We agree that an important goal of the statutory juvenile justice system is reunification of the juvenile with the parent, custodian, or guardian from whom the juvenile has been separated. § 9-27-303(17). We do not, however, conclude that reunification must be achieved if it proves to be against the best interests of the juvenile.

In response to this argument, DHS and the guardian *ad litem* of Mary Lila point out a number of actions taken which could be seen as efforts to effect reconciliation and thus reunification of Mary Lila with Ms. Nance. They include DHS's payment for long-distance phone calls and air travel for Mary Lila from Texas to Fayetteville and back for visitation in addition to some DHS home services.

[redacted] Ms. Nance argues that the home study requirements found in §9-27-303(19) were not met. Two home studies were

done on Mr. Nance's home. The first was an informal one conducted by DHS, and the second was by Texas Child Protective Services, resulting in a written report which appears in the record. No home study was done on Ms. Nance's home because she and her lawyer declined after being informed it was available at Ms. Nance's option. There was, as noted above, however, considerable testimony about conditions in Ms. Nance's home.

Finally, Ms. Nance argues that there was no compliance with the mandatory provisions of the Interstate Compact on the Placement of Children found at Ark. Code Ann. § 9-29-201 (Repl. 1993). Subsection (a) of Article III of the compact makes it clear that it is meant to deal with children who are sent from a sending state into a receiving state "for placement in foster care or as a preliminary to a possible adoption." That is not the case here.

Affirmed.

GLAZE, J., concurs.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
APRIL 18, 1994

873 S.W.2d 812

Kent L. Tharel, for appellant.

No response.

PER CURIAM. We deny Ms. Nance's petition for rehearing, but we do agree that a clarification is needed of our earlier opinion as it discussed Ark. Code Ann. § 9-27-338 (Repl. 1993).

In her petition, Ms. Nance contends, contrary to this court's decision, that Ark. Code Ann. § 9-27-338(a) (Repl. 1993) applies to this case. Under that provision, Nance points out that the juvenile court's disposition in this case was limited to one of the following: (1) return Mary Lila to Ms. Nance; (2) authorize a plan to terminate Mary Lila's relationship with Ms. Nance; (3) place Mary Lila in long-term foster care; or (4) allow Mary Lila to continue in an out-of-home placement for a specified, limited period of time.[1] Out-of-home placement is defined in Ark. Code Ann. § 9-27-303(26) (Repl. 1993) as follows:

> (A) Placement in a home or facility other than the home of the parent or guardian from whose custody the court has removed the juvenile; or
>
> (B) Placement in the home of a relative; provided, however, this definition shall not include circumstances where the court has discontinued orders for delivery of fam-

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[1]Section 9-27-338(a) states in full as follows:

(a) Eighteen (18) months after the date the juvenile enters an out-of-home placement, or earlier if ordered by the court, the court shall hold a hearing in order to enter a new disposition in the case. At the hearing, based upon the facts of the case, the court shall enter one (1) of the following dispositions:

(1) Return the juvenile to the parent, guardian, or custodian;

(2) Authorize a plan for the termination of the parent-child relationship, guardianship, or custody;

(3) Place the juvenile in long-term foster care; or

(4) Allow the juvenile to continue in out-of-home placement for a specified period of time.

ily services pursuant to a determination that the home of the relative shall be the permanent home of the juvenile.

The Juvenile Code further provides that, if the court finds that the juvenile should remain in an out-of-home placement, either long-term or otherwise, the juvenile's case shall be reviewed every six months. Ark. Code Ann. § 9-27-338(b) (Repl. 1993).

Ms. Nance's contention is correct that, once the juvenile court took jurisdiction of this matter as a dependent-neglect case, the Juvenile Code provisions became applicable. That being so, the juvenile court was obliged to provide for periodic reviews under Ark. Code Ann. § § 9-27-337 and 9-27-338 (Repl. 1993).

The record reflects the juvenile court did conduct hearings, but when it concluded its final hearing it merely found Mary Lila needed stability and her best interests would be served by transferring (continuing) custody with her father.[2] The court further found that DHS no longer had to provide services. The juvenile court then erred when it dismissed the proceedings even though it further determined Ms. Nance has been in substantial compliance with the case plan developed by DHS.

Under the Juvenile Code, a juvenile court must follow the procedures and dispositions set out under § 9-27-318, although other permissible dispositions are available under Ark. Code Ann. § 9-27-335 (Repl. 1993) in situations where the court finds reasonable efforts to deliver family services have *not* been made —the juvenile court here made no such finding.[3] See also Ark. Code Ann. § 9-27-335 (Repl. 1993). Nowhere in the Code can we find authority for a juvenile court to dismiss dependent-neglect proceedings when the parties all comply with the case plan and reasonable efforts are being made by all concerned.[4] Certainly, reuni-

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[2]We note here that this case is not one where the juvenile court authorized a plan to "terminate" Ms. Nance's parental relationship with or custody of Mary Lila. In fact, the court merely concluded that the return of custody of Mary Lila to Ms. Nance was contrary to Mary Lila's welfare "*at this time.*"

[3]In fact, the court's final order found DHS made reasonable efforts to provide services to the juvenile and family. We note also that § 9-27-335 does allow for dismissal of dependent-neglect proceedings if DHS fails to provide family services. Presumably in such an instance, the custody of the child is returned to the custodial parent.

fication, the cornerstone of the Juvenile Code, could never be achieved in these circumstances by dismissing the proceedings.

In sum, while we agree that at the time of the hearing, the record tended to support the juvenile court's continuing the custody of Mary Lila with her father, the court was entirely wrong in dismissing this dependent-neglect case under the circumstances presented. If such dismissal is permitted here, then the review procedures and services provided by law to protect children and families become applicable and enforceable only when a juvenile court, in its own discretion, wishes to invoke those Code provisions. Therefore, we remand this matter to the juvenile court with directions to reinstate this case for periodic reviews required by Arkansas's Juvenile Code provisions.

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[4]At this point, we would reiterate a point previously mentioned in our decision that the General Assembly has made it clear that a juvenile court's custody order supersedes any existing court order and remains in effect until a subsequent custody order is entered by a court of competent jurisdiction. Ark. Code Ann. § 9-27-334(b) (Repl. 1993).

Christi Lynn STURCH *v.* James Paul STURCH

93-574 870 S.W.2d 720

Supreme Court of Arkansas
Opinion delivered February 21, 1994

Gregory E. Bryant, *for appellant.*

Dana Sue West, *for appellee.*

DAVID NEWBERN, Justice. Christi Sturch appeals a divorce decree from Pulaski County Chancery Court. We affirm the Chancellor's decision pursuant to Ark. Rule Sup. Ct. 4-2(b)(2) due to the appellant's flagrantly deficient abstract.

Arkansas Supreme Court Rule 4-2(a)(6) requires an abstract to consist of material parts of the pleadings, proceedings, facts, documents, and other matters necessary to an understanding of the question presented to the court. In this appeal the appellant's abstract consists solely of a one-half page portion of the Chancellor's divorce decree. From this abstract it is impossible to locate any factors that led to the Chancellor's ruling which resulted in this appeal. For this reason it is impossible to address adequately the point on appeal, and we will not attempt to do so.

Affirmed.

ERNEST F. LOEWER, JR. FARMS, INC. *v.*
NATIONAL BANK OF ARKANSAS

93-808 870 S.W.2d 726

Supreme Court of Arkansas
Opinion delivered February 21, 1994
[Rehearing denied March 28, 1994.*]

Crockett, Brown, & Worsham, P.A., by: *Richard E. Worsham, Cheryl Fisher Anderson* and *Robert J. Brown*, for appellant.

Davidson Law Firm, Ltd., by: *Charles Darwin Davidson* and *Melanie C. Weaver*, for appellee.

TOM GLAZE, Justice. On July 31, 1983, Continental Cap-

*Holt, C.J., not participating.

ital Corporation (CCC) executed a promissory note to National Bank of Arkansas (NBA) in the amount of $150,000. On the same day the appellant, Ernest F. Loewer, Jr. Farms, Inc. (Loewer), executed an Assignment of Savings Account/Certificate of Deposit #50727 to NBA, assigning $100,000.00 of Loewer's $106,179.73 CD to NBA as collateral for the CCC note.[1] A Separate Collateral Agreement pledging the CD was also executed by Loewer on July 31, 1983. The CD matured on October 29, 1983, and renewal CDs were issued in Loewer's name. Loewer received periodic interest payments from these CDs.

On June 9, 1987, CCC defaulted on its note to NBA, and an officer of NBA endorsed Loewer's renewal CD #1753 which was payable in the amount of $102,056.85. NBA then issued a cashier's check for that amount payable to Loewer, endorsed the check and applied $100,000.00 of the proceeds to the CCC debt.

On January 7, 1992, about four and one-half years after CCC's default and NBA's application of Loewer's CD proceeds to CCC's debt, Loewer filed suit against NBA, seeking recovery of the $102,056.85, interest and attorney's fees. NBA answered, asserting the affirmative defense of the statute of limitations. On January 8, 1993, NBA filed a motion for summary judgment, alleging Loewer's tort or conversion claim was barred by the three-year statute of limitations set forth in Ark. Code Ann. 16-56-105 (1987).

On January 15, 1993, Loewer filed its first amended complaint, wherein it set forth additional allegations, stating (1) Loewer had pledged its CD for "clearing house purposes" only, (2) it never assigned additional collateral after its original CD had matured, (3) NBA and CCC's president had fraudulently concealed from Loewer that they had entered into a settlement agreement, (4) NBA's officer unilaterally made an unauthorized endorsement of Loewer's CD and cashier's check and (5) Loewer was entitled to the CD proceeds. In addition, Loewer

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[1]Ernest Loewer, President of Loewer, and J. R. Hodges, President of CCC, had both social and business relationships and were involved in past loans, investments and collateralized loans.

requested attorney's fees under Ark. Code Ann. § 16-22-308 (Supp. 1993) for having to bring suit against NBA for its breach of the terms of Loewer's CD. On March 3, 1993, the trial court entered an opinion and judgment granting NBA's summary judgment, finding Loewer's claim was based on conversion rather than written contract and therefore barred by the statute of limitations, § 16-56-105.

On March 12, 1993, Loewer filed a second amended complaint re-alleging the facts in its first amended complaint, but adding that NBA had created a forged assignment of Loewer's original CD as well as a forged collateral agreement. Loewer also specifically alleged it was seeking recovery on a written contract based on NBA's breach of the written terms on renewal CD #1753 and was waiving any tort claims it might have. In doing so, Loewer sought to have its action come within the five-year statute of limitations applicable to written contracts under Ark. Code Ann. § 16-56-111(b) (Supp. 1993).

On April 2, 1993, Loewer filed a motion for reconsideration, and the trial court entered an order which temporarily set aside its March 3 opinion and judgment. Following a hearing on Loewer's motion, the trial court entered an order on April 8, 1993, which reinstated its March 3, 1992 opinion and judgment. Loewer appeals from that reinstatement order which dismissed Loewer's suit against NBA.

Loewer's primary argument for reversal is that the gist of its cause of action against NBA is in contract and is based upon NBA's breach of failing to pay Loewer the proceeds due it under the terms set forth in its renewal CD #1753. Loewer claims that the original CD #50727 it had assigned to NBA for clearing house purposes as collateral for CCC's loan matured on October 29, 1983, and that the successive renewal CDs, including CD #1753, were unconditionally payable to Loewer per the contract terms on those written CDs.[2] Loewer also asserts its action against NBA is one in contract because in its second amended complaint, Loewer specifically waived any tort claim it had.

The trial court below rejected Loewer's arguments, and in doing so relied in part on our holding in *O'Bryant* v.

Horn, 297 Ark. 617, 764 S.W.2d 445 (1989). In *O'Bryant*, the lower court dismissed O'Bryant's complaint because the complaint stated a tort cause of action for fraud or deceit and therefore was barred by the three-year statute of limitations, § 16-56-105. Like Loewer now argues in our present case, O'Bryant contended that his action was based on a written contract (a bill of sale) and that the lower court should have found O'Bryant's suit was filed timely under the five-year statute of limitations for written instruments, § 16-56-111(b). In support of his contention, O'Bryant alleged in his complaint that he purchased from Horn a used log skidder which was represented by Horn to be a 1978 model worth $18,000, when in fact it was a 1973 model with a market value of $10,000. Although O'Bryant claimed damages as a result of Horn's misrepresentation, negligence and/or fraud, O'Bryant also asserted Horn breached their written contract (bill of sale) which was attached to the complaint. In rejecting O'Bryant's argument, this court stated the settled rule that it looked to the gist of the action as alleged to determine which statute of limitations applies. *See also Goldsby* v. *Fairley*, 309 Ark. 380, 831 S.W.2d 142 (1992). This court concluded O'Bryant's attachment of the bill of sale to the complaint was not enough to transform his action into one for breach of contract.

Here, Loewer concedes the renewal CD #1753 attached to its complaint is the basis of its contract action against NBA. Nonetheless, Loewer claims *O'Bryant* is not controlling here because, in addition to attaching its CD to the complaint, Loewer also had other allegations in the complaint making its action sound in contract. For example, Loewer mentions its second amended complaint and its specific allegations that (1) Loewer sought recovery on CD #1753, (2) that CD #1753 is a written contract, (3) Loewer waived any tort claims, and (4) it was entitled to recover not only the proceeds evidenced by CD #1753, but also attorney's fees for breach of contract under § 16-22-308.

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[2]Loewer's argument in this respect omits that NBA was assigned Loewer's CD and as assignee, NBA only exercised the same rights Loewer had as assignor-depositor of the CD. The original CD #50727 provided for automatic renewals for the same term as the original. Nothing in the collateral documents provided the original CD or its renewals would cease being collateral to the CCC note.

First, Loewer's argument ignores the many other factual allegations contained in its complaint. Loewer alleged that it pledged its CD for the CCC loan, but in an alleged "side agreement" the collateral was only for clearinghouse purposes. Loewer included several paragraphs in its complaint setting out that NBA was involved in replacing and changing dates on CDs, and in forging an assignment and collateral agreement in connection with the CDs and the CCC loan. In addition, Loewer factually asserted NBA unilaterally and without authority endorsed both CD #1753 and the cashier's check evidencing the proceeds of that CD. Clearly, these allegations considered together sound in tort, namely conversion.[3]

[redacted] In sum, Loewer's argument emphasizes the written terms of its CD and NBA's failure to pay it upon maturity, but at the same time, Loewer ignores the significance of the documents both parties used to collateralize CCC's note. When NBA initially issued Loewer its CD, NBA did have an obligation to pay Loewer its proceeds under the terms on the CD. However, that obligation later became subject to an assignment and pledge, and as mentioned previously, Loewer now alleges events transpired to render those documents ineffective. The gist of those allegations clearly sounds in tort. Such allegations include words like forgery, unauthorized endorsement and misapplication of funds, which denote a wrongful dominion or control by NBA over proceeds purportedly belonging to Loewer. Certainly, these allegations are unnecessary when stating an action involving breach of contract. Accordingly, we agree with the trial court that the gist of the complaint sounds in tort, and because of this finding, Loewer's suit is barred by the three-year statute of limitations.

We should add that, even if we could accept Loewer's contract contention, we point out that the statute of limitations, § 16-56-111(b) (1987), that Loewer relies on is statutorily made inapplicable under § 16-56-103(b) (1987). Under the express terms of § 16-56-103(b), § 16-56-111(b) does not apply to suits

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[3]Conversion is the exercise of dominion over property in violation of the rights of the owner or person entitled to possession with the specific intent to dominate or control property claimed by another. *City National Bank of Fort Smith* v. *Goodwin*, 301 Ark. 182, 783 S.W.2d 335 (1990).

to enforce payment of any bills, notes, or evidences of any debt issued by any bank.[4]

In conclusion, Loewer offers on appeal two alternative reasons for reversal if the court disagrees that the statute of limitations for written contracts is applicable. One, it suggests the six-year limitations after demand for payment under Ark. Code Ann. § 4-3-118(e) (Repl. 1991) should apply because Loewer's action merely involves the enforcement of NBA's obligation to pay Loewer the proceeds of its CD. Two, even if Loewer's action is one for conversion, NBA should not escape liability by claiming it converted a depositor's funds — that such a use of the three-year limitations is "shameful and unseemly." Neither these points nor the applicability of Article 3 of the UCC were ruled on by the trial court and matters left unresolved below are waived and will not be considered on appeal. *Morgan* v. *Neuse*, 314 Ark. 4, 857 S.W.2d 826 (1993).

For the reasons above, we affirm the trial court's decision.

HOLT, C.J., not participating.

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[4]Under Ark. Code Ann. § 4-3-104(j) (Repl. 1991), a CD is a negotiable instrument under the UCC, and an action to enforce such an instrument under Article 3 of the UCC would be subject to the six-year limitation period under the Code, Ark. Code Ann. § 4-3-118(e).

IN THE MATTER OF F & M BUILDING PARTNERSHIP *v.* FARMERS & MERCHANTS BANK, Rogers, Arkansas, et al.

93-710 871 S.W.2d 338

Supreme Court of Arkansas
Opinion delivered February 21, 1994
[Rehearing denied March 28, 1994.]

Richard C. Downing, P.A., by: *Richard C. Downing* and

Hardin & Grace, by: *David A. Grace*, for appellant.

Lyons & Emerson, by: *Scott Emerson*, for appellees.

TOM GLAZE, Justice. At issue in this case is the legal effect of two settlement agreements made in bankruptcy proceedings that involve real property upon which the main building of Farmers & Merchants Bank of Rogers, Arkansas (F & M Bank) stands. In 1984, F & M Bank entered into two leases with F & M Building Partnership, an Arkansas general partnership (F & M) and owner of the realty. F & M leased the land and improvements to F & M Bank through an Agreement of Lease and a Ground Lease.

In 1986, the partners of F & M were Mrs. Charlotte Lloyd and two trusts whose beneficiaries were her two sons. At that time, Mrs. Lloyd was married to Phillip Lynn Lloyd, who was the sole shareholder of Lynxx Limited, Inc. (Lynxx). F & M became involved with Lynxx in the two following transactions: (1) On April 8, 1986, Lynxx borrowed $2,100,000 from First Federal Savings and Loan Association of Paragould (First Federal), Lynxx signed a promissory note for the loan amount; the loan was secured by a mortgage of F & M's interest in its real estate, building, personal property and assignment of F & M's rents and revenues, including its interest in the F & M Bank leases. (2) In a separate document dated April 8, 1986, F & M agreed with Lynxx to secure Lynxx's note and loan from First Federal in return for Lynxx loaning F & M $1,705,000, which was evidenced by a note dated April 15, 1986. Lynxx's loan of $1,705,000 to F & M was unsecured and came from the $2.1 million proceeds Lynxx borrowed from First Federal.

On November 6, 1986, Lloyd filed for Chapter 11 bankruptcy, which was later converted to Chapter 7. A trustee was appointed, and during the course of the bankruptcy proceedings, the trustee entered into two separate settlement agreements which involved the above two transactions. In Settlement Agreement #1, dated December 5, 1988, F & M agreed to make its payments owed Lynxx on the $1,705,000 note to First Federal. Settlement Agreement #2 was executed on December 14, 1988, and it acknowledged that Lynxx agreed to First Federal's right to receive Lynxx's payments from F & M in return

for releasing Lynxx from any future liability. It further provided that First Federal agreed that the $2.1 million loan was "non-recourse" as to Lynxx and that it would not accelerate the $2.1 million loan so long as F & M continued timely payments on the $1,705,000 note.

Before the trustee's two settlement agreements were approved by the bankruptcy court, the Lloyds divorced, and in their property agreement, they agreed that Mrs. Lloyd would transfer her interest (and their sons') in F & M to Mr. Lloyd for $50,000. In turn, Mr. Lloyd accepted the assets and liabilities of F & M.[1] Thereafter, the bankruptcy court approved the trustee's two settlement agreements, and no one objected. Subsequently, the Resolution Trust Corporation, as receiver, took over First Federal and sold the $2,100,000 Lynxx note to Peoples Bank of Paragould (Peoples).

F & M later failed to make its quarterly payments on the $1,705,000 note. As a consequence, F & M Bank, as a tenant which was current on its lease obligation to F & M, initiated this interpleader and declaratory judgment action requesting the court to declare whether its monthly payments should be paid to F & M or Peoples, which was in present possession of the Lynxx note. Peoples answered and filed a third-party complaint against F & M for foreclosure under the mortgage. F & M answered Peoples, claiming Settlement Agreement #2 had discharged F & M as a surety for Lynxx and asserting that discharge effectively released F & M from its original obligation to First Federal (and now Peoples, which was assigned the $2.1 million note). Under an agreed temporary order of the trial court, F & M Bank continued to make its lease payments to Peoples.

Following a hearing, the chancellor ruled that F & M had not been released of its original loan obligation and the assignment and mortgage securing the loan was a valid first lien on F & M's bank building and ground lease. The trial court granted Peoples a foreclosure under the $2.1 million note and mortgage, and an in rem judgment of $1,956,173.35, plus accrued

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[1]At some time after the divorce, Mr. Lloyd then transferred back to his two sons, individually, interests in F & M with Lloyd retaining 95% ownership in F & M.

interest of $72,935.38, attorney's fees and costs, and interest against F & M. F & M appeals from that order.[2]

On appeal, this court tries chancery cases *de novo* on the record while considering the evidence in a light most favorable to the appellee. Further, this court will not reverse a finding of fact made by the chancellor unless it is clearly erroneous. *Ingram* v. *Wirt*, 314 Ark. 553, 864 S.W.2d 237 (1993).

For reversal, F & M relies on its argument that it was a surety for Lynxx under the $2.1 million loan from First Federal. Because Lynxx was released under bankruptcy agreement #2 from all liability under the $2.1 million, F & M argues, as surety, it was also released.

The chancellor found no evidence reflecting F & M was a surety of the $2.1 million note between First Federal and Lynxx. Instead of containing language of a suretyship, the chancellor found the mortgage was an unconditional assignment to First Federal of F & M's interests in the two leases. Further, the chancellor also held F & M was not a surety at law because F & M was the recipient of $1.7 million of the $2.1 million loan to Lynxx.

This court has defined a suretyship as a contractual relation whereby one party engages to be answerable for the debt or default of another. *Fausett Builders, Inc.* v. *Globe Indemnity Co.*, 220 Ark. 301, 247 S.W.2d 469 (1952); *see also* James L. Elder, *Stearns Law of Suretyship* § 1.3, at 3 (5th ed. 1951) (real suretyship arises where property is pledged or mortgaged as security for a debt of another). Further, a suretyship requires involvement of three parties:

> (a) the one for whose account the contract is made, whose debt or default is the subject of the transaction, and who is called the principal; (b) the one to whom the debt or obligation runs, the obligee in suretyship, called the creditor; and (c) the one who agrees that the debt or obligation running from the principal to the creditor shall be performed, and who undertakes on his own part to perform it if the principal does not, called the surety.

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[2]No sale of the property has occurred. Previous to entry of the final order, Peoples' third-party complaint against Lynxx was dismissed without prejudice.

Id. at 3. In a suretyship, the principal's contract and the bond or undertaking of the surety are to be construed together as one instrument. *Fausett Builders, Inc.*, 220 Ark. 301, 247 S.W.2d 469.

After a close inspection of the four documents Lynxx, F & M and First Federal used to transact the $2.1 million loan, we conclude that F & M benefited by receiving $1,705,000 of the loan proceeds and that F & M unconditionally conveyed its lease interests to First Federal to secure the entire $2.1 million note. In sum, F & M was effectively a co-principal on the $2.1 million loan along with Lynxx. Further, because it pledged nothing, Lynxx was an unsecured co-principal of the loan.

The four documents to which we refer are the following: (1) the $2.1 million promissory note from Lynxx to First Federal, (2) the mortgage, assignment and security agreement from F & M to First Federal as security for the $2.1 million note, (3) an agreement between F & M and Lynxx wherein F & M agreed to secure the $2.1 million note with its leases, in return for Lynxx's agreement to borrow the $2.1 million and to "simultaneously loan" F & M $1,705,000 from proceeds of the $2.1 million loan, and (4) the unsecured $1,705,000 promissory note from F & M to Lynxx.

As pointed out above, it is clear F & M received the majority of the benefits under the $2.1 million note which in effect made F & M a co-principal with Lynxx. If we accepted F & M's argument, F & M in actuality would be its own surety of the $2.1 million, of which it received most of the proceeds.

It is generally stated that the relationship of principal and surety only arises when the purported surety does not have a direct personal relationship in the debt and from which he does not receive a benefit. *See* 72 C.J.S. *Principal and Surety*, § 9; 74 Am.Jur.2d *Suretyship*, § 3; *Johnson* v. *Jouchert*, 124 Ind. 105, 24 N.E. 580, 581 (1890), (one who has received and who retains the consideration or benefit of a contract cannot, in equity, occupy the attitude of a surety); *Kennermer-Willis Grocery Co.* v. *Hacker*, 225 Ala. 415, 143 So. 821 (1932), (the relation of surety does not exist where the consideration moves directly to or from the person claiming the privilege of a surety).

[redacted]

[redacted] Next, F & M argues that, by operation of law, bankruptcy settlement #2 released its mortgage and assignment obligations to First Federal (Peoples) because that settlement agreement led to Lynxx's discharge in bankruptcy. Of course, F & M's argument is premised on its argument above that it served as surety for Lynxx on the $2.1 million. Because we hold F & M was not a surety for Lynxx, F & M's argument here fails as well.

Additionally, F & M argues that it was party only to bankruptcy agreement #1, not to settlement agreement #2. Therefore, F & M argues it should not be held accountable for the modification of the mortgage and release of Lynxx agreed to in settlement #2.

Bankruptcy agreement #1 was signed by Charlotte Lloyd personally and as trustee for her children and as general partner of F & M, and the bankruptcy trustee, and in pertinent part, that agreement provides as follows:

> (8) Lynxx hereby specifically agrees to release [F & M], Charlotte [Lloyd], Kevin and Clay [children] of personal liability to Lynxx on the $1,705,000.00 note dated April 15, 1986 (the "$1.7 Million Note"). In return, [F & M] agrees to continue to make timely installment payments directly to First Federal Savings and Loan Association of Paragould, Arkansas under the terms of the $1.7 Million Note until the remaining amount owed to Lynxx by [F & M] is satisfied. ... In the event that [First Federal] should attempt to accelerate its Note from Lynxx in the principal amount of $2,100,000.00 secured by certain assets of [F & M], notwithstanding the making of continual and timely installment payments by [F & M] to [First Federal], the Trustee agrees to defend any such actions on behalf of Lynxx and [F & M].

Paragraph (2)(d) of that same agreement states:

> Lynxx shall give [F & M] a $399,900.00 credit on the remaining balance of the $1,705,000.00 Note dated April 15, 1986 . . . made payable by [F & M] to Lynxx.

Nine days after settlement agreement #1 was executed, bankruptcy agreement #2 was signed by the bankruptcy trustee, by

the bankruptcy trustee as CEO of Lynxx, and by the president of First Federal. The second agreement specifically referred to agreement #1 and its parties. In addition, the parties to agreement #2 provided that, if the bankruptcy court did not approve agreement #1, agreement #2 would be null and void.

When a written contract refers to another instrument and makes the terms of that instrument a part of the contract, the two are construed together as the agreement of the parties. *Isbell* v. *Ed Ball Construction Co., Inc.*, 310 Ark. 81, 833 S.W.2d 370 (1992). Here, bankruptcy agreement #2 modified the original $2.1 million note and loan as follows:

> (5) Upon the execution and delivery of the $40,000.00 Note and the mortgage securing same [Little Rock property], Lynxx, the Trustee and [First Federal] shall execute and deliver Mutual Releases of All Claims in the forms attached hereto as Exhibit "A". It is specifically agreed and understood that the $2.1 million Lynxx loan shall remain in place and in full force and effect and that the purpose of the $40,000.00 Note is to release Lynxx from all future personal liability on the $2.1 Million Lynxx loan. . . . [First Federal] further acknowledges that the $2.1 million Lynxx loan is "nonrecourse" as to [F & M] and agrees that for so long as [F & M] continues to timely make its installment payments on its $1,705,000.00 note to Lynxx direct to [First Federal] that [First Federal] will not seek to accelerate the $2.1 million Lynxx loan provided that [F & M] is not otherwise in default of its obligations set forth in [F & M] collateral documents held by [First Federal]. Lynxx hereby consents to [F & M] making the aforesaid installment payments direct to [First Federal] for the life of the $1,705,000.00 note.

Peoples, as First Federal's successor in interest, suggests the foregoing modification discharged Lynxx from liability, but reaffirmed F & M's obligation under the $2.1 million note and mortgage. We agree.

Peoples' position is supported by the testimony of Clayton Blackstock, F & M's attorney at the time of the bankruptcy proceedings. Blackstock testified that he was involved in

the formation of bankruptcy agreement #2, and he said that the attorney for the trustee, Stuart Hankins, wanted two separate agreements in order to use agreement #1 in negotiations with First Federal. Blackstock testified as follows:

> I don't recall any conversation with respect to the release of the $2.1 million note. The conversations with Mr. Hankins both before and after this settlement agreement number one was entered into, but before settlement agreement number two was entered into. Stuart Hankins had negotiated with First Federal, had called us about the mortgage and collateral, this pledge from F & M Building Partnership to First Federal of Paragould. And it was by communication to him that it was my client's desire not to hurt, in any way, Dan Kell and First Federal Savings and Loan of Paragould. And then, in essence, if it meant that the building would be foreclosed on to satisfy whatever the indebtedness might be, that building was available and the collateral was there to satisfy that, and he wanted to know that before going into settlement negotiation with First Federal Savings and Loan of Paragould. I recall that if the $2.1 million debt remained in effect, the building was there and available as collateral for the debt. And then he had that to work with in any negotiating with First Federal of Paragould.

From this testimony, it is clear F & M had full knowledge that the $2.1 million note (with the building and ground lease as collateral) remained in full effect and we cannot say the chancellor was clearly erroneous in relying upon it. Further, F & M's obligation under the mortgage was not increased by the modification since its property had been pledged in the event of default under the $2.1 million note. In other words, the fact that the party responsible for payment under the note changed from Lynxx to F & M, did not increase F & M's liability under the mortgage.

[redacted] We acknowledge F & M's argument that Blackstock's testimony concerning the bankruptcy agreements was inadmissible parol evidence. We must disagree. Normally, parol evidence is inadmissible when there is a written agreement; however, the test for its admissibility is whether the evidence offered tends to alter, vary, or contradict the written agreement, or whether it

tends to prove a part of the agreement about which the writing is silent. In the former instance, the testimony is inadmissible; in the latter, it is allowed. *Rainey* v. *Travis*, 312 Ark. 460, 850 S.W.2d 839 (1993); *Loe* v. *McHargue*, 239 Ark. 793, 394 S.W.2d 475 (1965); *Gallion* v. *Toombs*, 268 Ark. 955, 597 S.W.2d 842 (Ark. App. 1980). When ambiguity exists and the meaning of a contract becomes a question of fact, parol evidence is admissible. *Isbell* v. *Ed Ball Construction Co., Inc.*, 310 Ark. 81, 833 S.W.2d 370 (1992).

Here, the chancellor was correct in finding the two agreements were silent on a number of points which were necessary to understanding the complete agreement of the parties. Specifically, the chancellor found both agreements #1 and #2 were ambiguous and silent as to what was to occur after F & M paid the $1,705,000 note in full. Thus, the chancellor here admitted the parol evidence to ascertain and give effect to the true intent of the parties. Because none of the parol evidence that was admitted actually varied, altered, or contradicted the written terms of the agreements, it was properly admitted.

We hold the chancellor's findings as discussed above are not clearly erroneous, and affirm.

LAWHON FARM SUPPLY, INC. *v.* Jerry HAYES

93-840 870 S.W.2d 729

Supreme Court of Arkansas
Opinion delivered February 21, 1994

Dover & Dixon, P.A., by: *David A. Couch* and *William Dean Overstreet*, for appellant.

H. David Blair, for appellee.

TOM GLAZE, Justice.* In an attempt to bring a tort action against appellee Jerry Hayes, the appellant, Lawhon Farm Supply, Inc., asks this court to find a duty of care between a purchaser of farm products, and the holder of an unattached security interest. *See* Ark. Code Ann. § 4-9-203 (Repl. 1991) of the Uniform Commercial Code. We decline to do so.

On July 20, 1988, Lawhon advanced farm items such as seed, chemicals and fertilizer to Carlyle Good, a farmer. In return, Good executed a promissory note payable to Lawhon in the amount of $135,000, along with a purported enforceable security interest in crops to be grown on his farm in Woodruff County — specifically 1600 acres of milo and 200 acres of soybeans.[1] In its

[1]Only the security interest in the milo is at issue.

attempt to perfect its interest in Good's crops, Lawhon filed a financing statement and security agreement with the circuit clerk in Woodruff County and a central farm filing with the Secretary of State.[2] While Good was a resident of St. Francis County, the milo was grown and stored on Good's farm in Woodruff County.

In January, 1989, Good sold the milo to Hayes, but prior to the sale, Lawhon notified Hayes orally that the milo was subject to Lawhon's lien. Lawhon requested Hayes to include Lawhon's name as co-payee, if Hayes decided to purchase Good's milo. Hayes does not dispute the fact that he had notice of Lawhon's interest in the milo. Nonetheless, Hayes purchased Good's milo and paid Good by check without including Lawhon as co-payee. Good later cashed the check without paying Lawhon, thus defeating Lawhon's interest in the milo.

On September 25, 1992, Lawhon filed suit against Hayes alleging Hayes negligently destroyed its security interest in the milo crop by failing to name Lawhon as a co-payee on Hayes' check to Good. Lawhon alleged Hayes' failure to include Lawhon on the check even though Hayes knew of Lawhon's interest both from its registration and from Hayes' conversation with Lawhon. Hayes filed a motion to dismiss for failure to state facts upon which relief could be granted. From the pleadings and supporting briefs, the trial court granted Hayes' motion to dismiss without prejudice because the complaint failed to allege facts sufficient to constitute a breach of any legal duty owed by Hayes to Lawhon. Lawhon appeals from the order of dismissal.

While the subject matter of this case is governed by the UCC, Lawhon has elected to pursue his claim against Hayes in tort. The question of what duty, if any, is owed a plaintiff alleging negligence is always a question of law and never one for the jury. *Keck* v. *American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983). A complaint is subject to dismissal pursuant to Ark. R. Civ. P. 12(b)(6) where it fails to state sufficient facts to support a cause of action, and the appellate court will sustain the trial court if the result is correct. *Carter* v. *F.W.*

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[2]Lawhon's interest in the milo was inferior to a mortgage held by Farmers' Home Administration. However, Lawhon indicates there were funds remaining after the sale of Good's milo in excess of Farmers' lien that should have been paid to him.

Woolworth Co., 287 Ark. 39, 696 S.W.2d 318 (1985).

On appeal, Lawhon argues Hayes owed it a duty of ordinary care due to Hayes' status as a purchaser of farm products. In pertinent part, Ark. Code Ann. § 4-9-301(1)(c) (Repl. 1991) provides as follows:

> (1)[A]n unperfected security interest is subordinate to the rights of:
>
> . . .
>
> (c) . . . a person who is not a secured party and . . . is a buyer of farm products in ordinary course of business, to the extent that he gives value and receives delivery of the collateral *without knowledge of the security interest* and before it is perfected[.] (Emphasis added.)

See also § 4-9-307(1)(Repl. 1991) (code does not protect a buyer in the ordinary course of business who buys farm products from a person engaged in farming operations).

Here, Lawhon's attempt to perfect its interest in the milo was ineffective because it failed to file a financing statement in St. Francis County where the debtor, Good, resided. *See* § 4-9-401(1)(a) (Repl. 1991)[3] Lawhon argues that, even if his interest in the milo was not properly perfected, Hayes had actual knowledge that Lawhon was claiming a security interest in the milo. As a consequence, Lawhon claims Hayes purchased the milo subject to Lawhon's security interest and had a statutory duty to preserve Lawhon's interest under § § 4-9-301(1)(c) and 4-9-306 and 307. However, because Lawhon has no enforceable security interest, its arguments and citation of authority are of no avail.

Under § 4-9-201 (Repl. 1991), a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. Section 4-9-203(1) (Repl. 1991) provides that as to the collateral, a security interest is not enforceable against a third party unless the formal requisites for

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[3]Under § 4-9-401(1)(a), perfecting a security interest in farm products requires filing in the county of the debtor's residence and, if crops growing or to be grown, in the county where the land is located. Crops are farm products under § 4-9-109(3) (Repl. 1991).

attachment are satisfied. Those requisites for attachment of a security interest in the milo are as follows: (1) the collateral is in the possession of the secured party pursuant to agreement or the debtor has signed a security agreement which contains a description of the collateral and, in addition, when the security interest covers crops growing or to be growing, a description of the land concerned; (2) value has been given, and (3) the debtor has rights in the collateral.

In this case, the security agreement between Good and Lawhon is a printed form that indicates it has been approved by the Secretary of State and the Arkansas Commission on Uniform State Laws. While the form identifies Good as the debtor, it is signed only by Noel Lawhon, and contains the following description of the collateral and the land:

> (i) All crops of every kind grown or to be planted heretofore or hereafter, within one year from date of the execution hereof, on lands commonly known and referred to as the K-180 & K-13 Farm in Woodruff County, Arkansas, or at any other place in Woodruff County (ies), Arkansas.
>
> . . .
>
> (v) Other:
>
> Approx. 1600 Acres Milo
>
> Approx. 200 Acres Soybeans

At another area of the form, the following is found:

> 3. That DEBTOR's residence in the State where the Collateral is located is
>
> Rt. 2, Box 126 Wheatley, Ar. St. Francis County[4]

Section 4-9-110 provides that any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described. In *Piggott State Bank* v. *Pollard Gin Co.*, 243 Ark. 159, 419 S.W.2d 120 (1967),

[4]The underlined portion represents the information filled in; the unlined portion represents the printed matter.

this court identified the test of sufficiency of a description of land on which crops are grown is to make possible the identification of the thing described. In *Piggott*, the description was "7 acres of cotton and 53 acres of soybeans . . . on the lands of S.E. Karnes . . . in Clay County, Arkansas." Finding this description insufficient, this court opined it could not determine whether exactly seven acres of cotton were grown and whether anyone else was also growing cotton upon this same land. In citing pre-UCC cases, the *Piggott* court reaffirmed the rule that the "mortgage of a specified number of articles out of a larger number will not be allowed to prevail, unless it furnishes the data for separating the property intended to be mortgaged from the mass." *Id.* at 161 (cites omitted).

In *People's Bank* v. *Pioneer Food Industries, Inc.*, 253 Ark. 277, 486 S.W.2d 24 (1972), the bank brought a third party action in conversion against a purchaser of crops in which the bank claimed a perfected security interest. This court found a description similar to that in *Piggott* (all crops on number of acres and whose land) was not sufficient, but did uphold the award of damages for those crops grown on land with "an accurate legal description." *Id.* at 280.

Here, Lawhon argues that its security agreement described Good's crops and real property by using A.S.C.S. K-180 and K-13 numbers from which a specific metes and bounds description of real estate could be determined. However, nothing in the abstract reflects the numbers appearing in the agreement were A.S.C.S. numbers, much less that the numbers sufficiently describe the lands so as to put a third person on notice under the UCC. To confuse matters, the financing statement not only reflects unidentified farm numbers but also refers to all crops on land commonly known as the K-180 and K-13 Farm in Woodruff County *or at any place in Woodruff County(ies)*, Arkansas. And to confuse matters further, a reference is made that the *collateral* involved *is located in St. Francis County.* Furthermore, it cannot be determined whether the "approx. 1600 acres of milo" represents the entire acreage or is only part of a larger amount of acreage.

In conclusion, Lawhon has failed to satisfy the requirements of 4-9-203(1) by omitting the signature of the debtor

and by not providing a sufficient description of the land on which the milo was to be grown. As a result, Lawhon's security interest in Good's milo did not attach, and, as the holder of an unattached security interest, Lawhon cannot claim or enforce any duty of care that Article 9 of the UCC may place on a purchaser of farm products in the ordinary course of business. Therefore, we affirm the trial court's order dismissing Lawhon's action under Ark. R. Civ. P. 12(b)(6).

HAYS, J., dissents; BROWN, J., concurs.

ROBERT L. BROWN, Justice, concurring. I certainly agree that no duty of care that could lead to a negligence action was established by Lawhon Farms. My sole reason for concurring is that the opinion could be read to intimate that the Uniform Commercial Code establishes a statutory duty *of care* which failed in this case because no security interest in the milo was created.

I disagree with that suggestion. Even had a security interest attached in the milo, I am not convinced that this could give rise to a tort remedy in negligence in Lawhon Farms.

STEELE HAYS, Justice, dissenting. The majority declines to address the question of whether appellant Lawhon has stated a cause of action because it finds Lawhon had no enforceable security interest in the crops of Mr. Good. I disagree.

Before addressing the validity of the security agreement I would point out that on a 12(b)(6) motion, only the pleadings are to be looked at. If matters outside the complaint are presented on the motion it is treated as a motion for summary judgment. D. Newbern, *Arkansas Civil Procedure* § 11-7 (Sec. Ed. 1993). Further, for purpose of deciding the motion, the factual allegations in the complaint are accepted as true. *Id.* This complaint alleges that the plaintiff held a properly filed security interest. That should be the end of the inquiry. Lawhon is not required to *prove* in a complaint that all the prerequisites for the security agreement have been met. That is a matter of proof, for trial. Even so, if the majority insists on going beyond the complaint to decide the 12(b)(6) motion, Lawhon has still met the requirements of pleading a valid security interest.

First the majority finds there is not a sufficient description,

relying on *Piggott State Bank* v. *Pollard Gin Co.*, 243 Ark. 159, 419 S.W.2d 120 (1967) and *People's Bank* v. *Pioneer Food Industries, Inc.*, 253 Ark. 277, 486 S.W.2d 24 (1972). Those cases are distinguishable from this one, as they also were from *United States* v. *Oakley*, 483 F. Supp. 762 (E.D. Ark. 1980). *Oakley* pointed out that in *Piggott*, there was a segregation of acreage involved that was not otherwise identified in the description of the land where the crops were located. In contrast, the description in *Oakley* read "all crops to be grown on the land in question." The description in this case is like the one in *Oakley*, not in *Piggott.*

As to *Pioneer*, the *Oakley* court said:

> In *Pioneer Food*, the description in question contained a general description of crops and a specific legal description as to three tracts. The legal description was erroneous in that three additional tracts were omitted. In holding that the description was inadequate as to the crops grown on the omitted tracts, the Arkansas Supreme court expressly stated that the question as to the sufficiency of the general description standing alone would remain unanswered.

In *Oakley*, the description stated that the collateral consisted of "all the crops" on the "farm of Alois Ledwig," consisting of "260 acres," "located in White County, Arkansas" and "approximately 3 1/2 miles southeast of McRae." The court, after examining all the relevant Arkansas law, concluded:

> Nothing in the Arkansas statutes or case law indicates that a full legal description of real estate is required in a financing statement covering crops. The information in the financing statement, together with inquiry suggested therein, would enable a stranger to the transaction...to identify the crops.

The court found that the description was sufficient. Other jurisdictions have adopted the test laid down in *Oakley. See In the Matter of Robert Younce*, 56 BR 232 (E.D. Wisc. 1985), where the court stated the *Oakley* test required four things: 1) name of the record owner, 2) approximate number of acres on which the crops are grown; 3) the county in which the land is located and 4) the distance of the real estate from the nearest city or town. However, the courts have taken a liberal approach and interpre-

tation of that test and found the description sufficient if it puts a third party on notice and gives enough information from which the third party can, upon inquiry, determine the precise location.

The court in *Younce*, for example, found the first and fourth factors missing in the description, but that the description was nevertheless sufficient. There was some reference to townships and sections, and even though it was not a legal description the court found it was sufficient to locate and identify the collateral.

> A real estate description is not intended to serve as the sole means by which a third party could locate and identify the collateral. Its purpose is to put an interested third party on notice of the existence of a claim. The obligation then runs to the third party to conduct further inquiries suggested by the description of the collateral and real estate upon which it governs to determine the precise location.

Id. at 235.

In this case we have the number of acres involved and the county and state where they are located. The description also lists (K180 and K13) numbers which Lawhon contends are identifying numbers with the A.S.C.S. office and that by reference to these A.S.C.S. farm numbers, a specific metes and bounds description of the land is obtainable.

As in *Oakley* and *Younce*, this description would be sufficient because it would "enable third persons, aided by inquiries which the instrument itself suggests, to identify the property." *Oakley, supra*, quoting from *Security Tire & Rubber Co.* v. *Hlass* 246 Ark. 1113, 441 S.W.2d 91 (1969). Under our case law, like that of other jurisdictions, the description in this case is sufficient. *See* 2 White, Summers, *Uniform Commercial Code*, § 24-4 (3rd ed. 1988).

The majority also finds the security agreement deficient because it is not signed by the debtor as required by Ark. Code Ann. § 4-9-203(1) (1987). The question of the debtor's signature is not raised by either party, below or on appeal, nor is it noted by the trial court in its order of dismissal. In a civil proceeding the allegations in a complaint are presumed to be true. *Carter* v. *F.W. Woolworth Co.*, 287 Ark. 39, 696 S.W.2d 318 (1985). *Carter*

also states that a presumption that the allegations are true does not mean that a bare allegation can overcome an accompanying exhibit which plainly refutes the allegation.

In this case Lawhon alleged it had a security agreement that was properly filed. The record on appeal contains a copy of that agreement which bears no signature of the debtor. However, the copy clearly reflects that it is the "Debtor Copy," and there is no reason the debtor would sign his *own* copy. This exhibit, unlike the exhibit in *Carter*, does not "plainly refute the allegation." Lawhon's allegation of a valid security agreement remains unchallenged for purposes of gauging the sufficiency of the pleading.

The only remaining problem is Lawhon's theory for its cause of action based on negligence. I find no direct authority supporting a cause of action for negligence in the context of this case, but the allegations otherwise clearly assert a cause of action for conversion. Under Ark. Code Ann. § 4-9-201 (1987) it is stated in part:

> Except as otherwise provided by this act a security agreement is effective according to its terms between the parties, *against purchasers of the collateral* and against creditors. [My emphasis.]

The rights of a secured party against a purchaser of the collateral are stated in 2. White, Summers, *Uniform Commercial Code*, § 27-7 (3rd ed. 1988).

> When a debtor sells collateral to subject to a perfected security interest, the secured party may proceed (1) against the debtor. . . . or (2) *against the purchaser (a) by replevin or (b) by an action in trespass for conversion of the collateral.* [My emphasis.]

Here, as clearly alleged in the complaint, Hayes, with knowledge of Lawhon's security interest, purchased the collateral in violation of that security interest. While this may not be an action for negligence, that does not mean the pleading is fatally deficient. ARCP 12(b)(6) only requires that sufficient facts to state a claim be pled, and not a correct theory of action. We have stated:

> The statement of facts constitutes the cause of action . . . . All that is necessary is that the complaint state a cause

of action within the jurisdiction of the court.

C.R.I.& P. v. *Lockwood*, 244 Ark. 122, 424 S.W.2d 158 (1968). To the same effect see 61A Am. Jur. 2d, Pleadings §§ 75, 77 (1981).

One question remains: What is the result if Lawhon failed to properly file the financing statement but the purchaser had knowledge of its interest? While we did not reach this question in *Affiliated Food Stores, Inc.* v. *Farmers & Merchants Bank*, 300 Ark. 450, 780 S.W.2d 20 (1989), we nevertheless acknowledged it in theory:

> The bank argues that, due to its first filing with the circuit clerk, Affiliated had knowledge of its security interest in the inventory and thus the filing with the circuit clerk was sufficient, citing *In re Davidoff*, 351 F. Supp. 440 (S.D.N.Y. 1972). In that case, in which New York law was applied, it was held that a creditor who had actual knowledge of a prior security interest could not defeat the prior interest on the basis that the prior interest was filed improperly. In the case now before us there is no evidence that Affiliated had actual knowledge of the bank's interest.

There is sound authority for the view that knowledge of a security interest will overcome a misfiling of the financing statement. *See* Hillman, McDonnel, Nicles, *Common law and Equity Under the Uniform Commercial Code* (1985), § 24.05[1]; 2 G. Gilmore, *Security Interests in Personal Property* § 34.2 (1965).

I think the approach is persuasive and in this case there is no dispute that Hayes had knowledge of Lawhon's security interest. Therefore, under the aforementioned authorities, any misfiling of the financing statement is irrelevant and it will be deemed to have been properly filed with regard to a third party with actual knowledge. In that case Lawhon has pled a properly perfected security interest and stated a cause of action, and may proceed against the buyer. Ark. Code Ann. § 49-9-201 (1987); Ark. Code Ann. § 4-9-306(2) (1987).

Donald BELLANCA *v.* ARKANSAS POWER & LIGHT COMPANY

93-711 870 S.W.2d 735

Supreme Court of Arkansas
Opinion delivered February 21, 1994

Swindoll Law Firm, by: *James F. Swindoll* and *Paul Byrd*, for appellant.

Chisenhall, Nestrud & Julian P.A., by: *Jim L. Julian* and *Janie W. McFarlin*, for appellee.

DONALD L. CORBIN, Justice. Appellant, Donald Bellanca, appeals a Pulaski Circuit Court summary judgment entered on

behalf of appellee, Arkansas Power and Light Company (AP&L). An employee of appellee activated the electrical power at appellant's mobile home on September 10, 1991, at appellant's request, and also turned the switches on in the breaker box. At the time, appellant was making electrical repairs and did not want the breaker switches turned on. A box sitting on an electric stove inside the mobile home ignited when the breaker switch was turned on; this, in turn, damaged the residence and its contents. Appellant filed suit, and appellee filed a motion for summary judgment. After a hearing on the motion for summary judgment, the court held that there were no genuine issues of material fact remaining and that appellee was entitled to judgment as a matter of law. Appellant appeals the summary judgment, and we reverse in that the trial court erred as a matter of law.

Summary judgment is proper when there exists no issue of material fact, and the movant is entitled to judgment as a matter of law. ARCP Rule 56. On appeal, this court determines if summary judgment was proper based on whether the evidence presented by the movant leaves a material question of fact unanswered. *Barraclough* v. *Arkansas Power & Light Co.*, 268 Ark. 1026, 597 S.W.2d 861 (1980). 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. *Harvison* v. *Charles E. Davis & Assoc., Inc.*, 310 Ark. 104, 835 S.W.2d 284 (1992). We acknowledge whether a duty is owed between parties is a question of law. *Stacks* v. *Arkansas Power & Light Co.*, 299 Ark. 136, 771 S.W.2d 754 (1989); *Keck* v. *American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983).

Appellant correctly points out that this court has spoken on the topic of utility companies and their duties to inspect and maintain its own equipment and has consistently held that those companies are not held liable for injuries that cannot be reasonably foreseen. *See e.g. Stacks*, 299 Ark. 136, 771 S.W.2d 754; *Arkansas Power & Light Co.* v. *Lum*, 222 Ark. 678, 262 S.W.2d 920 (1953). There is, then, without question a duty to act reasonably when supplying power. A duty of reasonable care is also made clear in our statutes, as argued by appellant. Ark. Code Ann. § 23-3-113 (1987) sets forth a duty of reasonable care and reads:

> (a) Every public utility shall furnish, provide, and maintain such adequate and efficient service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, requirements, and convenience of its patrons, employees, and the public.
>
> (b) Every person, firm, or corporation engaged in a public service business in this state shall establish and maintain adequate and suitable facilities, safety appliances, or other suitable devices and shall perform such service in respect thereto as shall be reasonable, safe, and sufficient for the security and convenience of the public and the safety and comfort of its employees, and, in all respects, just and fair, and without any unjust discrimination or preference.

This codifies a duty to act with reasonable care in the delivery of service. We reverse with regard to the existence of a duty, that duty being to act reasonably under the circumstances not to harm.

[redacted] Appellant argued to the court at the hearing that AP&L assumed a duty when it went onto appellant's property and turned the breakers on. Had the AP&L serviceman only activated the power at the power pole, we could affirm the trial court's summary judgment. However, whether activation of the breaker switches owned by appellant constituted a breach of the duty of reasonable care is a question of fact to be left to the finder of fact. The trial court erred in that it apparently limited its holding to deciding as a matter of law that there was no duty to inspect the customer's premises prior to activating service, ignoring that there is a broader duty of reasonable care in supplying power. Since we reverse the initial determination that there existed no duty as a matter of law, we need not address the question of whether there were factual issues unanswered.

Reversed and remanded.

HOLT, C.J., not participating.

George E. MARTIN *v.* NATIONAL BANK OF COMMERCE
of El Dorado, Administrator of the Estate
of Cynthia Martin, Deceased

93-850 870 S.W.2d 738

Supreme Court of Arkansas
Opinion delivered February 21, 1994

Shackleford, Shackleford & Phillips, P.A., by: *Norwood Phillips*, for appellant.

Compton, Prewett, Thomas & Hickey, P.A., by: *William I. Prewett*, for appellee.

DONALD L. CORBIN, Justice. Appellant, George E. Martin, appeals an order of the Calhoun Chancery Court refusing to set aside a decree granting a divorce to appellant's wife, Cynthia Martin, dividing the marital property, and awarding her custody of the two children. We have jurisdiction of the appeal as it requires our interpretation of ARCP Rule 60(c) as to whether a trial court is required to receive evidence or conduct a hearing. However, we do not reach the merits of this appeal because there is not an appealable order consistent with ARCP Rule 54(b). Therefore, we must dismiss the appeal.

The procedural history of this case is as follows. Appellant and Cynthia Martin married on February 7, 1980. Cynthia Martin filed for divorce in Calhoun County on September 25, 1992. Appellant was served with the summons on October 2, 1992.

Appellant did not answer the complaint for divorce. Cynthia Martin appeared in the Calhoun Chancery Court and gave testimony relating to the divorce, custody of the couple's two children, and property settlement on January 11, 1993; appellant did not appear, by counsel or otherwise, at the divorce hearing. On that same day, the chancellor granted Cynthia a divorce from appellant; the decree also awarded her custody of the two children, directed appellant to pay child support, and divided the couple's marital property.

Appellant acknowledged receiving a copy of the divorce decree from Cynthia's attorney a few days after January 11, 1992, from which he did not appeal. On March 9, 1993, appellant filed a motion to set aside the divorce decree pursuant to ARCP Rule 60(b). Cynthia Martin died intestate on or about March 13, 1993, as a result of gunshot wounds she received on or about March 1, 1993. Appellee, National Bank of Commerce of El Dorado, was appointed as administrator of her estate and substituted as a party in the proceedings.

Realizing that the court would not act on his motion within the ninety-day limitation period of Rule 60(b), appellant amended his motion to set aside the divorce decree to include a request for relief under ARCP Rules 55 and 60. Specifically, appellant argued that the divorce and property distribution were obtained through Cynthia Martin's perjured testimony and that she fraudulently represented to appellant that she no longer intended to pursue the divorce. Appellant also asserted the defense of condonation. Appellee responded to appellant's motions arguing that appellant was barred from having the divorce set aside by the doctrines of estoppel and unclean hands in that he shot and killed Cynthia Martin under circumstances constituting murder.

Alpha Brown, appellant's aunt by marriage, filed a motion to intervene and complaint for intervention on or about May 6, 1993. In her motion, Ms. Brown, an elderly widow, claimed ownership of certain property that was distributed as marital property in the divorce decree. Specifically, she claimed ownership of $100,000 which she gave to the couple along with a power of attorney to invest in her name at a higher interest rate than she was receiving at the Calhoun County Bank. Ms. Brown also claimed ownership of a 1992 Lincoln Town Car which was pur-

chased using her 1987 Buick LeSabre as a trade and part of the $100,000. The chancellor granted Ms. Brown's motion to intervene on May 10, 1993. Ms. Brown's counsel twice requested a continuance of the proceedings. The first request was granted. The second request was based on the grounds that counsel could not be present on the scheduled hearing date. The second request went unanswered by the trial court, and counsel for appellant and appellee appeared in court on the scheduled date. The record does not indicate that the intervenor was present nor that she was represented by counsel.

The chancellor considered the pleadings and arguments of counsel made in open court on June 21, 1993, and entered an order refusing to set aside the divorce decree for lack of jurisdiction pursuant to Rule 60(b) in that more than ninety days had passed since the entry of the divorce decree on January 11, 1993. The order also stated that due to appellant's delay in responding to the divorce action, and due to Cynthia Martin's death, substantial prejudice would result to her estate if the chancellor were to reopen any part of the divorce proceeding. The order did not dispose of or even consider the intervenor's claims. The order was entered of record on June 24, 1993. This appeal followed.

On appeal, appellant does not contest that part of the chancellor's ruling asserting a lack of jurisdiction under Rule 60(b). Appellant does contest the court's dismissal of his claim that the decree was obtained through Cynthia Martin's fraudulent conduct. He argues the trial court erred in allegedly summarily dismissing his fraud claim without giving him an opportunity to present evidence of the fraud.

We do not reach the merits of appellant's claim because the trial court did not dispose of the intervenor's claim as is necessary pursuant to ARCP Rule 54(b). The order appealed from does not mention the intervenor's claim nor does it mention any facts that would allow a piecemeal appeal under Rule 54(b). As was the situation in *South County, Inc.* v. *First Western Loan Co.*, 311 Ark. 501, 845 S.W.2d 3 (1993), the record does not reflect what happened to the intervenor's claim. Therefore, the order appealed from disposes of less than all the claims in this suit and is not a final, appealable order. *Id.* The finality of an order is a jurisdictional requirement this court is obliged

to raise even when the parties do not. *Alberty* v. *Wideman*, 312 Ark. 434, 850 S.W.2d 314 (1993).

The appeal is dismissed.

Calvin MULDROW d/b/a Muldrow Bonding Co. *v.*
Lee DOUGLASS, Insurance Commissioner,
Arkansas Insurance Department

93-719 870 S.W.2d 736

Supreme Court of Arkansas
Opinion delivered February 21, 1994
[Rehearing denied March 28, 1994.*]

Walker, Roaf, Campbell, Ivory & Dunklin, by: *Sheila F. Campbell*, for appellant.

Jeannette Denham, for appellee.

DONALD L. CORBIN, Justice. Appellant, Calvin Muldrow, appeals a Pulaski Circuit Court decision upholding the Arkansas Insurance Commissioner's finding that appellant had lost his status regarding the security deposit for bail bondsmen. Since appellant was no longer qualified for the lesser statutory minimum

*Hays and Brown, JJ., would grant rehearing.

deposit, the required security deposit increased from $25,000 to $100,000. We have jurisdiction to hear this case since it necessitates our interpretation of a statute, Ark. Code Ann. § 17-17-205 (1987). However, we do not reach the merits of this case because appellant's abstract is flagrantly deficient.

The abstract presented is virtually a verbatim copy of the transcript. In it is almost every typewritten word of the transcript, including certificates of service on pleadings. In fact, there are more pages in the abstract submitted (85) than are in the actual transcript (79). The cover page and index to the transcript are included verbatim in the abstract.

The abstract should contain an impartial condensation of only the material parts of the pleadings, proceedings, facts, documents, and other materials in the transcript as are necessary to an understanding of all questions presented to the court for decision. Ark. Sup. Ct. R. 4-2(a)(6). This court has stated that an abstract that is a mere reprint of the transcript, or substantial parts of it, may preclude this court from reaching the merits of an appeal. *Board of Educ. of Franklin Co.* v. *Ozark School Dist. No. 14*, 280 Ark. 15, 655 S.W.2d 368 (1983). This case falls into that category, and we therefore affirm.

HAYS and BROWN, JJ., dissent.

ROBERT L. BROWN, Justice, dissenting. I respectfully dissent.

In my three years on the court, we have not affirmed a case for failure to condense under Ark. Sup. Ct. R. 4-2(a)(6), formerly Rule 9, until today. The reason is obvious. We look at abstracts of the record that provide too much differently from those that provide too little. In other words, to warrant the harsh result of an affirmance under Rule 4-2(a)(6) for providing excessive material in the abstract, the violation must be of the most serious order. One factor that we consider in assessing whether to affirm because an abstract is not sufficiently condensed is whether this lapse has caused the court a prodigious waste of time. *See Forrest City Mach. Works* v. *Mosbacher*, 312 Ark. 578, 851 S.W.2d 443 (1993); *Oaklawn Jockey Club* v. *Jameson*, 280 Ark. 150, 655 S.W.2d 417 (1983) (J. Smith, concurring opinion).

Enforcing Rule 4-2(a)(6) is a relatively simple matter when a material part of the record is not abstracted such as the judg-

ment, the will at issue, a pertinent jury instruction, or testimony. *See Dixon* v. *State*, 314 Ark. 378, 863 S.W.2d 282 (1993) (hearing, findings of fact, and orders not abstracted); *Davis* v. *Peebles*, 313 Ark. 654, 857 S.W.2d 825 (1993) (pleadings, motion for summary judgment, affidavits, and order not abstracted); *Haynes* v. *State*, 313 Ark. 407, 855 S.W.2d 313 (1993) (hearing on issue raised on appeal not abstracted); *Watson* v. *State*, 313 Ark. 304, 854 S.W.2d 332 (1993) (abstract was a scattering of transcript references in the argument); *Edwards* v. *Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993) (abstract did not include pleadings, documents, or orders); *Stephens Prod. Co.* v. *Johnson*, 311 Ark. 206, 842 S.W.2d 851 (1993) (abstract did not contain the pleadings); *Gilmer* v. *State*, 308 Ark. 506, 824 S.W.2d 343 (1992) (complete failure to abstract the record); *Hunter* v. *Williams*, 308 Ark. 276, 823 S.W.2d 894 (1992) (abstract failed to include order); *D.J., A Juvenile* v. *State*, 308 Ark. 37, 821 S.W.2d 782 (1992) (abstract was a narrative statement reciting the barest facts); *Samples* v. *Samples*, 306 Ark. 184, 810 S.W.2d 951 (1991) (abstract failed to include the answer, jury instructions, motion for directed verdict, judgment, or the notice of appeal); *Fruit* v. *Lockhart*, 304 Ark. 457, 802 S.W.2d 930 (1991) (abstract consisted only of a "statement" that had been submitted as an exhibit at the evidentiary hearing); *Pennington* v. *City of Sherwood*, 304 Ark. 362, 802 S.W.2d 456 (1991) (abstract failed to contain the legal description contained in the ordinance or a copy of the plat at issue). Under such circumstances, an objective test on the materiality of the omission can readily be applied.

With regard to abstracts where we are given too much and there has been a failure to condense the material adequately, the issue becomes more subjective on the part of this court. I cannot conclude in this case that the abstract is flagrantly deficient under the Rule or that it has occasioned a prodigious waste of time for the court. True, the abstract is 85 pages, and the record is only 79 pages. But the abstract is not a mere photographic reproduction of the record as was the case in *Board of Educ. of Franklin Co.* v. *Ozark Sch. Dist. No. 14*, 280 Ark. 15, 655 S.W.2d 368 (1983). In that case, we said that the appellant had done little more than reproduce photographically substantial parts of the record, and no attempt was made to condense. Here, the pleadings, exhibits, and arguments abstracted have all been retyped by

Muldrow. More importantly, there has been an effort by Muldrow, albeit a minimal one, to condense the record, even though the number of pages in the abstract is longer. Portions of the pleadings, exhibits, and colloquy between counsel and the circuit court have been eliminated. And the testimony of Calvin Muldrow is abstracted correctly and put in first person narrative form in accordance with the Rule. Where there has been some effort to condense and the abstract does not cause the court an ordinate amount of time to read, affirmance is too draconian a penalty to levy.

In *Forrest City Mach. Works* v. *Mosbacher, supra*, we fired a shot across the bow and stated that we would no longer tolerate abstracts that were single-spaced, void of record references, or not adequately condensed. The clerk of this court is endowed with the authority under Ark. Sup. Ct. R. 4-1 and 4-2 not to accept briefs with abstracts that are single-spaced or without record references. But failure to condense falls to this court to assess and, again, requires a more subjective analysis.

This abstract did not cause this court a prodigious waste of time. It is not *flagrantly* deficient which is the ultimate test under Rule 4-2(a)(6). I would reach the merits.

HAYS, J., joins.

Marie TRAPP and Jimmy Moore, Co-Administrators of the Estate of Donald Wayne Moore, Deceased *v.* ECONOMY ENGINEERING COMPANY; Raymond Holt, d/b/a Holt's Equipment Rental and Sparton Corporation

93-874 871 S.W.2d 345

Supreme Court of Arkansas
Opinion delivered February 21, 1994
[Supplemental Opinion on Denial of Rehearing
April 11, 1994]

Wilson & Associates, by: *J.L. Wilson*, for appellants.

Rieves & Mayton, by: *Martin W. Bowen*, for appellees.

DONALD L. CORBIN, Justice. Appellant, Donald Wayne Moore, through the co-administrators of his estate, appeals the entrance of summary judgment in favor of separate appellee, Sparton Corporation (Sparton). Appellant was electrocuted on Sparton's property while riding an electrically charged forklift and coming in contact with another metal object. After Sparton moved for summary judgment, the parties filed briefs and a hearing was conducted. The trial court determined as a matter of law that appellant's status at the time of his death was that of a licensee and that Sparton had met the commensurate duty.

Although not raised by Sparton, we do not reach the merits of appellant's case because appellant failed to comply with our brief and abstract requirements. *See* Ark. Sup. Ct. R. 4-1 and 4-2. We may raise issues of deficiencies on our own motion. Ark. Sup. Ct. R. 4-2(b)(2). First, we note that appellant's brief lacked a jurisdictional statement as required by Rule 4-2(a)(2). Next we note that briefs submitted must be double-spaced unless the single-spaced material is quoted information. *See* Ark. Sup. Ct. R. 4-1(a). The abstract portion of appellant's brief is in large portion single-spaced in contravention of this rule. Deposition testimony appears to be quoted verbatim, but it is neither single spaced nor indented.

Moreover, the abstract contains information that is clearly unnecessary for determination of the issues presented, but is lacking information that is pertinent. Appellant also failed to abstract the notice of appeal as well as the order of the trial court. See Edwards v. Neuse, 312 Ark. 302, 849 S.W.2d 479 (1993). This appeal comes from an order disposing of less than all parties and less than all issues; not all defendants were released from this lit-

igation in the summary judgment from which this appeal resulted. Upon appellant's motion, the trial court entered an order granting appellant leave to appeal, and this is not made part of the abstract.

We have held that it is impractical if not impossible to pass around a single transcript when there are seven justices on this court. *See e.g. Davis* v. *Peebles*, 313 Ark. 654, 857 S.W.2d 825 (1993). In the absence of this vital information being properly abstracted, according to the rules of this court, it is impossible for this court to make an informed decision on the merits of this case. Flagrant failure to abstract in accordance with the rules will result in our refusal to reach an appellant's arguments. *Id.* Because of appellant's omission of material pleadings and the other enumerated deficiencies in the abstract, we affirm.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
APRIL 11, 1994

875 S.W.2d 486

Wilson & Associates, by: *J.L. Wilson*, for appellant.

Rieves & Mayton, by: *Elton A. Rieves IV*, for appellee.

PER CURIAM. Petitioner Jimmy Wayne Moore, Co-Administrator of the Estate of Donald Wayne Moore, deceased, argues on rehearing that failure to abstract an order giving leave to appeal an interlocutory order was not a flagrant violation of S.Ct. R. 4-2(a)(6). In the alternative, petitioner requests the right to file a supplemental abstract to comply with the rule.

The petition is denied. Failure to abstract a critical order has been grounds for affirmance under Rule 4-2(a)(6) or its predecessor, Rule 9. *See, e.g., Montgomery* v. *Butler*, 309 Ark. 491, 834 S.W.2d 148 (1992) (appendix case); *Stephens Production Co.* v. *Johnson*, 311 Ark. 206, 842 S.W.2d 851 (1992); *Hunter* v. *Williams*, 308 Ark. 276, 823 S.W.2d 894 (1992); *Brooks* v. *City of Benton*, 308 Ark. 571, 826 S.W.2d 259 (1992). The missing order in this instance was significant. Not knowing the basis by which the trial court permitted an interlocutory appeal impeded this court's ability to make an informed decision on whether a violation of Ark. R. Civ. P 54(b) had occurred.

We will allow a supplemental abstract in certain cases where the circumstances warrant it *before the case is submitted for decision. See, e.g., Young* v. *State*, 308 Ark. 372, 823 S.W.2d 911 (1992). When that occurs any expenses associated with reabstracting incurred by the non-moving party will be subject to payment by the moving party. Here, the request to reabstract comes not only after submission but after the case has been decided. It is simply too late to correct the deficiency.

Petition denied.

Wendy L. PARKS v. Tommie M. EWANS

93-866 871 S.W.2d 343

Supreme Court of Arkansas
Opinion delivered February 21, 1994

Steven W. Elledge, for appellant.

John D. Bridgforth, P.A., for appellee.

ROBERT L. BROWN, Justice. This appeal concerns the admissibility of blood tests taken at the behest of the appellant, Wendy L. Parks, to establish the paternity of the putative father, appellee Tommie M. Ewans. The chancellor, sitting as juvenile judge, refused to admit the blood tests into evidence at the paternity trial due to the absence of a chain-of-custody affidavit as required by Ark. Code Ann. § 9-10-108 (a)(3)(B)(i) (Repl. 1993). We hold that the chancellor erred in his ruling, and we reverse his decision and remand the matter for a new trial.

On December 7, 1992, Wendy Parks, the natural mother of

Tommie Ewans, Jr., filed her complaint against Tommie M. Ewans and alleged that he was the minor child's father. She prayed for a finding of paternity, child and medical support, and health care coverage. That same date, Ewans filed an objection "to being the father" and stated his willingness "to take any procedures to be sure." Ewans later filed a formal answer denying that he was the father.

On January 5, 1993, Ewans apparently allowed blood to be drawn, and blood was also drawn from the minor child and from Parks. Tests on the samples were performed on January 20, 1993, by Genetic Design, a paternity evaluation firm in Greensboro, North Carolina. On April 9, 1993, which was the Friday before the Monday trial, Ewans filed a motion challenging the paternity tests. In the motion, Ewans contended that he had not filed the motion 30 days before trial because he did not retain counsel until March 8, 1993.

Trial commenced on April 12, 1993, and at the trial the chancellor granted Ewans's motion to suppress the paternity report due to the failure of Parks to provide a chain-of-custody affidavit as required by statute. Parks then moved for a continuance based on surprise which was denied. The chancellor found that Parks had not met her burden of proof to establish Ewans as the father of the minor child and, accordingly, he entered an order of dismissal.

The primary issue raised on appeal is whether the chancellor erred in suppressing the blood test report. We conclude that he did. The relevant statute reads:

> (3)(A) A written report of the test results prepared by the duly qualified expert conducting the test, or by a duly qualified expert under whose supervision or direction the test and analysis have been performed, certified by an affidavit duly subscribed and sworn to by him or her before a notary public, may be introduced in evidence in paternity actions without calling the expert as a witness unless a motion challenging the test procedures or results has been filed within thirty (30) days of the trial on the complaint and bond posted in an amount sufficient to cover the costs of the duly qualified expert to appear and testify.

> (B)(i) If contested, documentation of the chain of custody of tissue and blood samples taken from test subjects in paternity testing shall be verified by affidavit of one (1) person witnessing the extraction, packaging, and mailing of said samples and by one (1) person signing for said samples at the place where same are subject to the testing procedure.

Ark. Code Ann. § 9-10-108 (a)(3)(A) & (B)(i) (Repl. 1993).

Our interpretation of § 9-10-108 (a)(3)(B)(i) turns on the meaning of "if contested" relative to the chain-of-custody affidavit. Admittedly, this subsection and § 9-10-108 (a)(3)(A) can be read to require that both a motion challenging the test results and a motion contesting chain-of-custody of the samples be filed within 30 days of trial. They can also be read as limiting the 30-day motion requirement to a challenge to the test results under § 9-10-108 (a)(3)(A). It would be an anomalous situation, however, for us to conclude that a putative father could wait until the Friday before the Monday trial, which was the case here, or even until the trial itself to contest the absence of an affidavit establishing chain of custody. Under such circumstances, the natural mother would have no warning that the blood tests were contested on foundation grounds until the eleventh hour, or later. That, of course, would be patently unfair.

The policy behind § 9-10-108 (a)(3) was to ease requirements for the admissibility of blood tests. *Boyles* v. *Clements*, 302 Ark. 575, 792 S.W.2d 311 (1990); *see also Ross* v. *Moore*, 30 Ark. App. 207, 785 S.W.2d 243 (1990). Parks was entitled to reasonable notice that the test results were contested to give her the opportunity to obtain the necessary affidavit. A challenge to the blood tests filed the Friday before the Monday trial was not reasonable notice. Moreover, even that challenge could be read to relate only to the test results themselves and not to a contest on chain-of-custody grounds.

In sum, we interpret § 9-10-108 (a)(3)(B)(i) to require a contest on chain-of-custody grounds within 30 days of trial. Certainly, the overall scheme of § 9-10-108 (a)(3) supports the 30-day requirement in both subsections. The chancellor erred in suppressing the test results. The test results are admissible on

the basis that Ewans failed to mount the contest to chain of custody in timely fashion.

The order of dismissal is reversed, and the matter is remanded for further proceedings.

CITY OF LITTLE ROCK and Arkansas Public Service Commission *v.* AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.

93-1251 870 S.W.2d 217

Supreme Court of Arkansas
Opinion delivered February 21, 1994

Thomas M. Carpenter, for appellant.

Wright, Lindsey & Jennings, by: *N. M. Norton, Jr.*, for appellee.

PER CURIAM. The City of Fort Smith and the Arkansas Municipal League have filed motions for permission to file *amicus curiae* briefs supporting appellants' side of this case. Appellee American Telephone and Telegraph Communications of the Southwest, Inc. has responded and asked for additional pages of argument to respond to the *amicus curiae* briefs. We grant permission to file the *amicus curiae* briefs and also grant appellee an additional ten pages of argument to respond.

In its motion, appellee states that it needs the extra pages to respond to new issues raised in the *amicus curiae* briefs. In order to prevent any possible misunderstanding, we state that we do not know if the new issues were raised by the pleadings and ruled on by the trial court, but we ordinarily address *amicus curiae* arguments similar to the way we address arguments by intervenors, and intervenors on appeal cannot enlarge the issues beyond those raised by the pleadings of the parties in the lower court. *Weber* v. *Pryor*, 259 Ark. 153, 531 S.W.2d 708 (1976).

NEWBERN, J., not participating.

Bryson JACOBS *v.* STATE of Arkansas

CR 93-1137 870 S.W.2d 740

Supreme Court of Arkansas
Opinion delivered February 21, 1994

Larry W. Horton, for appellant.

No response.

PER CURIAM. Appellant Bryson Jacobs moves (1) for additional time to file her brief and (2) to supplement the record with enhanced tapes, or their transcription, concerning the alleged drug transaction at issue. The State Crime Laboratory was unable to enhance the tapes, and Jacobs now states that a private firm in Little Rock may be able to accomplish this. The court reporter's letter is attached to the motion. She states that the tapes were not transcribed by her at trial because they were for the most part unintelligible and inaudible and contained background noises.

The motions are denied, and the clerk is directed to set a briefing schedule. Enhanced tapes would present this court with evidence not heard by the jury. We are limited on appeal to a review of the record of the trial court proceedings. We will not review evidence not considered by the jury or the trial court and, thus, not contained in the record. *Evans* v. *State*, 271 Ark. 775, 610 S.W.2d 577 (1981); *Weston* v. *State*, 265 Ark. 58, 576 S.W.2d 705 (1979).

Timothy Allen OLIVER *v.* STATE of Arkansas

CR 94-113 871 S.W.2d 332

Supreme Court of Arkansas
Opinion delivered February 21, 1994

Dana A. Reece, for appellant.

No response.

PER CURIAM. The appellant, Timothy Allen Oliver, by his attorney, has filed a motion for rule on the clerk. His attorney, Ms. Dana A. Reece, admits that the failure to file the record in time was due to a mistake on her 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.

The motion is therefore granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Christopher Ray STONE *v.* STATE of Arkansas

CR 94-61 871 S.W.2d 552

Supreme Court of Arkansas
Opinion delivered February 21, 1994

Frank E. Shaw, for appellant.

No response.

PER CURIAM. Appellant, Christopher Ray Stone, asks this court to issue a writ of certiorari directing the court reporter for the Faulkner County Circuit Court, Debbie Whillock, to complete the transcript in this case. Appellant filed a partial record on January 18, 1994, and states the transcript was due in this court on that date. Appellant states that the court reporter has been unable to prepare the record because of numerous trials and appeals, and asks for an additional thirty days for the reporter to complete the transcript to be due February 20, 1994.

Appellant has twice previously been granted extensions of time to file the transcript in this appeal of a judgment of conviction for first degree murder and sentence of life imprisonment entered June 20, 1993. Originally, the transcript was due to be filed on or about October 20, 1993; that deadline was extended until December 31, 1993, and again until January 18, 1994.

Since appellant filed this request for writ of certiorari, the reporter completed the transcript, although after the January 18, 1994, deadline. Therefore, we will treat this petition for certiorari as a motion for rule on the clerk.

We grant the motion for rule on the clerk and direct the clerk to accept the transcript. The clerk is also directed to forward a copy of this per curiam to the Board of Certified Court Reporter Examiners for any action it may deem necessary under its rules.

H.A. ADAMS and Opal Adams, and Gary Adams and Darlos Adams *v.* Donald OWEN and Darcy Owen

93-917 870 S.W.2d 741

Supreme Court of Arkansas
Opinion delivered February 28, 1994
[Rehearing denied April 11, 1994.*]

Robert E. Bamburg, P.A., for appellants.

Hale & Young, by: *Milas H. Hale, III*, for appellees.

JACK HOLT, JR., Chief Justice. Appellants contend that the trial judge's setting aside of a default judgment against JFK Laundry (JFK) and Guy Ramsey was error because the trial court abused its discretion in: (1) granting the motion to set aside the judgment; (2) misinterpreting Ark. Code Ann. § 16-110-407 and (3) finding that Mr. Ramsey had not employed the debtor, Darcy

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**See, Trapp* v. *Economy Eng'g Co.*, 316 Ark. 89, 90-A (1994).

Owen, and that he did not have a financial interest in her place of employment, JFK. We do not reach the merits of appellants' arguments and affirm the trial court because they have failed to comply with Rule 4-2(a)(6) of the Rules of the Supreme Court.

Appellants, the Adamses, obtained a default judgment against Ms. Darcy Owen and served JFK Laundry with "Allegations and Interrogatories" regarding certain funds JFK allegedly owed Ms. Owen. When JFK failed to respond to their interrogatories or appear at a hearing as garnishee, the Adamses obtained a default judgment against JFK. For reasons we are unable to adduce from the appellants' abstract, the Adamses attempted to garnish Mr. Guy Ramsey's certificate of deposit invested at Twin City Bank to satisfy the default judgment. Thereafter, Mr. Ramsey and JFK filed a motion with the trial court to have the default judgment set aside. The abstract, furnished by the Adamses, reflects a judgment against JFK; however, it does not reveal any judgments against Mr. Ramsey whatsoever. After the hearing on the issues, the trial court entered an order setting aside a default judgment against Guy Ramsey and a garnishment against Twin City Bank — no mention was made of the default judgment against JFK. The Adamses now appeal.

We cannot reach the merits of the case, for, as stated, the Adamses failed to comply with Ark. Sup. Ct. R. 4-2(a)(6). Pertinent pleadings are missing from the Adamses' abstract, and abstracted judgments of the trial court contain serious misstatements as to parties and disposition. The abstract is not only woefully deficient, it includes materials which cannot be found in the transcript of trial. For example, the Adamses claim that the trial judge erred in setting aside a default judgment against JFK and Guy Ramsey, and in support of their claim, they note in their abstract that the trial court, in its order filed May 3, 1993, set aside a default judgment against Guy Ramsey and JFK, when in fact, neither the Adamses' abstract nor the record of trial reveals the existence of a default judgment against Mr. Ramsey. Furthermore, appellants' abstract does not contain an order setting aside a default judgment against JFK.

Rule 4-2(a)(6) specifically provides that the appellant's abstract should consist of "an impartial condensation, without comment or emphasis, of *only* such material parts of the

pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions *presented to the Court for decision.*" (Emphasis added.) Moreover, we have held it is the appellant's burden to produce a record exhibiting prejudicial error, *Haynes* v. *State*, 314 Ark. 354, 862 S.W.2d 275 (1993), and that we cannot consider evidence on appeal that is not included in the transcript. *See BWH, Inc.* v. *Metropolitan Nat'l Bank*, 267 Ark. 182, 590 S.W.2d 247 (1979).

Obviously, the abstract of the final judgment of the court is incorrect and does not reflect the actual findings of the trial court. Likewise, there is not an abstract of judgment against Mr. Ramsey, and there are other materials contained in the Adamses' brief, such as a lease agreement, a certified mail receipt, and a photocopy of a cancelled check, which are not found in the record of the hearing. Simply put, the state of the abstract is as such that we cannot determine or resolve the issues presented on appeal.

Noncompliance with Rule 4-2(a)(6) under these circumstances requires that we affirm the trial court. *See Dixon* v. *State*, 314 Ark. 378, 863 S.W.2d 282 (1993); *Fruit* v. *Lockhart*, 304 Ark. 457, 802 S.W.2d 930 (1991).

Affirmed pursuant to Rule 4-2(a)(6).

CORBIN, J., not participating.

Kenneth BENSON and Louann Benson *v.*
SHULER DRILLING COMPANY, Inc.

93-822 871 S.W.2d 552

Supreme Court of Arkansas
Opinion delivered February 28, 1994
[Supplemental Opinion on Denial of Rehearing
April 18, 1994.]

[redacted]

Robert L. Depper, Jr. and *Denver L. Thornton*, for appellants.

Bridge, Young, Matthews & Drake, PLC, by: *Stephen A. Matthews* and *Ruth Ann Wisener*, for appellee.

JACK HOLT, JR., Chief Justice. This lawsuit arose when a saltwater tank owned by Shuler Drilling Company ("Shuler"), which was being serviced by Mr. Kenneth Benson, an employee of Arkansas Service Company, exploded, injuring him. Mr. Benson and his wife sued Shuler claiming that the explosion was the

result of Shuler's negligence. A crucial factual question at trial was whether Mr. Benson was on the catwalk on the side of the tank or on the ground near the tank when the explosion occurred. The jury found in favor of Shuler. We reverse and remand.

I. Admission of physician's discharge summary
A. A.R.E. Rule 803 (4) — Medical Records Exception to Hearsay Rule

For their first allegation of error, the Bensons contend that the trial judge erred in refusing to grant their motion in limine as to certain sections of Dr. Callaway's deposition relating to his medical records. Dr. Callaway was Mr. Benson's orthopedic surgeon whose deposition was admitted into evidence in lieu of his live testimony.

Of primary concern is Dr. Callaway's written discharge summary, which provides in pertinent part: "The patient is a 22 year old white male in an oil tank explosion, fell from the cat walk around the oil tank down to the ground."

When asked who had informed him that Mr. Benson had fallen from the catwalk, Dr. Callaway spoke in contradictory terms: "I assume that it came out in the subsequent, when he was able to talk about it, or someone told us. . . .I would not know where else I would have gotten it except from Mr. Benson, unless a relative or somebody — I'm sure that once he was able to discuss it, we discussed the mechanism of injury, and that may be where that came from, but at this point, I don't have any documentation to tell me how I got that information." On the other hand he stated: "When opposing counsel asked me about the catwalk fall and that thing, I said I just assumed that Mr. Benson told me that, but I can't state that with any degree of certainty. I don't know where we got it, but I didn't pick it out of the air someplace. Somebody told me, or I got the information from some place."

In addition, it is unclear from the record when Dr. Callaway was informed that Mr. Benson had fallen from the catwalk. The written history, taken in the emergency room, reflects that Dr. Callaway was not informed at the time of Mr. Benson's admission that he had allegedly fallen from a catwalk: "The patient is a 21 year old white male involved in an oil field explosion in which he sustained injuries to both arms and both lower extrem-

ities. *Exact mechanism of injury is not known.*" (Emphasis added.) In his deposition, Dr. Callaway explained that he had taken a history from him "as best he could at that time with his injuries and all."

Dr. Callaway acknowledged that it is helpful for him to learn of the cause of a patient's injuries immediately and stated:

> In the extent in this case or in many cases, it was in the emergency room, that the nature of the injury and the mechanism of injury is sometimes important in assessing the severity of the injury. A high velocity crush injury is going to be much more severe even though the x-rays and appearances may be very similar to a low velocity injury in the emergency room.

Yet, Dr. Callaway did not indicate that he had relied upon the information that Mr. Benson had fallen from the catwalk in making his diagnosis or prescribing treatment. Judging from the doctor's testimony and his case history report, it is readily apparent that Dr. Callaway did not have this information upon Mr. Benson's admission nor did he utilize it in making his diagnosis and prescribing treatment.

Because of Dr. Callaway's uncertainty as to who made the statements or when they were made, Mr. Benson filed a motion in limine prior to trial, seeking to exclude portions of testimony contained in Dr. Callaway's deposition, namely matters relating to Mr. Benson's cause of injury. The trial court examined his testimony on a line-by-line basis, excluding certain portions but admitting the information relating to his discharge summary which attributed his injury to a fall from the catwalk. We have stated that motions in limine are to enlighten the court and advise counsel of the specific nature of the anticipated evidence so that the court may intelligently act on such motions. *Smith* v. *Walt Bennett Ford, Inc.*, 314 Ark. 591, 864 S.W.2d 817 (1993); *Schichtl* v. *Slack*, 293 Ark. 281, 737 S.W.2d 628 (1987). Motions in limine are not ordinarily used to extinguish an entire claim or defense. Rather, they are usually used to prohibit the mentioning of some specific matter, such as an inflammatory piece of evidence, until the admissibility of that matter has been determined out of the hearing of the jury. *Schichtl, supra*, (citing *Lewis* v. *Buena Vista*

Mutual Ins. Ass'n, 183 N.W.2d 198 (Iowa 1971)).

It follows, then, that one who offers evidence has the burden of showing its admissibility. *See Arkansas State Highway Comm.* v. *Roberts*, 246 Ark. 1216, 441 S.W.2d 808 (1969). When a party asks for a motion in limine to exclude evidence because it is hearsay, the burden is on the "offering party to prove the admissibility of the evidence." See Robin L. Lafferty, Comment, *Motion in Limine*, 29 Ark. L. Rev. 215, 226 (1975)(citing *Aetna Casualty and Surety Co.* v. *Finney*, 346 S.W.2d 917 (Tex.Civ.App. 1961)). This burden was not met in this case.

Since the introduction of evidence is a matter within the sound discretion of the trial judge, we must determine whether or not he abused his discretion in allowing the discharge summary in evidence before we reverse his findings, and in the absence of abuse of that discretion, we will not reverse. *See Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986). *See Robinson* v. *State*, 314 Ark. 243, 861 S.W.2d 548 (1993); *Gipson* v. *Garrison*, 308 Ark. 344, 824 S.W.2d 829 (1992).

In support of their argument that the trial court abused its discretion and committed error in admitting the discharge summary, the Bensons cite A.R.E. Rule 803 (4):

> Hearsay exceptions — Availability of declarant immaterial.
>
> (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensation or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The Bensons contend that because Dr. Callaway could not say with any certainty when or from whom he had acquired the information that Mr. Benson had fallen from the catwalk and because he could not have relied upon this information "for purposes of medical diagnosis and treatment," Shuler has not met its burden of proof.

Granted, where an injured party has described how his injury occurred, the basis for this hearsay exception is his strong

motivation to be truthful in giving statements for diagnosis and treatment. *Carton* v. *Missouri. Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990). Moreover, it has been suggested that, under these circumstances, a fact reliable enough to serve as the basis for diagnosis is also reliable enough to escape hearsay proscription. *United States* v. *Iron Shell*, 633 F.2d 77 (8th Cir. 1980). Thus, the trustworthiness of statements made to a physician and offered at trial under the exception may be tested by determining whether the information provided is of a type reasonably relied upon by a physician in diagnosis and treatment, and by determining whether the patient's motive is consistent with this rule's purpose. *Id.* However, when, as here, the declarant is unknown, the reliability of the statement is highly suspect.

Although we have not addressed this precise issue before, the Eighth Circuit Court of Appeals faced a similar situation in *Stull* v. *Fuqua Industries, Inc.*, 906 F.2d 1271 (8th Cir. 1990). In *Stull*, there was a factual dispute as to how the seventeen-year-old appellee hurt himself on a riding lawnmower — the question was whether he jumped off the mower or got his foot trapped in the mower. The Eighth Circuit affirmed the trial judge's decision to exclude a hospital record that stated that the accident occurred when Stull jumped off the lawn mower, explaining:

> The medical records exception to the hearsay rule assumes that a person making a statement for the purpose of obtaining medical diagnosis or treatment will likely tell the truth to a medical person and that the statement is therefore inherently reliable. Hence, to fall within the exception, the statement must be obtained from the person seeking treatment, or in some instances from someone with a special relationship to the person seeking treatment, such as a parent.
>
> Here the word "apparently" in the hospital record indicates that the statement about jumping off the mower may not have been made by Stull; it may instead represent conjecture on the part of the person filling out the record. Fuqua introduced no evidence rebutting this possibility. In fact, Dr Wolf, the treating physician, testified that he did not know from whom the statement was obtained. In the absence

> of any evidence attributing the statement to Stull, the district court acted well within its discretion in excluding the hospital record.

Stull, 906 F.2d at 1273-1274.

Although not binding, the holding of the Eighth Circuit Court of Appeals is persuasive and in applying its rationale to the case at bar, we see that the trial court abused its discretion in admitting Dr. Callaway's statements from the discharge summary into evidence, for Dr. Callaway could not remember whether or not he obtained this statement from Mr. Benson while he was seeking treatment or from someone who was in a special relationship with him. In short, he could not remember who told him about Mr. Benson falling from a catwalk.

Furthermore, the record is devoid of any indication that Dr. Callaway relied on the information he received that Mr. Benson fell from the catwalk to fashion his diagnosis of Mr. Benson or his treatment. Construing the federal equivalent to A.R.E. Rule 803(4), Professor Weinstein explains that in order to be admissible, these statements need to be for the purposes of diagnosis or treatment:

> Statements relating to someone else's symptoms, pains or sensations would be admissible, provided again, they were made for purposes of diagnosis or treatment. The relationship between the declarant and patient will usually determine admissibility . . . As the relationship becomes less close, the statement becomes less reliable, both because the motive to tell the truth becomes less strong, and because even a stranger in good faith may not be able to describe another's physical pain and suffering as infallibly as an intimate. The court in its discretion pursuant to Rule 403 will have to assess the probative worth of the statement, which will depend on its significance, its contents, by whom it is made, and in what circumstances it was made, and decide whether admission is warranted despite the dangers of prejudice, confusion and waste of time.

Weinstein's Evidence, Vol. 4 (1993), p. 803-145.

In the absence of any evidence attributing the state-

ment to Mr. Benson or to someone in a special relationship with him, or that Dr. Callaway relied on this statement to fashion his diagnosis or treatment of Mr. Benson, we hold that the trial court abused its discretion in admitting the hospital record into evidence.

B. A.R.E. Rule 803(6) — Business Records Exception to Hearsay Rule

Shuler also claims that the discharge summary was admissible under the business records exception contained in A.R.E. Rule 803 (6), which provides:

> Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

We interpreted the business records exception as having seven requirements: (1) a record or other compilation, (2) of acts or events, (3) made at or near the time the act or event occurred, (4) by a person with knowledge, or from information transmitted by a person with knowledge, (5) kept in the course of regularly conducted business, (6) which has a regular practice of recording such information, (7) all as known by the testimony of the custodian or other qualified witness. *Terry* v. *State*, 309 Ark. 64, 67, 826 S.W.2d 817, 819 (1992). Rule 803 (6) further provides that business records will be not be admitted if the source of information or the method of circumstances of preparation indicate lack of trustworthiness. *Id.*

Applying these seven requirements to the discharge summary, we hold that it was not admissible under this excep-

tion because the source of information indicates lack of trustworthiness and the record was not made by a person with knowledge of the testimony. Nor was the record made at or near the time the event occurred.

C. Waiver of testimony by "opening the door"

Lastly, Shuler claims that the Bensons "opened the door" on this testimony in Dr. Callaway's deposition and, therefore, have waived their right to complain about it. Yet, as the Bensons point out in their brief, the parties stipulated prior to the taking of the deposition that "[t]he right to object to the testimony of the witness on the grounds of incompetency, irrelevancy and immateriality is expressly reserved. . . ." Our rules of civil procedure permit parties to stipulate to preserve any objections as to the taking of the deposition until the time of trial. *See* Ark. R. Civ. P. 29; Carlton Bailey, *"Usual Stipulations" are Usually a Mistake at the Oral Deposition*, 1991 Ark. L. Notes 3. In addition, Ark. R. Civ. P. 32(b) provides that an objection may be made at the trial or hearing to receiving into evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness was then present and testifying. *Shelter Mut. Ins. Co.* v. *Tucker*, 295 Ark. 260, 748 S.W.2d 136 (1988). As such, even though the Bensons first explored the medical history in a limited manner during the taking of Dr. Callaway's deposition, they have a well-established right to make objections and to try to excise portions of his testimony at trial.

II. Bracketed material in AMI 301

Although we reverse and remand this case based on the introduction of the discharge summary, we address the Bensons' argument regarding AMI 301 as it will, in all probability, be an issue facing the trial court in the event of retrial.

The Bensons contend that the trial court committed reversible error by giving the bracketed portion of AMI 301. The jury instruction given provides:

> When I use the word "negligence" in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a rea-

> sonably careful person would not do, under circumstances similar to those shown by the evidence in this case. [To constitute negligence an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner.]

The Bensons claim that by giving the bracketed material, the court "eroded and lessened the 'reasonable care' standard." We disagree, for as Shuler emphasizes, Arkansas law recognizes that the failure to guard against an occurrence that is not reasonable to anticipate is not negligence.

Foreseeability is a necessary ingredient of actionable negligence in this state. *Dollins* v. *Hartford Accident & Indemnity Co.*, 252 Ark. 13, 477 S.W.2d 179 (1972); *North Little Rock Transp. Co.* v. *Finkbeiner*, 243 Ark. 596, 420 S.W.2d 874 (1967). There is no negligence in not guarding against a danger which there is no reason to anticipate. *First Electric Cooperative Corp.* v. *Pinson*, 277 Ark. 424, 642 S.W.2d 301 (1982). There is a duty on the part of one in charge of a dangerous instrumentality to protect against danger if he knew or should have known that the situation was dangerous. *Id.*

In the situation before us, the evidence was disputed as to whether the saltwater tank resting on gravel would create static electricity and if so, whether this was the cause of the explosion. Evidence presented at trial also established that Shuler's saltwater tank was no different than those used by other companies in similar situations. Accordingly, foreseeability of the accident was in issue and the bracketed portion of AMI 301 was justified under the circumstances.

Since this case is being reversed and remanded, we need not address the Bensons' argument that the verdict for Shuler was not supported by substantial evidence.

Reversed and remanded.

DUDLEY and HAYS, JJ., dissent.

ROBERT H. DUDLEY, dissenting. The majority opinion reverses because "the trial court abused its discretion in admitting the hospital record into evidence." It is difficult to squarely join issue

with the majority opinion because the point of appeal is not about admitting a hospital record into evidence, but rather it is about the admissibility of questions and answers contained in the deposition of Dr. J.C. Callaway, plaintiff Kenneth Benson's orthopedic surgeon.

The parties agreed to take the evidentiary deposition of Dr. Callaway because he would be unavailable to testify on the scheduled trial date. The deposition was to constitute a part of plaintiffs' case-in-chief, and, at trial, it was read into evidence for that purpose. In taking the deposition, plaintiffs' counsel asked about plaintiff Kenneth Benson's condition when he was initially brought into the emergency room of the hospital. After a few questions, and without objection from the defendant, plaintiffs' counsel asked, "Did you take a history from him at that time?" Dr. Callaway responded, "As best I could with his injuries and all." On cross-examination, after the plaintiffs' attorney had opened the door, the defendant's attorney asked additional questions about that history. Subsequently, plaintiffs' attorney filed a motion objecting to the questions and answers about the medical history. *See* ARCP Rule 32(b). The motion identified by page and line the questions and answers to which plaintiffs objected. The trial court carefully considered each objection and separately ruled on the admissibility of each. Some objections were sustained, while others were overruled. In this point of appeal, the Bensons contend the trial court erred in overruling some of the objections and allowing the jury to hear the answers.

We have often set out the standard of review for a case of this kind: A trial court has discretion in admitting evidence, and, on appeal, we will reverse a trial court's ruling on the admissibility of evidence only in the case of abuse of that discretion. *Warhurst* v. *White*, 310 Ark. 546, 838 S.W.2d 350 (1992). That standard should be applied in this case.

The facts surrounding the trial court's ruling are as follows. After the deposition had been transcribed, plaintiffs filed their initial motion to exclude the questions and answers as follows: "Plaintiffs would move to exclude the following testimony of Dr. J.C. Callaway for the reasons of hearsay; page 20, line 17; page 20, lines 21-24; page 21, lines 2-8; page 6, lines 9-25; page 15, lines 5-8; page 25, lines 13-19." In the motion, plaintiffs did not

cite a rule of evidence, nor did they cite a single case to the trial court. The abstract does not reflect that plaintiffs filed a brief in support of the motion. The complete objection was contained in the motion, and that was the sole word "hearsay."

Later, plaintiffs amended their motion as follows: "The Plaintiffs would additionally designate the following testimony of Dr. J.C. Callaway to be excluded: page 21, lines 9-25; page 22, lines 1-3." Again, neither a rule of evidence nor a case was cited in the motion, nor was a supporting brief filed. The parties did not make an oral argument to the court, so the plaintiff did not supply any additional citations.

The abstract does not reflect that the trial court ever ruled on the motion to exclude the specific questions and answers, and, consequently, we might affirm solely on that basis. *Linnell* v. *State*, 283 Ark. 162, 671 S.W.2d 741 (1984). Even so, I would not do so. Rather, I would go to the record, examine the rulings, reach the merits, and affirm the rulings of the trial court because the trial court did not abuse its discretion.

While plaintiffs' abstract does not reflect that they filed a brief in support of their motion, the record reflects that they did do so. The record discloses that they filed a brief and objected to the admission of the questions and answers on the ground that Dr. Callaway was not certain who gave him the medical history. No other ground for exclusion was ever argued to the trial court. In response to that one argument, the trial court ruled:

> These motions dealt with the testimony of Dr. J.C. Callaway, who will be presented to the jury by deposition. Specifically, those exceptions dealt with Dr. Callaway's testimony on pages 6 of the deposition, page 15 of the deposition, page 20 of the deposition, page 21 of the deposition, page 22 of the deposition, and page 25 of the deposition.
>
> The Court from the motions did some preliminary research and caused rulings to be presented and made. Basically, the Court relied on the Arkansas Rules of Evidence, Rule 803(4), which deals with diagnosis or medical information taken by the medical care provider and Rule 803(6) which deals with recorded statements and business records.

The Court feels that any evidence, either admitted or excluded, would have to be, particularly with regard to Dr. Callaway's statements, reasonably relied on and reasonably pertinent to the diagnosis or treatment.

There are several authorities for that and the court founded it's rulings on *Huls* v. *State*, 27 Ark. App. 242. Although a criminal case dealt with these statement or statements and I think in that case it was the statement of a victim concerning the defendant throwing something at her and busting her tooth. The court felt that was not necessary because whether it was thrown at her or whatever the situation was, it wasn't necessary for the purpose of diagnosis or treatment.

The second was *United States Iron and Steel*, 636 Fed. 2d, 177, an 8th Circuit case [*United States* v. *Iron Shell*, 633 F.2d 77 (8th Cir. 1980)]. It gave the test of this which hopefully the Court is using.

The Court then reviewed the depositions and on page 6, lines 9 through 25, granted the motion to exclude on the basis that it was not certain to the court or from the deposition who the declarant was, who the source of the statement was received from, that this statement made by Dr. Callaway would be at best speculative, not reliable and not trustworthy.

Secondly, on page 15 the testimony of Dr. Callaway dealt with social security. That is a collateral source and the Court feels that that should be excluded.

Finally, on pages 20, 21, 22, and 25, [the basis of this appeal] the Court felt that all of this or all of these statements by Dr. Callaway were elicited in the questioning of Dr. Callaway and basically he says that the source of these statements, he assumed were from Mr. Benson and he further stated "I would not know where else I got it."

I think that that was written down on his discharge summary or the statements relating thereto from the discharge summary do have reliability, do have trustworthiness and are admissible under 803(4) and 803(6) and specif-

> ically, on page 20 there were lines 17 and lines 21 and 24; on page 21 line 8; on page 22 lines 1 through 3; and on page 25 lines 13 through 19. I think that those should not be excluded and should be admitted as testified to by Dr. Callaway.

The majority opinion takes direct issue with the trial court's finding of fact and implies that there was no evidence whatsoever that plaintiff Kenneth Benson gave the history. The majority opinion states: "In the *absence of any evidence* attributing the statement to Mr. Benson or someone in a special relationship with him, or that Dr. Callaway relied on this statement to fashion his diagnosis or treatment of Mr. Benson, we hold that the trial court abused its discretion in admitting the hospital record into evidence." That statement reflects the issue between the majority opinion and this dissent. The issue is whether the trial court abused its discretion in ruling that there was sufficient evidence to allow Dr. Callaway to testify about the medical history.

The majority opinion discusses other issues, and they can be quickly laid aside. We have often written that we will not consider arguments raised for the first time on appeal. *Babbitt* v. *Quick-Way Lube & Tire Inc.*, 313 Ark. 207, 853 S.W.2d 273 (1993). The majority opinion goes far beyond the one issue raised in the trial court. The majority opinion reverses in part because of a Rule 403 weighing of probative worth against the danger of prejudice. The notion that a 403 weighing should have been conducted is raised for the first time in the majority opinion. Plaintiffs did not ask for a 403 weighing, and the argument should not be considered for the first time on appeal. To do so is very unfair to appellee, for it has not been given the opportunity to make a record on the issue.

Additionally, the majority opinion holds, in part, that the defendant, as a matter of law, had the burden of showing the admissibility of the evidence and that it failed to meet that burden. The majority opinion cites a case decided before the adoption of the Uniform Rules of Evidence. *Arkansas State Highway Comm'n* v. *Roberts*, 246 Ark. 1216, 441 S.W.2d 808 (1969). Even though the Arkansas Rules of Evidence do not address the burden of proof, the statement is subject to question, because all

relevant evidence is now admissible unless excluded by a rule of evidence or by law. A.R.E. Rule 402. Under the Rules it would seem that the opponent of evidence must invoke some rule of evidence that excludes the evidence, and, if it is applicable, then the proponent must make the evidence satisfy the rule. Regardless of the correct rule about the burden of proof, the argument should not be considered, because, like the others, it is raised for the first time on appeal. This part of the holding in the majority opinion should also be laid aside.

There is only the one issue before this court. The record of evidence on that issue is just as the trial court found: On direct examination, plaintiffs' counsel asked about plaintiff Kenneth Benson's condition when he was brought to the hospital. A few questions later plaintiffs' counsel asked Dr. Callaway the following:

> Q Did you take a history from him at this time?
>
> A As best I could with his injuries and all.

Later, on cross-examination, defendant's counsel asked, and the doctor answered:

> Q Yes. You spoke earlier of history, the history that you have, I believe you said, such as you were able to obtain or something like that. Is history important to you in treating a patient?
>
> A In the extent in this case or in many cases, it was in the emergency room, that the nature of the injury and the mechanism of injury is sometimes important in assessing the severity of the injury. A high velocity crush injury is going to be much more severe even though the x-rays and appearances may be very similar to a low velocity injury in the emergency room.
>
> Q So you try from whatever source you can to get the best information you can about what caused the injury, is that correct?
>
> A At this time, of course, there wasn't much—
>
> Q I'm not taking about this particular case.

A Yes, we try to ascertain how much the patient was injured and particularly the mechanism of injury and whether it was a high velocity or low velocity type injury.

Q In your discharge summary, which you dictated October the 7th, 1984, you wrote, quote, "The patient is a 22 year old white male in an oil tank explosion." I think maybe the word "injured" is left out, ". . .in an oil tank explosion, fell from the catwalk around the oil tank down to the ground sustaining a fracture of the left femur, a comminuted fracture of the lateral femoral condyle on the left and posterior dislocation of the right hip," unquote. Do you know who told you that he fell from a catwalk?

A I assume that is came out in the subsequent, when he was able to talk about it, or someone told us but —

Q You wrote this on October 7th, after the accident on September 24th, and that was the time he was discharged from the hospital. Do you assume that Mr. Benson gave you this information?

A I would not know where else I would have gotten it, unless a relative or somebody — I'm sure that once he was able to discuss it, we discussed the mechanism of injury and that may be where that came from, but at this point, I don't have any documentation to tell me how I got that information.

Q But you did write on October 7th, 1984, that "he fell from the catwalk around the oil tank down to the ground," is that correct?

A If that is what it says, it is correct as far as I know.

Q Well, would you like at your—

A I read it just a few minutes ago.

The trial court read the foregoing questions and answers, examined them in light of the sole objection regarding uncertainty about who gave the information, and ruled "basically he says that the source of these statements, he assumed were from Mr. Benson and he further stated 'I would not know where else I got them.'" The trial judge thought the doctor's testimony about the

history was certain enough to allow the evidence to be admitted, and the weight to be given the evidence would be left up to the jury. It is inconceivable that the majority opinion says the ruling constituted an abuse of discretion, and, in addition, the ruling has a basic fairness about it. On direct examination, plaintiffs' counsel asked whether Dr. Callaway had taken a history from Kenneth Benson, and, after finding that he had done so, questioned him on the subject. On cross-examination, defendant's counsel asked about the details of the history. Plaintiffs objected to the detailed information. The trial court read the deposition and recognized that the jury would hear plaintiffs' question about taking a history and the answer that the doctor had taken a history from the plaintiff Kenneth Benson, but would never hear the details of that history. It was obvious that plaintiffs wanted the jury to know that the doctor had taken a history, but they did not want the jury to know what it was. In comparable cases we have said that one who opens up a line of questioning should not be heard to complain of that for which he was responsible. *Bull Shoals Community Hosp.* v. *Partee*, 310 Ark. 98, 832 S.W.2d 829 (1992). That is only fair.

In summary, the trial court had discretion in allowing the relevant testimony into evidence, and the trial court did not abuse its discretion in allowing the testimony. Accordingly, I dissent from the majority opinion.

HAYS, J., joins in this dissent.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
APRIL 18, 1994

Robert L. Depper, Jr., for appellants.

Bridges, Young, Matthews & Drake, P.L.C., by: Stephen A. Matthews, for appellee.

JACK HOLT, JR., Chief Justice. In its petition for rehearing, the appellee Shuler Drilling Company, Inc.'s (Shuler) sole point of contention is that this court erred in holding that the Bensons "did not open the door" to the testimony from Dr. Callaway regarding the medical records. In this regard, we noted that "as the Bensons point out in their brief, the parties stipulated prior to the taking of the deposition that '[t]he right to object to the testimony of the witness on the grounds of incompetency, irrelevancy and immateriality is expressly reserved . . .'" Shuler claims that since the stipulation does not appear in the record, this holding was based on assumed facts not in the record. This is partially correct.

Dr. Callaway's deposition was read into the record at trial. Thus, it appears in the transcript, but without the stipulations in question. Examination of the files and record in this case reflect that although Bensons' exhibits one through six and Shuler's exhibit one are in the packet, and the exhibit sheet prepared by the court reporter lists the deposition as being included, the deposition, Bensons' exhibit seven, is no where to be found. In the Bensons' brief, they cite us to page two of the deposition for the stipulations; however, this citation is of no moment since the deposition is not available. Thus we stand in error as to the stipulation.

Regardless, Shuler's argument does not justify granting its petition for rehearing because we spelled out in our opinion another basis for our holding in Bensons' favor. Ark. R. Civ. P. 32(b) provides that an objection may be made at the trial or hearing to receiving into evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness was then present and testifying. Since Shuler's

counsel complied with Rule 32(b), our mistaken assertion as to a stipulation between the parties is of no consequence.

Affirmed.

ARKANSAS DEPARTMENT OF HUMAN SERVICES *v.* Robert HARDY

93-153 871 S.W.2d 352

Supreme Court of Arkansas
Opinion delivered February 28, 1994

G. Keith Griffith, for appellant.

Eddie N. Christian, for appellee.

ROBERT H. DUDLEY, Justice. The Arkansas Department of Human Services filed this paternity suit on behalf of Brenda Elliott, the mother of the child, and asked that Robert Hardy be found to be the father and that he be ordered to pay past and future child support. The chancellor heard the proof, decided the case, signed a final order setting out his ruling, and, in a second order, decreed that the final order was sealed. The Department appealed to the court of appeals. The court of appeals questioned whether it had jurisdiction and certified the case to this court for an interpretation of the various rules. We remanded the case for the parties to brief the issues of whether the chancellor validly sealed the final order and whether the appellate court obtained jurisdiction. *Arkansas Dep't of Human Servs.* v. *Hardy*, 314 Ark. 537, 866 S.W.2d 820 (1993). Their briefs have now been received, and the case is again submitted to us. We take jurisdiction, and reverse, modify, and remand.

The initial issue is whether the trial court entered a final

order so that we have appellate jurisdiction. Rule 58 of the Arkansas Rules of Civil Procedure provides that "[e]very judgment or decree shall be set forth on a separate document. A judgment or decree is effective only when so set forth and entered as provided in Administrative Order Number 2." Administrative Order Number 2, in the material part, provides that a judgment or decree shall be "filed in the folio assigned to the action and shall be marked with its file number." Rule 4(e) of the Arkansas Rules of Appellate Procedure, which concerns the time for filing a notice of appeal, provides that an order is "entered" when it is "filed with the clerk of the court in which the claim was tried." The date a judgment is filed with a court clerk is denoted by the clerk marking or stamping the date and the word "filed" on the document. *See Shaefer* v. *McGhee*, 284 Ark. 370, 681 S.W.2d 353 (1984).

The final order in this case was set forth on a separate document as required by Rule 58. It contains the case number on the front page as well as the date the judge signed the order. It was filed with the clerk, and the clerk placed it in the folio assigned to the action, as required by Administrative Order Number 2. However, the clerk did not separately mark the final order because it was sealed in the envelope. Instead, the clerk taped a copy of the second order securely to the sealed envelope containing the final order. The second order provides: "The [final] Order made and entered by this court on the 19th day of October, 1992, is hereby sealed and filed in-camera and shall not be opened except by order of court of competent jurisdiction." The final order bears the identical style and date.

The issue is whether the final order was sufficiently marked by either the chancellor or the clerk to constitute entry. The clerk placed her filemark on the second order and then securely taped a copy of that second order onto the face of the envelope containing the final order so that there can be no doubt about the authenticity of the final order or the date it was handed to the clerk for placement in the folio. Consequently, we hold there was a sufficient marking of the final order to constitute an entry for purposes of this appeal. This holding is limited to the facts of this case, and, as can be seen from the next section of this opinion, it is a problem that should not arise again.

[redacted] The foregoing issue came about because the chancellor sealed the final order, and, contrary to the arguments of both parties, we know of no authority for the sealing of a final order. One of the basic principles of a democracy is the people have a right to know what is done in their courts. Correlative of this principal is the vital function of the press to subject the judicial process to extensive public scrutiny and comment. *See Arkansas Television Co.* v. *Tedder*, 281 Ark. 152, 662 S.W.2d 174 (1983). Secret final orders could defeat this synergy of the peoples' right and the press's function, especially in cases in which the State is a party, as in this case. In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), the Supreme Court wrote that when public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals. We have no hesitancy in holding the final order in this case should not have been sealed.

[redacted] There is no rule providing for secret final orders, but parts of files may be sealed, and some hearings may be closed to the public. The General Assembly has provided the general rule that "every person may freely attend the sittings of every court." Ark. Code Ann. § 16-10-105 (1987). However, other statutes provide that particular proceedings may be closed under certain circumstances. *See, e.g.*, Ark. Code Ann. § 4-75-605 (Repl. 1991) (for cases involving trade secrets); § 9-9-217 (Repl. 1993) (involving adoption proceedings); § 9-27-325 (Repl. 1993) (for juvenile proceedings); and § 16-13-318 (1987) (involving domestic relations cases). Section 9-27-217 provides, "Adoption *records* shall be closed, confidential, and sealed unless authority to open them is provided by law or by order of the court for good cause shown." (Emphasis added.)

Without determining which branch of government has the power to make laws or rules providing that parts of files can be sealed or court proceedings can be closed, we note that Rule 26 of the Arkansas Rules of Civil Procedure provides for protective orders closing depositions, for protection of trade secrets, and for filing specified documents in sealed envelopes. In addition, Rule 6-3 of the Rules of the Supreme Court provides for

anonymity in certain appellate proceedings by the use of the initials of the first and last name of children involved in adoption or juvenile proceedings. We often utilize this rule for appeals in adoption proceedings after the final order has been entered. *See, e.g., In Re Adoption of K.F.H. and K.F.H.*, 311 Ark. 416, 844 S.W.2d 343 (1993). We have recognized the inherent authority of a trial court to issue appropriate protective orders to control court records, and, thus, the right to inspect public records is not absolute. *See City of Fayetteville* v. *Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990). Many jurisdictions have made similar holdings. *See, e.g., Deere & Co.* v. *Finley*, 431 N.E.2d 1201 (Ill. App. Ct. 1981); *Church of Scientology* v. *Armstrong*, 283 Cal. Rptr. 917 (Cal. Dist. Ct. App. 1991); & *Werfel* v. *Fitzgerald*, 260 N.Y.S.2d 791 (N.Y. App. Div. 1965).

The inherent authority to seal parts of court files is tempered by the requirements that a request for sealing part of a file must be particularized, that there must be some good cause for sealing part of a file, such as a trade secret, and that it should be in effect for only so long as is necessary to protect the specified interest. If a trade secret has no value after five years, the protective order should be for no longer than five years. *Deere & Co.* In *Giltner* v. *Stark*, 219 N.W.2d 700, 707 (Iowa 1974), the court ruled that factual details of a divorce action might be sealed long enough "to permit the conciliation process to have some hope of success," but after that time the files were to be open. For the related requirement of particularization of a need for closure of a courtroom see *Arkansas Television Company* v. *Tedder*, 281 Ark. 152, 662 S.W.2d 174 (1983) and *Arkansas Newspaper, Inc.* v. *Patterson*, 281 Ark. 213, 662 S.W.2d 826 (1984). In summary, the trial court had no authority to seal the final order in this case, and we order it unsealed.

The chancellor ruled that Robert Hardy is the father of the child. There is no cross-appeal of that issue. The only assignments of error are those raised by the Department on direct appeal. In the first of these assignments, the Department contends that the chancellor erred in fixing the amount of child support. The chancellor ordered the father to pay $300 per month. The Family Support Chart in effect at the time of the trial judge's ruling, *see Guidelines For Child Support Enforcement*, appendix to ARCP, provides for child support of $824 per month according to the

Department. The Department's computation under the chart is not contested by Hardy.

The chancellor ruled that it would be inequitable to follow the chart. We have said that reference to the family support chart is mandatory, but awarding the amount set by the chart is not mandatory if it would be unjust or inequitable to do so, and if the reasons for not doing so are set out in written findings. *Stewart* v. *Winfrey*, 308 Ark. 277, 824 S.W.2d 373 (1992). In such a case, the factors to be considered in determining the amount of support are listed in the per curiam setting out the Family Support Chart. *See In Re: Guidelines For Child Support*, 314 Ark. 644, 863 S.W.2d 291 (1993). In this case the chancellor ruled that it would be inequitable to award the amount provided by the chart because: (1) the mother only requested $300 per month, (2) there is not, and never will be, a father-son relationship, and (3) the child will be a recipient of "governmental medicaid, dental and hospital insurance." The chancellor abused his discretion in making the ruling. The finding that the mother only requested child support of $300 per month was clearly erroneous. The mother requested past child support of $300 per month, but requested child support from the date of the hearing in the amount provided by the chart. The second factor, involving the father-son relationship, was incorrectly applied. That factor as used in the guidelines is to give a noncustodial parent some financial relief when the child or children spend an extraordinary amount of time with the noncustodial parent. In such a case, the noncustodial parent will obviously spend more on child support than is usual, and the custodial parent will be relieved of some of the expenses of raising the child or children. In such cases, support payments to the custodial parent may be reduced. However, that factor is not applicable to this case.

We summarily dispense with the third factor cited by the chancellor, that the father is relieved of part of the required child support because of "governmental medicaid, dental and hospital insurance." Medicaid is a governmental program designed in part to provide aid to dependent children whose income or resources are not sufficient to meet the costs of necessary medical care. *See Arkansas Dep't of Human Servs.* v. *Walters*, 315 Ark. 204, 866 S.W.2d 823 (1993). It would be incongruous to hold that a father is relieved of child support because his child

is receiving public assistance as a result of the father's failure to pay the full amount of child support. Consequently, we modify the ruling of the chancellor and order that child support be set at $824 per month commencing with the date of the final order.

[redacted] The Department's second assignment is that the chancellor erred in refusing to make an award of back child support. The child was born on February 8, 1986. At that time the mother was married to another man and contended that the child was fathered by her husband. She was soon divorced, and the husband was found not to be the father of the child. It was not until September 24, 1991, that the Department filed this complaint. Hardy is being required by this opinion to pay a large amount of support commencing with the date of the final decree. In *Green* v. *Bell*, 308 Ark. 473, 479-80, 826 S.W.2d 226, 230 (1992), in discussing back child support, we said, "the question is simply what is fair," and quoted from *Ryan* v. *Baxter*, 253 Ark. 821, 824-25, 489 S.W.2d 241, 244 (1973), as follows:

> The granting or denial of such a recovery rests upon the equities in a particular case. We have in several cases, recognized the equitable nature of such an award. Thus, in order to find that the chancellor committed reversible error, we would have to hold that his finding as to where the equities lay was against the preponderance of the evidence.

We cannot say that under the circumstances of this case the chancellor's determination as to where the equities lay was against the preponderance of the evidence.

[redacted] The Department's third assignment is well taken. In fact, it is conceded by Hardy. In the point, the Department contends that the chancellor erred in not ordering income withholding. Section 9-10-112(b)(1) of the Arkansas Code Annotated provides that support orders must include a provision for income withholding, absent a finding of good cause, in all cases filed pursuant to Title IV-D of the Social Security Act after October 1, 1989. This case fits within that category, and the chancellor did not make the required finding.

[redacted] The Department's fourth, and final, assignment is that the chancellor erred in refusing to order the father to provide

health insurance for the child. Our per curiam of May 13, 1991, setting out the child support guidelines provides: "In addition to the award of child support, the court order *shall* provide for the child's health care needs, which would normally include health insurance if available to either parent at a reasonable cost." *In Re: Guidelines for Child Support Enforcement*, 305 Ark. 613, 617, 804 S.W.2d XXIV, XXVII (emphasis added). Consequently, the chancellor was obligated to make some sort of provision for health care coverage for the child. The chancellor may have thought he was complying with this provision when he found that the child would receive medicaid. However, there was no determination whether or not either parent has health insurance available to him or her at a reasonable cost, and we are unable to decide this issue on the record before us. Consequently, we remand for a determination of the child's health care.

We reverse in part, modify in part, remand for proof on the issue of health care, and remand for entry of orders consistent with this opinion.

Gary D. PIERCEFIELD *v.* STATE of Arkansas

CR 93-646 871 S.W.2d 348

Supreme Court of Arkansas
Opinion delivered February 28, 1994

Rex W. Chronister, P.A., by: *Andrew A. Flake*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. Gary D. Piercefield appeals from a conviction for Possession of Methamphetamine with the intent to distribute. His first point on appeal challenges the sufficiency of the evidence. Due to the overwhelming and uncontested evi-

dence presented by the State, we hold the evidence to be sufficient. He also challenges the Trial Court's admission into evidence of two bags of methamphetamine and his statement to the effect that he was the owner of the bags. The Trial Court correctly denied the motions to suppress. Mr. Piercefield further claims the Trial Court erred by admitting hearsay testimony. The testimony complained of does not meet the definition of hearsay and was properly allowed. The conviction is affirmed.

On the night of June 20, 1992, Mr. Piercefield was driving his motorcycle down the highway. A police officer, alerted by the weaving of the motorcycle, attempted to stop him. Mr. Piercefield did not heed the officer's blue lights and sped away at speeds in excess of 100 miles per hour. He did not stop until he ran off into a ditch.

The pursuing officer, during his inspection of the wrecked motorcycle, discovered two packets of white powder approximately five steps from the motorcycle. Mr. Piercefield was arrested and taken to a hospital for treatment of his injuries. Upon his release from the hospital, approximately three and one-half hours later, he was given his *Miranda* warnings. He agreed to waive his rights and confessed to owning the bags of white powder, which contained almost two ounces of nicotinamide vitamin and methamphetamine. The bags of methamphetamine and the admission of ownership were allowed into evidence at the trial over Mr. Piercefield's objection.

1. Sufficiency of the evidence

Mr. Piercefield moved for a directed verdict at the close of all the evidence on the ground that he possessed less than one ounce of methamphetamine, that the State had not produced any other evidence of intent to deliver, and that the evidence presented was insufficient to support the verdict.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas* v. *State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or another. *Coleman* v. *State*, 314 Ark. 143, 860 S.W.2d 747 (1993). In determining whether substantial evidence exists, we

review the evidence in the light most favorable to the appellee. *Id.* Under Ark. Code Ann. Sec. 5-64-401(a)(i), the measurable amount of the methamphetamine for the purpose of inferring intent includes the amount of the pure drug plus all adulterants.

The fact that the bags of methamphetamine were not found on Mr. Piercefield's person is only some evidence whether the appellant possessed them. The only issue concerning possession before the Trial Court was one of credibility. That was for the jury to decide. *Urquhart* v. *State*, 273 Ark. 486, 621 S.W.2d 218 (1981). Intent may be inferred under Ark. Code Ann. §5-64-401(d) (Supp. 1993) from the fact that Mr. Piercefield possessed more than 200 milligrams of a stimulant drug. The evidence presented is sufficient to affirm the Trial Court's denial of the motion for directed verdict.

2. Hearsay

Mr. Piercefield contends the Trial Court erred by allowing a witness for the State to give hearsay testimony based on Mr. Piercefield's medical records. This objection stems from the fact that the Trial Court allowed officer Machund to give testimony concerning whether or not he believed Mr. Piercefield had suffered a head injury after he admitted he had looked at the medical records.

Arkansas R. Evid. 801 defines hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence as truth of the matter asserted." After ascertaining that the officer had seen Mr. Piercefield's medical record at the hospital, the prosecutor began a question as follows, "Based on what you have seen, read and heard, and been told —." The question was interrupted by objection. The Trial Court, at the bench cautioned that it sounded like the prosecutor was about to elicit hearsay. The question was rephrased, "Do you have any reason to believe that Mr. Piercefield suffered from any sort of head injury that night?" The testimony did not fit the basic definition of hearsay. The witness did not say what was said in the medical records. While it could be inferred that he was basing his opinion in part on the medical records, the statement was not one made by other than the declarant.

3. Suppression of the confession

Mr. Piercefield asserts that the State did not meet its burden of proving that the in-custody statement was given knowingly, intelligently and voluntarily. He argues he was incapable of a knowing and voluntary waiver due to his confused mental state.

[redacted] At trial, the burden is upon the State to demonstrate that a defendant knowingly and voluntarily waived his rights. *Bogard* v. *State*, 311 Ark. 412, 414, 844 S.W.2d 347, 349 (1993). This Court independently reviews the totality of the circumstances surrounding a confession to determine if the accused knowingly, voluntarily, and intelligently waived his constitutional rights. *Moore* v. *State*, 303 Ark. 514, 519, 798 S.W.2d 87, 91 (1990). The Trial Court's determination will be reversed only if it is clearly against the preponderance of the evidence. *Id.* The evidence presented at trial will be viewed in the light most favorable to the State. *Id.*

The State's evidence consisted of a form initialed and signed by Mr. Piercefield which waived his *Miranda* rights, testimony from two police officers that Mr. Piercefield was coherent when he signed the form some three and one-half hours after the accident, and testimony from officers that he admitted possession and ownership of the bags of methamphetamine after his rights were explained to him and after he signed the waiver.

[redacted] Mr. Piercefield did not introduce any evidence to controvert that produced by the State. Given the totality of the circumstances, the Trial Court's finding of a knowing and intelligent waiver was not against the preponderance of the evidence.

4. Suppression of evidence

Mr. Piercefield objected to the admission of the two bags of methamphetamine on the ground that the arresting officer made an illegal stop which should have resulted in the suppression of any evidence produced from the stop. He states, without citation to any authority, that because there was no violation of a statute prior to the officer's attempt to stop him, the stop was illegal and the evidence obtained due to the arrest should have been suppressed.

An officer does not have to witness the violation of a statute in order to stop a suspect. *Smith* v. *State*, 301 Ark. 569, 785 S.W.2d 465 (1990). The authority for this holding is found in Ark. R. Crim. P. 3.1. Under this rule, a law enforcement officer may stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony or (2) a misdemeanor involving danger of forcible injury or damage to property.

The arresting officer noticed the motorcycle weaving from the centerline of the highway to the shoulder. The officer noted that it was a late hour and was concerned that the driver might be driving while intoxicated. Under these conditions, the arresting officer had a reasonable suspicion to stop the appellant, to say nothing of the fact that when ultimately "stopped" and approached by Officer Machund, Mr. Piercefield had been observed driving far in excess of the speed limit.

Affirmed.

CORBIN, J., not participating.

Charles Laverne SINGLETON *v.* Roger ENDELL, Director, Arkansas Department of Correction

93-950 870 S.W.2d 742

Supreme Court of Arkansas
Opinion delivered February 28, 1994
[Rehearing denied March 28, 1994.]

Jeff Rosenzweig, for appellant.

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

DAVID NEWBERN, Justice. On June 1, 1979, the appellant, Charles Laverne Singleton, stabbed Mary Lou York to death at York's Grocery Store in Hamburg. He was convicted of the crime on October 30, 1979. We described the evidence against Mr. Singleton as "overwhelming" and affirmed his conviction of capital felony murder and sentence to death. *Singleton* v. *State*, 274 Ark. 126, 623 S.W.2d 180 (1981), *cert. denied*, 456 U.S. 938 (1982).

In the 14 years since his conviction Mr. Singleton has pursued numerous remedies in Arkansas and federal courts. The most recent action from which this appeal arises is for a declaratory judgment to the effect that Mr. Singleton is entitled to a hearing, in keeping with the United States Supreme Court decision in *Ford* v. *Wainwright*, 477 U.S. 399 (1986), to determine

whether he is insane and thus not to be executed. The Trial Court denied the relief requested. We affirm the Trial Court's decision.

In his petition to the Trial Court, Mr. Singleton alleged that the State has been administering antipsychotic medication to him. Exhibits attached to the petition included a number of medical reports by prison physicians indicating that antipsychotic medication has been administered from 1988 through 1992. One report states that Mr. Singleton asked to be taken off the medication because he was to see some "federal doctors." The physician who wrote the report stated Mr. Singleton wanted to appear "crazy." One other report indicated Mr. Singleton asked when he could be taken off the medication and was told it should be continued. The reports state that he is not exhibiting psychotic symptoms and is in "remission." No report indicates that Mr. Singleton refused medication or objected to it, other than as noted above.

Also attached as an exhibit to the petition is an undated affidavit asking that the appeal be dropped because Singleton lacks the courage to kill himself and, death being his only escape, he will let "you," apparently meaning the State, do it. The affidavit is signed, "God the Father, Adam, the Christ, King Charles Laverne, Lamar, Lamont Singleton."

Mr. Singleton's counsel wrote to the appellee, Mr. Endell, the Director of the Department of Correction, asking that Mr. Singleton be evaluated to determine his eligibility for execution. A response on behalf of Mr. Endell, written by Max J. Mobley, Assistant Director, Treatment Services, appeared as an exhibit to the petition. The response, in pertinent part, was as follows:

> The Director referred your letter of November 30, 1992, to my attention. I have spoken with the psychiatrist who is the clinical manager of Charles Singleton's mental health treatment. He indicates that at this time he does not have clinical concerns which would serve as the basis for a referral to the state hospital. Therefore, the Director has no basis to request intervention on the part of the state hospital.

Based on the affidavit and the physician reports, Mr. Singleton asked the Trial Court to declare that he is not competent

to be executed, citing Ark. Const. art. 2, § 9, and the Eighth Amendment to the United States Constitution as interpreted in *Ford* v. *Wainwright, supra.* He also sought a declaration that the State violates his rights by medicating him to make him appear competent. He asked for an order that the State cease administration of antipsychotic drugs and that the State be ordered to conduct a psychiatric examination in accordance with the requirements found in the *Ford* case.

In denying the declaratory relief sought, the Trial Court held that Mr. Singleton's only avenue of relief is prescribed in Ark. Code Ann. § 16-90-506(d)(1) (Supp. 1993). The order noted that Mr. Singleton had sought an evaluation pursuant to that statute and that Mr. Endell had determined, pursuant to the statute, that there were no reasonable grounds to believe that Mr. Singleton was insane and thus declined to refer him to the State Hospital. This procedure was held to have exhausted Mr. Singleton's state remedies, but the Trial Court noted that Mr. Singleton has petitioned a federal court for the same relief sought here.

The State attached to its response a copy of Mr. Singleton's petition for *habeas corpus* in the federal court. The State's argument in response to Mr. Singleton's argument in this appeal is that declaratory judgment is not proper because it is the subject of another proceeding, and thus the Trial Court properly denied relief. The State has cited no case in which a declaratory judgment was sought and dismissed because another action seeking essentially the same relief was filed *subsequent* to the complaint for declaratory judgment.

The only cases we have found in which that situation occurred held that dismissal of the declaratory judgment action was not required. *Associated Indemnity Corp.* v. *Wachsmith*, 99 P.2d 420 (Wash. 1940), citing *E.W. Bliss Co.* v. *Cold Metal Process Co.*, 102 F.2d 105 (6th Cir. 1939). It may make a difference to the propriety of pursuing declaratory relief that the plaintiff filed both the actions in this case. We cannot tell from the *Associated Indemnity Corp.* case whether that was so in that instance. In any event, we are disinclined to follow the State's recommendation that we affirm on procedural grounds due to the lack of any cited authority in support of it.

The State's main argument is that the decision in the *Ford* case does not require that an inmate in Mr. Singleton's situation be given a hearing. True, the precise question in the *Ford* case was whether Ford was entitled to a hearing in a federal court. The answer to that question depended, however, upon the constitutional sufficiency of proceedings in Florida to protect Ford's Eighth Amendment right not to be executed while insane. We can hardly ignore the United States Supreme Court's guidance in determining whether the law of this State is constitutionally adequate when challenged. This Court's duty is to support the Constitution of the United States, and we cannot agree with the State's apparent position that whatever rights Mr. Singleton may have are to be protected in a federal court but not here.

In *Rector* v. *Clinton*, 308 Ark. 104, 823 S.W.2d 829 (1992), a death row inmate claiming to be insane challenged § 16-90-506(d)(1), as it then appeared, as being unconstitutional. We said in a brief *per curiam* opinion that the circuit court lacked jurisdiction to consider the petition for declaratory relief, mandamus, and prohibition because matters occurring after the commission of the crime, including a claim of "current insanity," fall within the purview of the Governor in the exercise of clemency. Despite that pronouncement, however, this Court concluded its opinion as follows: "Arkansas law does not pose for execution of a person who may be mentally deficient a standard different from that declared by the United States Supreme Court in *Ford* v. *Wainwright*." Thus, regardless of our conclusion that a circuit court could not stay an execution on the basis of a ground which should be relegated to the area of clemency, we obviously and properly reviewed the constitutionality of our statute governing the manner in which the executive branch should deal with a claim of insanity by a death row inmate. We do so again in this case.

We note that in the petition before the federal court, Mr. Singleton pursues his argument that administration of antipsychotic medication violates his constitutional rights, citing *Washington* v. *Harper*, 494 U.S. 210 (1990), and *Perry* v. *Louisiana*, 498 U.S. 38 (1990).

The *Perry* case resulted in the Supreme Court of Louisiana, upon remand from the United States Supreme Court, holding that the administration of such medication to a death row inmate

against his will was indeed a constitutional violation. *State of Louisiana* v. *Perry*, 610 So. 2d 746 (1992). Mr. Singleton does not mention the *Perry* case in the argument to this Court.

In *Washington* v. *Harper, supra*, an inmate in the Washington prison system argued his right not to be medicated for manic-depressive disorder against his will. Reversing a decision by the Washington Supreme Court, the United States Supreme Court held the safeguards provided by Washington law were sufficient and did not preclude the State from medicating the prisoner prior to the prescribed hearing on the issue if he posed a danger to himself or others. Mr. Singleton mentions *Washington* v. *Harper, supra*, only in passing, and we do not regard the issue of the constitutionality *vel non* of the administration of antipsychotic drugs to Mr. Singleton as being before us. No argument is made on the point, and it is apparent that Mr. Singleton would prefer to present the medication issue exclusively in the federal court.

In his argument here, Mr. Singleton attacks § 16-90-506(d)(1) as being insufficient to comply with the requirements set out in the *Ford* case in which Mr. Justice Marshall, on behalf of himself and three other Justices, concluded that the execution of an insane person violates the Eighth Amendment. The opinion dwelt upon the means by which a person claiming to be insane could assert the right not to be executed.

> In a habeas corpus proceeding, "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." *Townsend* v. *Sain*, 372 U.S. 293 (1963). The habeas corpus statute, following this Court's decision in *Townsend*, provides that, in general, "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . ., shall be presumed to be correct." and an evidentiary hearing not required. 28 U.S.C. § 2254(d).

At issue in the *Ford* case was the Florida law which directed the Governor of that State, when informed that a person under sentence of death may be insane, to appoint a commission of three psychiatrists to examine the prisoner. Upon receipt of the report of the commission, the Governor was required to decide

whether the convicted person had the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him.

Mr. Justice Marshall's opinion found several flaws in the Florida mechanism for protecting the right at issue. First, the "state practice does not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution." Second, there is a "denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions." Third, the Florida law resulted in "placement of the decision wholly within the executive branch." The opinion then states:

> Having identified various failings of the Florida scheme, we must conclude that the State's procedures for determining sanity are inadequate to preclude federal redetermination of the constitutional issue. We do not suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences. It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity. Cf. *Pate* v. *Robinson*, 383 U.S. 375 (1966) (hearing on competency to stand trial required if "sufficient doubt" of competency exists). Other legitimate pragmatic considerations may also supply the boundaries of the procedural safeguards that feasibly can be provided. [Footnote omitted.]

As noted above, Mr. Justice Marshall's opinion expressed his views and those of three other Justices. Two Justices dissented on the ground that there is no constitutional right of an insane person not to be executed. Two justices found no Eighth Amendment protection but concurred in the result on the basis that Florida law had created the right of an insane person not to be executed but had not provided sufficient procedural safeguards to protect that right.

Mr. Justice Powell concurred in the result, agreeing that the Eighth Amendment provides a right of an insane person not to be executed, but his opinion expressed a view which would nar-

row the procedural means a state must provide to protect the right of an insane person not to be executed. Mr. Justice Powell's opinion thus expresses the law of the land. *Marks* v. *United States*, 430 U.S. 188 (1977).

[redacted] Mr. Justice Powell agreed that, in order for a state court's determination of sanity to be given deference in accordance with 28 U.S.C. § 2254(d), it is insufficient that the decision be left to a governor. He also agreed that it is insufficient to rely solely on examination by state appointed psychiatrists. He stated, however, that he "would not require the kind of full-scale 'sanity trial' that Justice Marshall appears to find necessary." The essence of his controlling opinion is this:

> . . . petitioner does not make his claim of insanity against a neutral background. On the contrary, in order to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process.
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> . . .
>
> . . . ordinary adversarial procedures — complete with live testimony, cross-examination, and oral argument by counsel — are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity.
>
> . . .
>
> The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. [Footnotes omitted.]

It would be difficult for us to hold that § 16-90-506(d)(1) does not fulfill the requirements stated by Mr. Justice Powell. Here is the language of the statute:

When the Director of the Department of Correction is satisfied that there are reasonable grounds for believing that an individual under sentence of death is not competent, due to mental illness, to understand the nature and reasons for that punishment, the director shall notify the deputy Director of the Division of Mental Health Services of the Department of Human Services. The Director of the Department of Correction shall also notify the Governor of this action. The Division of Mental Health Services shall cause an inquiry to be made into the mental condition of the individual within thirty (30) days of receipt of notification. The attorney of record of the individual shall also be notified of this action, and reasonable allowance will be made for an independent mental health evaluation to be made. A copy of the report of the evaluation by the Division of Mental Health Services shall be furnished to the Division of Mental Health Services of the Department of Correction, along with any recommendations for treatment of the individual. All responsibility for implementation of treatment remains with the Division of Mental Health Services of the Department of Correction.

(A) If the individual is found competent to understand the nature of and reason for the punishment, the Governor shall be so notified and shall order the execution to be carried out according to law.

(B) If the individual is found incompetent due to mental illness, the Governor shall order that appropriate mental health treatment be provided. The director may order a reevaluation of the competency of the individual as circumstances may warrant.

We stated the earlier version of the statute was not unconstitutional in our 1992 *per curiam* opinion in *Rector* v. *Clinton, supra*. Act 914 of 1993 rewrote the statute to provide for the notification of counsel for the inmate and "reasonable allowance" for "an independent mental health evaluation." The current version, applicable in this case, thus differs markedly from the Florida law considered in the *Ford* case. The Florida Governor specifically directed that attorneys for Ford not participate in the

examination in any adversarial manner. He also refused to review materials provided by Ford's counsel after the examination concluded. As Mr. Justice Marshall reported, that was in keeping with "the present Governor's 'publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane.' *Goode* v. *Wainwright*, 448 So. 2d 999, 1001 (Fla. 1984)." We cannot know that Mr. Singleton and his counsel would be precluded from participating and presenting evidence of his insanity if such a hearing were held pursuant to § 16-90-506(d)(1). We cannot agree with Mr. Singleton's conclusion that the statute is constitutionally inadequate.

Five Justices of the United States Supreme Court have concluded that it may be necessary that a state impose a "high" or "substantial threshold" over which a death row inmate must step in order to be entitled to a hearing on the issue of the Eighth Amendment right not to be executed while insane. Except for the bizarre undated affidavit apparently written by Mr. Singleton, the evidence presented to the Trial Court in this case consisted of reports of treating physicians that Mr. Singleton's psychosis was in remission. We cannot say the "threshold," imposed in the statute, *i.e.*, "When the Director . . . is satisfied that there are reasonable grounds . . . ." has been crossed. We are not oblivious to the fact that this "threshold" is erected in the executive branch of government. While that may seem incongruous with Mr. Justice Powell's conclusion that a governor should not have the *final* say after there has been an examination, we are given no guidance on the matter of whether the *initial* decision whether there is to be an examination, which seems to us to be equally important, must reside somewhere other than with a member of the executive branch such as the Director of the Department of Correction. The only reasonable alternative, it seems, would be to require that such a decision be made by a court, and that would surely be inconsistent with Mr. Justice Powell's reticence to require a "sanity trial" in every case.

[redacted] Again we note that Mr. Singleton has not sufficiently pursued before us, as he is doing in the concurrent federal proceeding, an argument that administering antipsychotic drugs violates his rights. Our holding is solely that Mr. Singleton has not demonstrated that § 16-90-506(d)(1) is unconstitutional or that

it has been improperly applied in this case to deny him a sanity examination.

Affirmed.

CORBIN, J., not participating.

ARKANSAS STATE EMPLOYEES INSURANCE ADVISORY COMMITTEE *v.* ESTATE OF Brent Ronald MANNING

93-885 870 S.W.2d 748

Supreme Court of Arkansas
Opinion delivered February 28, 1994

Winston Bryant, Att'y Gen., by: *M. Wade Hodge*, Asst. Att'y Gen., for appellant.

Gocio & Dossey, by: *Samuel M. Reeves*, for appellee.

TOM GLAZE, Justice. This case was instituted in probate court where the parties argued the applicability of this court's recent decisions in *Higginbotham* v. *Arkansas Blue Cross and Blue Shield*, 312 Ark. 199, 849 S.W.2d 464 (1993), and *Shelter Mutual Insurance Company* v. *Bough*, 310 Ark. 21, 834 S.W.2d 637 (1992). Brent Manning, a minor, was seriously injured as a result of his

motorcycle being struck by a vehicle owned and operated by Bob Hulsizer. Brent's mother was subsequently appointed Brent's guardian by the probate court, so she could enter into a proposed settlement of Brent's tort claim against Hulsizer. Hulsizer was agreeable to settle the claim for $25,000, which reflected the policy limits of his State Farm Mutual Automobile Company insurance policy.

Brent's father intervened in this probate proceeding, requesting the trial court to allocate the funds from any settlement in accordance with the terms of the subrogation clause of the group health insurance policy the father maintained with the State Employees Insurance Advisory Committee. Because Brent was a dependent of his father and thereby covered by his father's insurance plan, $37,407.51 of Brent's medical expenses had been paid by the state employees insurance.

Relying upon this court's decision in *Bough*, the probate court entered its order on March 11, 1993, rejecting the Committee's request for subrogation. In its ruling, the lower court stated the general rule that an insurer is not entitled to subrogation unless the insured had been made whole for his loss and any additional payments would cause the insured to receive a double recovery. The probate court then specifically found that Brent's loss exceeded the total of the amounts paid by the state insurance and State Farm policies ($37,407.51 plus $25,000 = $62,407.51), and accordingly denied the Committee had any right of subrogation to any part of the monies paid by State Farm to Brent's estate.

After the probate court's decision on March 11th, the Committee filed a "motion for reconsideration" citing this court's March 1, 1993 ruling in *Higginbotham* and claiming that this more recent holding indicated that the *Bough* decision was not controlling of the facts here. More specifically, the Committee argued below (and now on appeal) that when an express subrogation clause is contained in the insurer's policy (not found in *Bough*), the subrogation agreement is controlling and permits the insurer to be reimbursed from the tortfeasor to the extent of the value of benefits or services furnished the insured by the insurer. The Committee's motion was deemed denied, and the Committee brings this appeal contending the lower court erred in failing to follow the *Higginbotham* decision.

[redacted] We are unable to reach the merits of the parties' arguments as to whether the *Bough* or *Higginbotham* decision controls the instant case because the probate court had no subject matter jurisdiction to reach the ruling it rendered. In fairness to the trial court, this jurisdiction issue was not raised below, but Brent does argue it in this appeal. Even if Brent had failed to raise the jurisdiction issue on appeal, this court has said repeatedly that it is not only the right but the duty of this court to determine whether it has jurisdiction of the subject matter. *Hilburn* v. *1st State Bank of Springdale*, 259 Ark. 569, 535 S.W.2d 810 (1976). It is also settled law that subject matter jurisdiction is always open, cannot be waived, can be questioned for the first time on appeal, and can even be raised by this court. *Id.*

[redacted] Probate court has exclusive jurisdiction over all matters of guardianship, other than guardians ad litem in other courts. *See* Ark. Code Ann. § 28-65-107(a) (1987); *Forehand* v. *American Collection Serv., Inc.*, 307 Ark. 342, 819 S.W.2d 282 (1991). In addition, the court in *Forehand* has stated that a guardian is under a duty to pay from the estate all just claims against the estate of the ward. *See also* Ark. Code Ann. § 28-65-317(a)(1) (1987). And under Ark. Code Ann. § 28-65-317(b), any person having a claim against the estate of the ward for services lawfully rendered to the ward or his estate for necessities furnished to the ward, or for the payment of a lawful liquidated claim or demand against the estate of the ward, the probate court, after notice and appropriate hearing, may direct the guardian to pay the claim. *See also First State Bank, Gdn.* v. *Thessing*, 241 Ark. 150, 406 S.W.2d 865 (1966). These statutory provisions also bring into focus the settled rule that probate court is a court of special and limited jurisdiction, having only such jurisdiction and powers as are conferred by the constitution or by statute, or necessarily incidental thereto. *Eddleman* v. *Estate of Farmer*, 294 Ark. 8, 740 S.W.2d 141 (1987). Finally, upon petition of the guardian of a ward's estate, the probate court may make an order authorizing the settlement or compromise of any claim by or against the ward or his estate, whether arising out of contract, tort, or otherwise, and whether arising before or after the appointment of the guardian. Ark. Code Ann. § 28-65-318(a) (1987).

[redacted] Brent argues the Committee's petition in this matter is designed to specifically enforce the subrogation provisions of the

state's health insurance plan, and because specific performance is an equitable remedy it is cognizable only in chancery court. *Hilburn*, 259 Ark. 569, 535 S.W.2d 810; *Morton* v. *Yell*, 239 Ark. 195, 388 S.W.2d 88 (1965). This court, however, has steadfastly adhered to the rule that equity will not enforce, by specific performance, a contract relating to personalty unless special or peculiar reasons exist which make it impossible for the injured party to obtain relief by way of damages in an action at law. *Morris* v. *Sparrow*, 225 Ark. 1019, 287 S.W.2d 583 (1956); *Stacy* v. *Hsi-Chi Lin*, 34 Ark. App. 97, 806 S.W.2d 15 (1991). Here, the Committee's purported claim or loss would undoubtedly be satisfied by the reimbursement of the monies it has expended for medical expenses in Brent's behalf. And because such damages are available in an action at law, we see no merit in Brent's attempt to characterize the Committee's action or claim as one for specific performance.

The second part of Brent's jurisdiction argument is not as easily dismissed. In this regard, Brent points to the language in § 28-65-317(b) which permits the probate court to pay claims against the estate of the ward (1) for services rendered to the ward for necessaries or (2) for payment of liquidated claims or demands against the Ward's estate. The Committee here has not framed its request to the probate court asking it to require the guardian to pay for necessaries provided Brent. Instead, the Committee requested the lower court to permit the Committee to be subrogated to Brent's rights against Hulsizer to the extent of the services or benefits provided Brent. Brent contested the Committee's claim to subrogation. In particular, the Committee asked the court to distribute Brent's settlement proceeds in accordance with the terms of the subrogation clause of the Committee's insurance plan. The Committee never requested or demanded recovery of any specific money amount(s).

For these same reasons, we also conclude the Committee's petition fails to assert or meet the requirements of a liquidated claim under § 28-65-317(b). As discussed above, probate court is a court of special and limited jurisdiction and has only such powers as are expressly conferred by statute or the constitution or necessarily incident thereto. Having failed to assert or present a constitutional or statutorily cognizable claim to the probate court, we must set aside the lower court's order which denied the Committee's petition.

Janie S. HICKS *v.* Ken CLARK

93-955 870 S.W.2d 750

Supreme Court of Arkansas
Opinion delivered February 28, 1994
[Rehearing denied April 11, 1994.]

Pettus Law Firm, P.A., by: *Alisa Thorven-Corke*, for appellant.

Arnold Law Firm, by: *Thomas S. Arnold* and *Clarke Arnold*, for appellee.

TOM GLAZE, Justice. On May 22, 1989, the appellant, Janie Hicks, filed a complaint alleging the appellee, Ken Clark, was negligent in permitting one of his cows to roam upon a roadway. Hicks alleged she hit the cow with her automobile, and sustained personal and property injuries for which she sought $61,209.51 in damages. The deputy sheriff failed to serve Hicks's summons and complaint on Clark until March 29, 1990, or more than ten months after the filing of the complaint. Clark filed no answer, and a default judgment was subsequently entered against Clark on July 17, 1991.

On October 8, 1992, Clark filed a motion to set aside the default judgment. Clark contended that, among other things, he had not been served personally within 120 days of the filing of Hicks's complaint, as required by ARCP Rule 4(i).

Following a hearing on October 9, 1992, the trial court set aside the default judgment because Clark had not been properly and timely served. It further held that, because Hicks had filed no motion within the 120-day time period seeking an extension of time for service, she was not entitled to refile her action under the one-year savings statute, Ark. Code Ann. § 16-56-126 (1987). The lower court dismissed Hicks's complaint with prejudice because her action was barred by the three-year statute of limitations, Ark. Code Ann. § 16-56-105 (1987). Hicks appeals from that order of dismissal and one reaffirming it dated February 25, 1993. We affirm.

Our recent decision in *Forrest City Machine Works, Inc.* v. *Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993), sets out the rules that control here. In *Lyons*, we related that Arkansas's rules pertaining to commencement of an action require only that the plaintiff complete service upon the defendant within 120 days from filing the complaint. However, if the plaintiff fails to complete service during that period, he or she may still request that the time be extended to complete service in order to protect the plaintiff against the running of a statute of limitations if that extension is requested within the 120-day period. We further said that, to toll the limitations period and to invoke the one-year savings statute, a plaintiff need only file his or her complaint within the statute of limitations and complete timely service on a defendant. We concluded by saying that even where a court later finds

the plaintiff's timely completed service to be invalid, the plaintiff is not disinherited from benefiting from the one-year saving statute. *Accord Cole* v. *First National Bank of Ft. Smith*, 304 Ark. 26, 800 S.W.2d 412 (1990).

In the present case, Hicks altogether failed to meet the requirements of Rule 4(i) and ARCP Rule 3 discussed in *Lyons*. Hicks simply failed to obtain completed service upon defendant Clark, nor did she request an extension, within the required 120-day period. Instead, Hicks waited over ten months before completing any service on Clark, and this delay and her failure to request a timely extension prevented her from invoking the savings statute. This being so, and the applicable three-year statute of limitations having run, the trial court was correct in dismissing Hicks's action with prejudice. *See also Green* v. *Wiggins*, 304 Ark. 484, 804 S.W.2d 536 (1991).

Hicks's final argument is that the effect of setting aside her default judgment against Clark was "an arrest of judgment" and § 16-56-126 provides for commencing a new action within one year where the plaintiff suffered a "judgment arrested." However, Hicks failed to obtain a ruling on this point, and issues left unresolved below cannot be considered on appeal. *Morgan* v. *Neuse*, 314 Ark. 4, 857 S.W.2d 826 (1993).

For the reasons discussed, we affirm.

CORBIN, J., not participating.

Michael HAWKINS *v.* CITY OF PRAIRIE GROVE

CR 93-1053 871 S.W.2d 357

Supreme Court of Arkansas
Opinion delivered February 28, 1994

John William Murphy, for appellant.

Boyce R. Davis Assoc., by: *Boyce R. Davis*, for appellee.

DONALD L. CORBIN, Justice. We treated appellant's petition for writ of certiorari, filed pursuant to superseded Ark. Sup. Ct. R. 29(6)(a) as a petition for review under the current Ark. Sup. Ct. R. 1-2(f), and granted review of the Arkansas Court of Appeals's decision reported as *Hawkins* v. *City of Prairie Grove*, 43 Ark. App. 81, 861 S.W.2d 118 (1993). We granted review under Rule 1-2(f) because the appeal requires the interpretation of Ark. Code Ann. § 16-17-213 (Supp. 1991) and should therefore have originally been heard in this court. Upon review, we find no error and affirm.

Appellant, Michael Hawkins, was convicted of driving while intoxicated in Prairie Grove Municipal Court on January 18, 1991. He filed a timely notice of appeal with the clerk of the Washington Circuit Court. He also filed a timely affidavit of appeal with the clerk of the municipal court on February 6, 1991. However, the municipal court clerk never filed the transcript with the circuit court. Consequently, the circuit court dismissed the appeal for lack of jurisdiction on June 18, 1992.

In dismissing for lack of jurisdiction, the circuit court relied

on Ark. Code Ann. § 16-17-213(a) (1987) and *Nowlin* v. *Merchants Nat'l Bank*, 192 Ark. 529, 92 S.W.2d 390 (1936), and concluded that the requirements of the statute are mandatory and jurisdictional and that it is the duty of the appealing party to see that the transcript is lodged in the time limited. On appeal, appellant contends Ark. Code Ann. § 16-17-213(a) (1987) was superseded by 1987 Ark. Acts 431, now codified as Ark. Code Ann. § 16-17-213 (Supp. 1993), and that the new version of the statute shifted the responsibility of perfecting appeals from the appellant to the clerk.

We agree that section 16-17-213 was amended by 1987 Ark. Acts 431, but disagree that the amendment shifted the responsibility of perfecting an appeal away from appellant. Moreover, appellant's reliance on section 16-17-213 and its 1987 amendment is misplaced. We recently held in *Ottens* v. *State*, 316 Ark. 1, 871 S.W.2d 329 (1994), that the timely filing of an appeal from municipal court is controlled by Rule 9 of the Inferior Court Rules. We have stated that Rule 9, which applies to criminal as well as civil cases, *Ottens*, 316 Ark. 1, 871 S.W.2d 329, is mandatory and jurisdictional and leaves the circuit court without authority to accept untimely appeals. *Bocksnick* v. *City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992); *Edwards* v. *City of Conway*, 300 Ark. 135, 777 S.W.2d 583 (1989). This court stated further that "it is the duty of the counsel, not the judge, clerk, or reporter, to perfect the appeal." *Id.* at 137, 777 S.W.2d at 584. Rule 9(b) states in pertinent part: "the appellant shall have the responsibility of filing such record in the office of the circuit clerk."

We are aware that the statutes on municipal courts intimate that the responsibility for filing a transcript on appeal falls on the municipal court itself. Ark. Code Ann. § 16-17-213; *see Bocksnick*, 308 Ark. 599, 825 S.W.2d 267 (citing Ark. Code Ann. § 16-96-505 (1987)). However, section 16-17-213 has been superseded by Rule 9 of the Inferior Court Rules, and we so hold. Supersession Rule, *Arkansas Court Rules*, p. 689 (1993).

Appellant raises the additional points that the trial court's decision violates his due process rights, creates confusion, and is a burden to judicial economy. The record on appeal does not reveal that these points were raised below; therefore we

will not address them. Even constitutional issues are waived on appeal when not argued below. *Whitson* v. *State*, 314 Ark. 458, 863 S.W.2d 794 (1993).

Affirmed.

J.D. STEWART *v.* STATE of Arkansas

CR 93-478 870 S.W.2d 752

Supreme Court of Arkansas
Opinion delivered February 28, 1994

Thomas A. Potter, for appellant.

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

ROBERT L. BROWN, Justice. This is a first degree murder case where the appellant, J.D. Stewart, was sentenced to 40 years. He raises three issues on appeal: (1) whether the trial court erred in refusing to give his proffered instruction on duress to the jury; (2) whether the trial court erred in granting the State's motion in limine to prevent expert testimony concerning Stewart's intent and culpability; and (3) whether the trial court erred in refusing to allow defense counsel to delve into specific instances of the victim's alleged propensity for violence. We hold that the trial court did not err in the three rulings, and we affirm.

On March 17, 1990, at about 4:30 p.m., Stewart entered the Citizen's Cafe in Texarkana. It was Stewart's birthday, and the restaurant was preparing food for a party. The victim, Percy

Ragland, was seated on a stool inside the cafe. Ragland and Stewart exchanged heated words, and when Stewart approached Ragland, Ragland pushed him away. Stewart then pulled a large caliber pistol and pointed it at Ragland, who got up and started walking towards the door. Stewart fired his pistol once, striking Ragland in the upper right back and killing him.

Shortly after the shooting, Stewart turned himself in at the Texarkana Police Station. Detective John Gann took a statement from him where he said that he did not know what happened and was just holding the gun when it went off. He added, "I didn't mean to kill anyone." He also said that Ragland tried to get him to buy him a beer and would not leave him alone when he refused. He said that he had had trouble with Ragland in the past. Stewart admitted that Ragland did not have a weapon and had not threatened him. Stewart was charged with first degree murder.

At the request of his defense counsel, Stewart was then examined by Dr. James R. Blackburn, a clinical psychologist with the Southwest Arkansas Counselling and Mental Health Center in Texarkana. Dr. Blackburn's July 31, 1990 report stated that at the time of the shooting Stewart realized the criminality of his conduct. The report also noted that Stewart was discharged from the Marines after serving two years and six months in Vietnam in 1969 and that he was suffering from emotional stress. On July 24, 1991, Dr. Blackburn issued a second report where he concluded that Stewart, though not psychotic at the time of the shooting, had a mental defect caused by stress and fear that rendered him unable to conform his behavior at that time. Blackburn was of the opinion that under physical threat or aggression, Stewart would overreact and panic as the result of impaired judgment. The doctor also opined that he had a greater than average lack of ability to delay his reaction to threats or aggressiveness.

Dr. Marianne Seidel, a psychiatrist in Texarkana, also examined Stewart at the request of the trial court to determine his sanity at the time of the slaying. In her report, she stated that while he may have suffered some psychotic symptoms immediately after Vietnam, those symptoms were resolved very early on in his stay at Oakland Naval Hospital in 1969 when he was put on psychotic medications. She was also of the opinion that he "probably was not ever truly schizophrenic," and that at the time of the

shooting, he was not suffering from any psychotic illness. Dr. Seidel specifically stated that in her opinion his behavior was not the result of a momentary psychosis that rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. In the latter respect, she disagreed with Dr. Blackburn's second report.

Stewart filed a motion for acquittal due to mental incapacity which was denied. The day of the trial the State filed a motion in limine to prohibit defense counsel from asking expert witnesses whether Stewart had the purposeful intent to commit murder at the time of the killing. The motion was granted.

At trial, Carrie Newton testified that she was a barmaid in the cafe and viewed the altercation between Stewart and Ragland and the murder. She testified that Ragland did not have a pistol and had walked eight to ten feet toward the front door when he was shot. On cross examination, defense counsel asked her whether the victim had a reputation for violence in the community. She answered that she had not known Ragland to be violent. The State objected on grounds of relevance, and the objection was sustained.

Robert Nelson, who also worked at the cafe, described the shooting at trial. He stated that he did not see Ragland make any threatening moves toward Stewart. Ragland, he testified, was almost at the door of the cafe when he was shot.

Stewart took the stand as part of his defense and testified that his aunt had a relationship with Ragland and that he had seen them have disagreements. The State objected to this on grounds of relevance, and a bench conference was conducted. The State argued that what the defense was trying to offer was evidence of prior bad acts of Ragland which was not relevant. Defense counsel argued that evidence that Stewart observed Ragland hit his aunt established that Stewart had reason to fear Ragland. The trial court ruled that if the defense could show that Ragland had placed Stewart in actual fear by past actions, defense counsel could inquire into prior acts of aggression on the part of Ragland.

Dr. Blackburn then testified as a defense witness that Stewart told him that he was afraid of Ragland because of Ragland's relationship with his aunt. The state objected again, and the trial

court sustained the objection. Dr. Blackburn added that Stewart gave him no other reason why he was afraid of Ragland. The doctor posited that Stewart's "mental defect" prevented him from being able to conform his conduct and formulate the requisite intent at the time he shot Ragland. The doctor was of the opinion that Stewart suffered from a "paranoid personality disorder."

Dr. Marianne Seidel testified on rebuttal that after examining Stewart and reviewing his medical records, she was of the opinion that he appreciated the nature of his conduct and was able to conform his conduct on the day he shot Ragland. On cross examination, the defense asked Dr. Seidel about her report which contained a reference to Stewart's intent at the time of the shooting. The State objected, and a bench conference ensued. The court instructed the defense that it could not ask Dr. Seidel to read to the jury that part of her report which stated that Stewart's behavior did not "appear to have been premeditated but rather a reaction to a perceived threat to his own safety and well-being." The trial court did allow the full report to be proffered.

After the jury retired and per an agreement among counsel and the trial court, defense counsel objected to the trial court's failure to instruct the jury on the affirmative defense of duress. That requested instruction was not proffered and is not part of the record in this appeal. The jury found the appellant guilty of murder in the first degree and sentenced him to 40 years.

I. DURESS INSTRUCTION

Stewart first asserts that the trial court erred in refusing to instruct the jury on the affirmative defense of duress. Specifically, he contends that there was evidence that at the time of the shooting he suffered from an impairment which rendered him unable to control his conduct.

We do not reach this issue because it was not preserved for appeal. The instruction in question was not proffered into the record, and we do not have it before us for our review. This court has stated that it is the appellant's duty to bring up a record sufficient to show that the trial court erred. *Enos* v. *State*, 313 Ark. 683, 858 S.W.2d 72 (1993). In order to preserve an objection to an instruction for appeal, the appellant must make a proffer of the instruction to the judge. *Vickers* v. *State*, 313

Ark. 64, 852 S.W.2d 787 (1993). That proffered instruction must then be included in the record and abstract to enable the appellate court to consider it. *Camp* v. *State*, 288 Ark. 269, 704 S.W.2d 617 (1986). An instruction that is not contained in the record is not preserved and will not be addressed on appeal. *Marcum* v. *State*, 299 Ark. 30, 771 S.W.2d 250 (1989). We further note that objections made to the instructions given or based on an instruction not given are untimely after the jury retires. *See Young* v. *Johnson*, 311 Ark. 551, 845 S.W.2d 509 (1993).

II. EXPERT TESTIMONY ON INTENT

Stewart's next claim of error is that the trial court erred in granting the State's motion in limine which prevented his attorney from questioning the mental health experts on his intent and culpability.

▪ The standard of review for a trial court's ruling on the admissibility of expert testimony is abuse of discretion. *Utley* v. *State*, 308 Ark. 622, 826 S.W.2d 268 (1992). Expert testimony is admissible when it will aid the jury to understand evidence presented or to determine a fact in issue. Ark. R. Evid. 702; *Harris* v. *State*, 295 Ark. 456, 748 S.W.2d 666 (1988). In determining whether expert testimony will aid the trier of fact, the question becomes whether the subject is beyond the ability of a lay person to understand. *Utley* v. *State, supra.*

Stewart was charged with first degree murder for purposely causing the death of Ragland under Ark. Code Ann. § 5-10-102(a)(2) (Supp. 1990). Following his examination by Dr. Blackburn and Dr. Seidel, he moved for acquittal on grounds that he lacked capacity, as a result of mental disease or defect, to conform his conduct to the requirements of law. The motion was denied. The prosecutor then moved in limine to prevent either Dr. Blackburn or Dr. Seidel from testifying as to whether Stewart acted with purpose to cause Ragland's death or, stated another way, whether he lacked the specific intent to do so at the time of the murder. The trial court granted the motion which limited this expert testimony.

Jurisdictions in this country have split over the issue of whether expert testimony on the ability of a defendant to form specific intent to murder is admissible. *See Admissibility of Expert*

Testimony As To Whether Accused Had Specific Intent Necessary For Conviction, 16 ALR 4th 666 (1982). The better view, in our judgment, is that it is not. We recognize that psychiatric testimony concerning whether a defendant has the ability to conform his conduct to the requirements of law at the time of the killing as part of an insanity defense may seem in some cases to approximate testimony on whether the defendant had or did not have the required specific intent to commit murder at a precise time. We draw a distinction between the two categories of testimony, however. A general inability to conform one's conduct to the requirements of the law due to mental defect or illness is the gauge for insanity. It is different from whether the defendant had the specific intent to kill another individual at a particular time. Whether Stewart was insane certainly is a matter for expert opinion. Whether he had the required intent to murder Ragland at that particular time was for the jury to decide.

Other jurisdictions have held that expert testimony on specific intent to murder is inadmissible. *See, e.g., Haas* v. *Abrahamson*, 910 F.2d 384 (7th Cir. 1990); *State* v. *Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (Neb. 1990); *State* v. *Clements*, 789 S.W.2d 101 (Mo. App. 1990); *State* v. *Bouwman*, 328 N.W.2d 703 (Minn. 1982). According to the Nebraska Supreme Court, expert testimony on homicidal intent is merely an expression of an expert on how the jury should decide the case. *State* v. *Reynolds, supra.* We agree. We further agree that the issue of whether the defendant formulated intent to kill is within the capability of lay jurors to decide. *State* v. *Clements, supra.* While expert testimony on whether a defendant lacked the capacity to form intent is probative, we question whether opinion evidence on whether the defendant actually formed the necessary intent at the time of the murder is. *State* v. *Bouwman, supra.*

Nor do we believe that Ark. R. Evid. 704 allowing opinions embracing an ultimate issue controls this matter. The threshold question under Rule 704 is whether the testimony is otherwise admissible. Under Ark. R. Evid. 702 expert testimony must assist the trier of fact to be probative. Under Ark. R. Evid. 401-403, it must be relevant and not misleading or confusing to the jury. Expert opinion on whether Stewart killed Ragland purposely on March 17, 1990, at least had the potential for being misleading and confusing to the jury.

The trial court did not abuse its discretion in refusing to permit the expert opinion concerning the ability of Stewart to form the requisite mental intent at the time he shot Ragland. We affirm its ruling on this point.

III. INQUIRY INTO VIOLENT ACTS

Stewart's final point is that the trial court erred in refusing to allow an inquiry into specific instances of violent or aggressive conduct on the part of Ragland, after the State had introduced evidence of Ragland's propensity for peacefulness. Ragland claims that the State's witnesses, Carrie Newton and Robert Nelson, testified as to Ragland's character trait for peacefulness and argues that this testimony was premature because the defense had not offered evidence that Ragland was the aggressor. At the very least, Stewart contends, this testimony opened the door for contravening testimony on Ragland's aggressiveness.

Under Ark. R. Evid. 404 (a)(2), evidence of a pertinent trait of a victim's character is admissible. The State, however, is limited in character evidence about the victim under 404(a)(2) to rebutting what the defense has presented. In cases where the character of the victim is an essential element of the defense, Ark. R. Evid. 405(b) permits inquiry into specific instances of the victim's conduct. The trial court concluded that it did not believe that evidence of the victim's character trait for aggressiveness was relevant under these facts. This ruling was a matter for the trial court's discretion and is supported by the facts.

Here, the victim was shot in the back by Stewart. Irrespective of any penchant for violence that Ragland may have had, there was testimony that he was walking away from Stewart when he was shot. We have held that where a victim was shot in the back, a trial court did not err in refusing to permit defense counsel to delve into prior acts of aggression by the victim. *Heinze* v. *State*, 309 Ark. 162, 827 S.W.2d 658 (1992). The same rationale applies to the case at bar. The fact that the State may have first "opened the door" regarding the victim's character does not overcome the problem of relevancy under these circumstances. Nor do we consider the testimony of Newton and Nelson on Ragland's propensity for peacefulness to be sufficiently preju-

dicial under these circumstances to warrant a new trial due to its irrelevancy.

There was no error in the trial court's ruling.

Affirmed.

Kenneth Thomas TRIMBLE *v.* STATE of Arkansas

CR 93-196 871 S.W.2d 562

Supreme Court of Arkansas
Opinion delivered February 28, 1994
[Rehearing denied March 28, 1994.]

Jeff Rosenzweig, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This is a capital murder case arising out of the theft of hunting dogs belonging to Raymond Jacobs and the murder of Jacobs. The appellant, Kenneth Thomas Trimble, and John Young were both charged with capital murder. Trimble was tried first, convicted of the crime, and sentenced to life imprisonment without the possibility of parole. He appeals, raising seven points, none of which has merit. The judgment of conviction is affirmed.

The procedural history of this case involves both Trimble and John Young and is somewhat convoluted, which is part of the basis for Trimble's appeal. Raymond Jacobs raised hunting dogs at his home in Benton. On April 28, 1992, Young delivered four or five dogs to Jacobs, and Jacobs's records indicate that Young sold the dogs to him. On the evening of May 8, 1992, Jacobs's body was found in his barn at his residence. He had been stabbed multiple times with a pitchfork and bludgeoned with a hammer. Blood was found on the ground leading to the dog pens. Several of his dogs were missing.

Following the initial crime scene investigation, Saline County Sheriff's deputies travelled to Young's residence in Missouri and talked with him. At the time Young was not a suspect. Young told the investigators that he and Trimble had been at Jacobs's residence on May 8, 1992, and that he had picked up four dogs. Young said that Jacobs was alive when he left.

On May 11, 1992, Young was interviewed again. This time, he was informed that he was a suspect and was read his *Miranda* rights. On May 12, 1992, an information was filed charging Trimble and Young with theft of property, to wit, the dogs. On June 1, 1992, the charge was amended to capital murder and robbery. On June 4, 1992, Young was granted immunity on the capital murder charge by the circuit judge in return for his agreement to supply "complete and truthful information and data" to those investigating Jacobs's death.

After Young was granted immunity, he gave a statement

about events surrounding Jacobs's murder and stated that it was Trimble who killed Jacobs. Afterwards, Young took investigators to various locations in North Central Arkansas to recover physical evidence which included the blood-stained clothing of Young and Trimble, the collars of the stolen dogs, and the hammer used in the slaying. Young told investigators that he and Trimble had purchased new clothing at a Wal-Mart store in Clinton. This enabled the investigators to locate Crystal Shaffer, a Wal-Mart employee who sold the clothing.

Following Young's immunity grant and statement, Trimble was advised by his attorney to give his own statement. On June 23, 1992, Trimble gave a videotaped statement to Saline County Sheriff's deputies in which he admitted going to the Jacobs residence with Young and that Young intended to steal the dogs. He further admitted registering in a motel under a false name. He denied, though, that he participated in the murder of Jacobs and claimed that the murder was committed solely by Young. Trimble said that Young had been in the barn alone with Jacobs and came out with blood on his clothing. He also said that he got blood on his clothes after Young grabbed him. On the drive back to Missouri, Trimble told the deputies that Young threw the bloody clothes, dog collars, and hammer out the window. Trimble said he bought new clothes at a Wal-Mart store.

Following a hearing on August 24, 1992, Young's immunity was revoked by the circuit judge for inconsistent statements to the prosecutor and for failure to cooperate. Trimble then filed a motion to suppress his statement, claiming that it had been coerced because he only gave it after Young had been granted immunity and had made a statement implicating him and raising the issue of ineffective counsel.

On August 17, 1992 — the day before the trial began — a motion requesting that the circuit judge recuse because his son, John Lee Cole, was employed by the prosecuting attorney's office was heard. The judge concluded that his son, age 20, was working merely as an errand boy in the hot checks division during the summer and did not live at home. On that basis, he denied the motion.

Also at that hearing, the circuit judge brought up the matter of the State's revoking the grant of immunity to Young. The

prosecutor stated that Young would not be called as a witness against Trimble and that the State would not use any physical evidence recovered from Young after he was granted immunity on June 4, 1992.

The circuit judge then heard Trimble's motion to suppress his statement on grounds of coercion effected by Young's grant of immunity and statement and by ineffective counsel. Trimble testified that under these circumstances his attorney advised him that he had no choice but to give a statement. The circuit judge found no coercion and denied the motion.

The case was tried over two days on August 18-19, 1992. Trimble was convicted of capital murder and sentenced to life without parole.

On September 14, 1992, Trimble filed a motion for new trial alleging juror misconduct, the failure of Circuit Judge John Cole to recuse, and an improper grant of immunity to Young. In support of his motion, Trimble offered four affidavits: (1-2) Mark Marcus and David Hunter, who stated that they saw the son of the victim, Jeff Jacobs, talking with members of the jury; and (3-4) Kenneth Trimble and Lora Trimble, who stated that they were seated behind a person who was later selected as jury foreman, Michael Brown, and who said that Trimble looked "old enough to know better." Testimony was taken from the jury foreman and the son of the victim, both of whom denied the allegations.

On October 21, 1992, the circuit judge ordered Trimble to testify at Young's trial, which commenced that date. Trimble did so and testified essentially to what he said in his videotaped statement which was used against him at his own trial. Young was convicted of capital murder.

On October 26, 1992, Trimble filed an amended motion for new trial and a petition for writ of error *coram nobis* on grounds that at his trial, the State introduced his statement against him and labeled it as false. At Young's trial, however, he was ordered to testify. Trimble contended that if the State believed his statement was a lie at his trial, it either offered false testimony at Young's trial or learned after the first trial that Trimble's statement was true.

On November 9, 1992, the circuit judge denied Trimble's motion for a new trial and petition for a writ of error *coram nobis*.

I. SUFFICIENCY OF THE EVIDENCE

We first consider whether the evidence was sufficient to support the verdict. The standard of review for determining the sufficiency of the evidence is clear and was recently set out in *Sheridan* v. *State*, 313 Ark. 23, 30-31, 852 S.W.2d 772, 775-776 (1993):

> 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. *Brown* v. *State*, 309 Ark. 503, 832 S.W.2d 477 (1992); *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. *Lukach* v. *State*, 310 Ark. 38, 834 S.W.2d 642 (1992); *Smith* v. *State*, 308 Ark. 390, 824 S.W.2d 838 (1992); *Williams* v. *State*, 304 Ark. 509, 804 S.W.2d 346 (1991). Circumstantial evidence may constitute substantial evidence. *Hill* v. *State*, 299 Ark. 327, 773 S.W.2d 424 (1989). To be sufficient to sustain a conviction, the circumstantial evidence must exclude every other reasonable hypothesis consistent with innocence. *Bennett* v. *State*, 308 Ark. 393, 825 S.W.2d 560 (1992). This becomes a question for the fact finder to determine. *Id.* In determining whether there was substantial evidence, the court reviews the evidence in the light most favorable to the appellee. *Pope* v. *State*, 262 Ark. 476, 557 S.W.2d 887 (1977). Guilt may be proved, even in the absence of eyewitness testimony, and evidence of guilt is not less because it is circumstantial. *Smith* v. *State*, 282 Ark. 535, 669 S.W.2d 201 (1984). *See also Standridge* v. *State*, 310 Ark. 408, 837 S.W.2d 447 (1992); *Abdullah* v. *State*, 301 Ark. 235, 783 S.W.2d 58 (1990).

It is readily apparent that the evidence in support of the verdict was substantial, albeit circumstantial. Trimble was familiar with the dealings between Jacobs and Young and Young's dealings with three prior dog owners. He accompanied Young to

Jacobs's house knowing, by his own admission, that Young intended to steal the dogs from Jacobs. He later checked into a motel with Young, using a false name. His statement also supports the verdict with respect to the planning and travel to Benton, the initial attempt to steal the dogs, and later the attempt of the two men to get rid of their bloody clothes, the dog collars, and the murder weapon as well as Trimble's purchase of new clothes at the Wal-Mart store. His contention that the murder was perpetrated by one person is contrary to the physical evidence which reveals multiple blows from two weapons. Dr. William Sturner, Chief Medical Examiner for the Arkansas Crime Lab, found as many as 40 blows inflicted on Jacobs. The wounds were lacerating wounds and blunt force wounds suggesting two different weapons. A pitchfork was found under Jacobs's body. Trimble, in his statement, referred to a hammer as the weapon used by Young. The jury clearly was not bound by Trimble's version of the murder itself and based on the evidence presented could have concluded that Trimble was lying when he said he was not involved in the murder. *See Heard* v. *State*, 284 Ark. 457, 683 S.W.2d 232 (1985). We find no basis for reversal on this point.

II. PROSECUTORIAL MISCONDUCT

Trimble's next asserted error is that the circuit judge abused his discretion in refusing to grant his motion for new trial due to prosecutorial misconduct. Specifically, Trimble points out that in closing arguments, the prosecutor labeled his version of Jacobs's death as "hogwash" and added that Trimble "lied to save his life." However, then the prosecutor obtained a court order that Trimble testify at Young's trial, where Trimble gave the same version of events as he did at the first trial. Trimble argues that the prosecutor either knew that his statement was the truth and lied when he labeled it as untrue or, alternatively, that between Trimble's trial and Young's trial, the prosecutor learned that Trimble had been telling the truth and failed to support his motion for a new trial. Trimble adduces Rule 3.3 of the Rules of Professional Conduct prohibiting a lawyer's introduction of false evidence in support of his argument.

In reading the prosecutor's closing argument at the Trimble trial, it is clear that it was the claim that Young acted alone in killing Jacobs which the prosecutor contended was a lie. The

prosecutor, nevertheless, believed that portion of Trimble's statement concerning the planning of the crime and the events leading up to the murder and the aftermath of the murder as well. We know of no reason why a prosecutor should be foreclosed from contesting part of a defendant's statement which the prosecutor believes to be untrue. What Trimble advocates is that whenever a defendant gives a statement detailing a crime but denying ultimate culpability, the prosecutor when using the statement at trial cannot contest that denial. Such a ruling would unduly hamstring prosecutors and place them in the untenable position of gauging credibility on all aspects of a witness's statement before offering that witness's testimony. We know of no law requiring such. Trimble's argument has no merit.

III. ILLEGAL GRANT OF IMMUNITY TO YOUNG

Trimble also contends that the circuit court erred in refusing to grant his motion for new trial due to the acquisition of evidence against him occasioned by an illegal grant of immunity to Young. In support of this point, he offers that the grant of immunity to Young was improper because it was "full transactional immunity" while the applicable statute, Ark. Code Ann. § 16-43-601 (1987), only permits "use immunity." In addition, he argues that had this grant of immunity not been made to Young, Young would not have cooperated with the authorities and without Young's help, the police would not have amassed the evidence which was necessary to convict Trimble. The precise items of evidence listed in Trimble's brief which were gathered from Young are the name of the Wal-Mart store in Clinton, the clerk's name at the Wal-Mart store, and the name of the motel in Benton. No other contested evidence is listed in Trimble's brief. Trimble concludes by advancing the argument that this evidence is tainted irrespective of Trimble's later statement which covers the same ground. Trimble notes on this point that the prosecutor assured the circuit court that he would not use any evidence or testimony gleaned from Young after the grant of immunity.

As a threshold matter, we conclude that Trimble has no standing to contest the kind of immunity granted to Young. *See generally Vickers* v. *State*, 313 Ark. 64, 852 S.W.2d 787 (1993); *Manatt* v. *State*, 311 Ark. 17, 842 S.W.2d 845 (1992). Information gathered by virtue of Young's immunity, however,

is a different matter, at least with respect to the use of such evidence against the person who was granted immunity. *See United States* v. *Brown*, 801 F.2d 352 (8th Cir. 1986). Here, that person is Young. Yet, the prosecutor also advised the circuit judge that he would not use the Young evidence against Trimble. According to Trimble, he did exactly that when he used the evidence gathered at the Wal-Mart store and the Benton motel.

We do not consider this circumstance, though, to be a basis for reversal. Trimble made no objection to the evidence alleged to be dubious when offered so as to alert the circuit judge to its questionableness and to preserve the matter for appeal. *See Tucker* v. *State*, 313 Ark. 624, 855 S.W.2d 948 (1993); *Heywood* v. *State*, 297 Ark. 218, 760 S.W.2d 218 (1988). The point, accordingly, is not reviewable.

IV. RECUSAL

Trimble's third point is that the circuit judge erred in not recusing because his son worked for the prosecutor during the summer of the trial. According to statements made by counsel at hearing, the judge's son, John Lee Cole, who was age 20 at the time, worked in the hot check division of the prosecutor's office during the summer of 1992. He was an errand boy and did not live in the judge's home. Trimble argues that even if the judge's initial decision not to recuse was proper, the judge should have recused after allegations of the prosecutor's misconduct in this case were brought to light. Trimble further posits that the situation was such that it was reasonable to question the judge's impartiality under these circumstances which violates Canons 2 and 3C(1) of the Arkansas Code of Judicial Conduct. He concludes that the judge's refusal to disqualify prevented him from receiving a fair trial.

Canon 2 provides generally that a judge should avoid the appearance of impropriety. Canon 3C(1) of the Judicial Code is more specific:

> A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a

party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

That canon does not precisely cover the conduct complained of here.

We agree with Trimble that the appearance generated by the employment of a judge's son at the prosecutor's office is none too good. At the same time, we are not prepared to say that the canons have been violated or that the conviction must be reversed. Other jurisdictions have considered the bias occasioned by the employment of a judge's son, but have not found that that sole circumstance was sufficient to reverse a conviction on grounds of lack of fairness. *Wilmington Towing Co.* v. *Cape Fear Towing, Co.*, 624 F.Supp. 1210 (EDNC 1986) (judge not disqualified by son's summer internship in law firm representing a party); *State* v. *Loera*, 530 So.2d 1271 (La.App. 2 Cir.

1988) (judge not required to recuse in criminal case where his daughter was an assistant district attorney in the office prosecuting the case but was not involved in this specific case); *State* v. *Logan*, 236 Kan. 79, 689 P.2d 778 (1984) (trial judge's son was an attorney in the district attorney's office but this fact did not require reversal).

Disqualification matters under Canon 3C(1) are discretionary with the trial judge. *Roe* v. *Dietrich*, 310 Ark. 54, 835 S.W.2d 289 (1992). The son's summer employment in and of itself does not warrant reversal. No additional basis for recusal or prejudice to Trimble is presented apart from his general disagreement with some of the judge's rulings. We find no abuse of discretion in the circuit judge's refusal to disqualify.

V. INEFFECTIVE COUNSEL

For his next point, Trimble urges that his statement should have been suppressed because it was obtained as the result of coercion and ineffective assistance of counsel. Because the issue of ineffective counsel was raised as part of the pretrial motion to suppress, we will consider it.

We do not agree, however, with Trimble's contention. We have no doubt that the advice of Trimble's counsel to give a statement after Young's grant of immunity and statement was tactically made. We have made it clear in the past that we will not make a finding of ineffectiveness when a strategic decision is questioned on review. *Missildine* v. *State, supra; Burnett* v. *State*, 310 Ark. 202, 832 S.W.2d 848 (1992). Moreover, trial counsel had no way of knowing that Young's immunity would later be revoked.

We also observe that the mere fact that Young was given immunity and made a statement did not force Trimble to do the same. Indeed, he was free not to do so but decided, on advice of counsel, to tell his side of the story. Young's immunity was subsequently revoked but that has no bearing on the validity of Trimble's statement. Young's cooperation may have been a catalyst for Trimble's own statement but this does not translate into coercion or ineffectiveness on the part of counsel.

VI. MANSLAUGHTER INSTRUCTION

Trimble further argues that the circuit court erred in refusing to instruct the jury on manslaughter as a lesser included offense of capital murder under Ark. Code Ann. § 5-10-104(a)(4) (1987). The rational basis asserted by Trimble for giving this instruction is that the jury could have found him criminally negligent because he went to Jacobs's house with the knowledge that Young was going to steal dogs, and he allowed Young to go into the barn with the victim.

We agree with Trimble that whenever there is a rational basis for giving an instruction, it must be given. *Rainey* v. *State*, 310 Ark. 419, 837 S.W.2d 453 (1992); *Sanders* v. *State*, 305 Ark. 112, 805 S.W.2d 953 (1991). But we cannot agree that the manslaughter instruction premised on Trimble's negligence is appropriate under these facts. The evidence did not suggest that Jacobs was killed for any purpose other than to facilitate the theft of his dogs. Trimble, by his own admission, knew about the proposed theft in advance and drove with Young to Jacobs's house for that purpose. Theft is an intentional act from which violence might easily follow. There is no factual basis to support a crime based on negligence. The circuit court correctly refused to give the instruction.

VII. JUROR MISCONDUCT

Trimble claims juror misconduct in that after trial four individuals came forward and offered affidavits stating that one member of the jury expressed opinions about the case before he was selected and that at least one member of the victim's family had talked with a juror during trial. Trimble concedes that the jury foreman, Michael Brown, and the victim's son, Jeff Jacobs, denied the allegations of misconduct under oath, but argues that the circuit judge's decision to deny the motion for new trial was tainted by his refusal to recuse.

Jury misconduct is a basis for granting a new trial under Rule 59 (a)(2). *See Hacker* v. *Hall*, 296 Ark. 571, 759 S.W.2d 32 (1988). The decision whether to grant a new trial under Rule 59 (a)(2) is discretionary with the trial judge who will not be reversed absent an abuse of that discretion. *Diemer* v. *Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993). The burden

of proof in establishing jury misconduct is on the moving party. *Id.* The moving party must show that the alleged misconduct prejudiced his chances for a fair trial and that he was unaware of this bias until after trial. *Owens* v. *State*, 300 Ark. 73, 777 S.W.2d 205 (1989); *Hendrix* v. *State*, 298 Ark. 568, 768 S.W.2d 546 (1989).

While we have some doubt that the information surrounding the allegations of misconduct were only discovered *after* trial, we will address the merits of the argument. The issue of misconduct was contested. The juror alleged to have made a biased statement about Trimble denied it, and one of the victim's sons testified that he did not shake a juror's hand or talk to jurors. We further note that the four affiants making the charges were either family of Trimble or related by marriage.

Under these circumstances, we have no hesitancy in deferring to the decision of the circuit judge. *See Porter* v. *State*, 308 Ark. 137, 823 S.W.2d 846 (1992).

The record has been examined for other error in accordance with Ark. Sup. Ct. R. 4-3(h), and no reversible error has been discovered.

Affirmed.

Alvin McKEE *v.* STATE of Arkansas

CR 93-1151 871 S.W.2d 351

Supreme Court of Arkansas
Opinion delivered February 28, 1994

Green & Henry, by: *J. Bradley Green*, for appellant.

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

PER CURIAM. The appellant Alvin McKee was charged with theft of property, a Class C felony, in that he exercised unauthorized control over property in the excess of $200.00 but less than $2500.00. It was also alleged that he should be sentenced as an habitual offender.

In addition to the Class C theft of property charge, there were numerous other charges pending against Mr. McKee, including four counts of escape. Mr. McKee pleaded guilty to the one count of Class C theft of property and four counts of escape. In exchange for the plea agreement several other charges against Mr. McKee were dropped. He was sentenced to twenty years imprisonment for the theft of property and five years for the four counts of escape, for a total of twenty-five years imprisonment. He was not sentenced as an habitual offender. He filed a petition to correct an illegal sentence which was denied without comment. Mr. McKee brings this appeal.

Mr. McKee was sentenced as though his theft of property were a Class B felony. Although the information and judgment and commitment order classifies the theft of property as a C felony, Mr. McKee's signed guilty plea statement characterized the theft of property as a Class B felony with a possible sentence of five to twenty years imprisonment. At the plea hearing, the court called the charge a "B felony" and told Mr. McKee that he could be sentenced from five to twenty years. The court said,

"And you know that you are charged with a count of theft which is a B felony, and carries five to twenty years." Mr. McKee answered, "Yes, sir."

A circuit court may correct an illegal sentence at any time pursuant to the provisions of Ark. Code Ann. § 16-90-111(a) (Supp. 1993). An illegal sentence is one that is illegal on its face. *Blanks* v. *State*, 300 Ark. 398, 779 S.W.2d 168 (1989). The judge never made an official pronouncement of sentence orally. The judgment and commitment form reflected that Mr. McKee was convicted of a Class C felony, and that is what he was charged with in the information. Since Mr. McKee was not charged with a Class B felony, he could not have been convicted of one. As this court stated in *Hedrick* v. *State*, 292 Ark. 411, 730 S.W.2d 488 (1987), "Conviction upon a charge not made would be sheer denial of due process." *See also Hagen* v. *State*, 315 Ark. 20, 864 S.W.2d 854 (1993). Mr. McKee should have been sentenced for a Class C felony, the maximum sentence being ten years. Ark. Code Ann. § 5-4-401(4). Therefore, his sentence for theft of property is reduced to ten years.

Reversed.

CORBIN, J., not participating.

MEMPHIS PUBLISHING COMPANY *v.* Honorable C. David BURNETT, Judge of the Circuit Court of Crittenden County

94-201 871 S.W.2d 359

Supreme Court of Arkansas
Opinion delivered March 1, 1994

Banks, Dodson & Goodhart, by: *Charles A. Banks*; and *Stephen P. Hale*, for petitioner.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Acting Deputy Att'y Gen., for appellee.

PER CURIAM. Petitioner Memphis Publishing Company petitions this court to issue a writ of mandamus to Circuit Judge C. David Burnett to conduct *voir dire* of prospective jurors and all other proceedings in open court. The allegation is made that *voir dire* has been closed to the public. Counsel for the parties argued the matter before this court on this date. At oral argument this court was advised that *voir dire* was now completed. Memphis Publishing stated that it desired a release of the court reporter's *voir dire* tapes or, alternatively, a transcription of the tapes. No request for the tapes or transcriptions was made in Memphis Publishing's petition.

We have previously decided that a member of the news media, though not a party to the litigation, has standing to question an exclusion from *voir dire. Commercial Printing Co. & Tosca* v. *Lee*, 262 Ark. 87, 553 S.W.2d 270 (1977). We have also determined that we have jurisdiction to decide the issue, though voir dire is concluded, because the issue may well occur again and yet entirely evade review. *Id.*

The question of an open voir dire has been resolved by this court. *Taylor* v. *State*, 284 Ark. 103, 679 S.W.2d 797 (1984); *Commercial Printing Co. & Tosca* v. *Lee, supra.* We have premised our decisions on the guarantee of a public trial in the state and federal constitutions and in our statutory law. U.S. Const. amend.

6; Ark. Const. art. 2, § 10; Ark. Code Ann. § 16-10-105 (1987). In *Lee*, we discussed what occurs at *voir dire* and why it should be an open process:

> Normally, lawyers ask prospective jurors if they know anything about the facts of the case — if they have talked with any person concerning the facts who purports to be a witness — if they are represented by one of the attorneys involved — their feelings about the possible punishment that might be imposed — or if there is any reason why they could not give both the state and the defendant a fair and impartial trial.
>
> . . . .
>
> Certainly members of the public, probably including members of a victim's family, have the right to hear the *voir dire* examination of individual jurors. This may well have a salutary effect. Cases have been reversed in this court because of answers given by prospective jurors on *voir dire* which subsequent investigation established were false, or at least incorrect, and which might have well disqualified the prospective juror.
>
> . . . .
>
> As stated previously, we have only one question before us, viz, was the court's order excluding the public and press from the *voir dire* valid? It is clear by what has been said that we have answered with an emphatic "No!"

262 Ark. at 93-95, 553 S.W.2d at 273-274.

The State cites *Arkansas Television Co.* v. *Tedder*, 281 Ark. 152, 662 S.W.2d 174 (1983), to bolster its position that this is a matter of discretion in the trial court. We disagree that *Tedder* applies. That case concerned a *pretrial* suppression hearing, not jury selection which we have emphasized to be a stage of the proceedings where openness is particularly appropriate for the reasons already stated. *Commercial Printing Co.* v. *Lee, supra.*

[redacted] The trial court was in error in excluding the public and Memphis Publishing from *voir dire* in this trial. We do not hold that it was error to conduct *voir dire* out of the presence of

other members of the venire.

Error declared.

HOLT, C.J., dissents.

CORBIN, J., not participating.

JACK HOLT, JR., Chief Justice, dissenting. Under the facts before us, the right to a fair trial should take precedence over the public's right to access to voir dire proceedings, and for this reason I dissent.

The Petitioner has requested that this Court issue a writ of mandamus to Circuit Judge C. David Burnett to conduct voir dire of prospective jurors and all other proceedings in open court and has presented a partial transcript of the court proceedings in support of its petition. Granted, the question of open voir dire has been passed upon by this Court on several occasions. *Taylor* v. *State*, 284 Ark. 103, 679 S.W.2d 797 (1984) and *Commercial Printing Co. & Tosca* v. *Lee*, 262 Ark. 87, 553 S.W.2d 270 (1977). In these cases, we oversimplified the issues and gave short shrift to a defendant's right to receive a fair trial, creating what appears to be an absolute right to open hearings regardless of the circumstances.

The petition before us presents in the starkest terms the opposition of two values of immeasurable worth in our national history and our legal culture — the right of a free press to observe and report criminal trials and the right of a criminal defendant to a fair trial. Both concepts are deeply rooted in the Anglo-American experience, but when they conflict, one must yield to the other.

In my opinion, this court has made the wrong decision in declaring error and, in so doing, has once again elevated a qualified right into an absolute right. As the United States Supreme Court declared in *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966): "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused."

The United States Supreme Court has, in the past decade, recognized the qualified right of the press to observe criminal trials. In *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), the Court held that open judicial proceedings were implicit in the First Amendment guarantee of the freedom of the press. And in *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986), the Court, considering the right of access to preliminary hearings, ruled that a judge must have evidence of an overriding interest — such as a defendant's right to a fair trial — that cannot be effectively protected except by closing the courtroom.

Such a case is now before us. This court should not follow the absolute rule laid down in *Commercial Printing Co. & Tosca* v. *Lee, supra*, but should apply a more flexible, nuanced balancing test as set forth in "closed court cases." In *Arkansas Television Co.* v. *Tedder*, 281 Ark. 152, 662 S.W.2d 174 (1983), we held that, with regard to reviewing a decision by the circuit court to close pretrial proceedings in criminal cases, such as a suppression hearing, the appropriate standard to apply is a flexible balancing test. We emphasized that the right of public access is not absolute but must be balanced against the defendant's right to a fair trial. To protect the two competing interests, we held that the proponent of closure must demonstrate a substantial probability that irreparable damage to the defendant's fair trial will result from an open hearing and that alternatives to closure will not adequately protect the right to a fair trial. *See also Arkansas Newspaper, Inc.* v. *Patterson*, 281 Ark. 213, 622 S.W.2d 826 (1984). Although these cases pertain to pretrial proceedings, I believe that the same balancing test is appropriate for other phases of a criminal trial.

Here, both the State and the defendant sought closure of the trial, mindful of the fact that there was a substantial probability that irreparable damage to the defendant's fair trial could result from an open proceeding and that alternatives to closure would not adequately protect his right to a fair trial. The court agreed and noted that "I had a couple of jurors express concern about — anonymity requesting that they remain anonymous or their identity not be revealed in the media." The trial court further remarked:

It would be my finding based upon the test laid down in

Tedder, a two-prong test that one, irreparable damage will occur to the defendant's right to a fair trial. There is absolutely no question but what if I allowed the 60 odd representatives of the media to crowd into a small room in the back to hear voir dire questions, extensive voir dire questions, the space alone, the carnival atmosphere would just be enhanced. Further, the sensitive nature of the questions that are being asked of prospective jurors in this case simply should not be printed or publicized to the public at large. It is difficult at best. It's almost impossible at this time to find 12 people that can honestly set aside what they might have read, heard or seen about this case in the press. The right of a fair trial as far as this Court is concerned supersedes by far the right of the press to access. And I think counsel will join with the Court. This is not a one-sided deal. I would even prefer to conduct the voir dire as we normally do in the presence of every one here. It would have been a lot simpler for me, we wouldn't have had to set up two pieces of equipment. We wouldn't have to move back and forth. We wouldn't have to take near as much time. But the defendants, in my estimation, would receive irreparable harm from an open voir dire where every member of the potential jury panel would repeatedly hear questions that may reinforce biases or prejudice that may reinforce preconceived notions or ideas, and it's absurd.

And point two, in my estimation, I bet there are no adequate alternatives for closure of the voir dire at this time. And those will be my findings. Gentlemen, if you care to add anything to it that you see facilitates the voir dire in this fashion, I'll be glad to hear your comments.

I'm also going to add that the method and manner that we have selected to conduct the very sensitive voir dire in a case of this magnitude I've never encountered one like this. In fact, I've never encountered the multitudes of motions and side issues in any case I've ever handled. We have elected to conduct the voir dire in this fashion to relieve the prospective jurors of that normal anxiety that all of them have in an ordinary simple case.

With this case the remedy sought by the state, the penal-

> ties that are being sought, to ask laypeople to come in from their work, their home, their normal pursuits and to be bombarded by very sensitive questions, to where they have to verbalize their innermost feelings in front of 200 people, the eyes of the cameras, the eyes of the world, to me that is simply unreasonable to even expect people to have to respond under those circumstances. And I am very strongly finding that the Tedder test is easily met by the circumstances of this case.

Simply put, the trial court did not abuse its discretionary powers when it applied an appropriate balancing test, weighing the defendant's right to an open trial against the public's right to access, and rightfully found in favor of a fair trial. For these reasons, I respectfully dissent.

Bill D. HENDRICKSON *v.* STATE of Arkansas

CR 93-898 871 S.W.2d 362

Supreme Court of Arkansas
Opinion delivered March 7, 1994

[redacted]

Meredith Wineland, for appellant.

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

JACK HOLT, JR., Chief Justice. The appellant, Bill D. Hendrickson, was found guilty of possession of cocaine with intent to deliver and was fined $50,000 and sentenced to life imprisonment. He was also found guilty of possession of marijuana with intent to deliver, possession of LSD, possession of drug paraphernalia, and being a felon in possession of a firearm, for which he was fined a total of $105,000 and sentenced, respectively, to twenty, ten, ten, and six years in prison. The trial court

ordered that the terms run consecutively.

On appeal, Hendrickson raises three points for reversal: (1) whether the trial court erred in refusing to sever the firearms charge from the drug offenses; (2) whether the evidence was sufficient to sustain his convictions; (3) whether the trial court erred in failing to strike the testimony of a defense witness and to admonish the jury regarding an improper prosecutorial implication. None of Hendrickson's arguments has merit, and we affirm the judgment of the trial court.

On February 19, 1993, Director Roger Walls of the Drug Task Force for the Seventh Judicial District of Arkansas, accompanied by Task Force agents and Saline County sheriff's deputies, executed a warrant at Hendrickson's residence in Benton. When the authorities arrived, Hendrickson was in the house, along with his son, Billy, Jr.; his daughter, Mandi Lewis; her minor child; and Hendrickson's companion, Marsha Pinson.

A room-by-room search was made, and, according to the affidavit filed by Drug Task Force Supervisor John Garner, the agents located and seized the following:

> a large quantity of green vegetable material, consistent with marijuana, in excess of ten (10) pounds, a lighted terrarium which contained several live plants consistent with marijuana, a quantity of white powder believed to be cocaine, in excess of five (5) ounces, a Bible containing seventy-nine squares containing LSD, twenty-two (22) firearms (pistols, rifles, semi-automatic machine pistols, and shotguns), one of which had been defaced by having the serial number filed off, and a quantity of drug-related paraphernalia, i.e., smoking devices, hemostats, cigarette papers, syringes, vitamin B, plastic bags, a vacuum sealing machine, mirrors with razor blades and short straws on them, and scales.

Upon Hendrickson's arrest, the affidavit noted, a substance believed to be cocaine was found on his person. When the officers ran a check on the suspect, the report showed that Hendrickson was a convicted felon, having been convicted in 1984 of a violation of the Uniform Controlled Substance Act and sentenced to seven years in the Arkansas Department of Correction.

The report also indicated that he had been arrested on drug-related charges in Texas in 1990.

At a hearing before the trial began on April 15, 1993, counsel for Hendrickson urged that, in order to avoid prejudice with respect to the felon-in-possession charge, it would be "proper" to conduct "two jury trials and two separate hearings." The State maintained that "bifurcation is always required," and the trial court agreed, ruling that the felon-in-possession charge would not be presented to the jury until after the return of verdicts on the drug charges.

Twenty-five firearms that had been seized in Hendrickson's house were introduced during the State's case-in-chief, but no mention of the felon-in-possession charge was made. Following the return of guilty verdicts on the drug charges, the trial court informed the jury of its duty to consider the felon-in-possession charge, and that portion of the trial proceeded. Again, the jury rendered a verdict of guilty. Hendrickson was sentenced to the terms set forth above and filed a notice of appeal.

I. Sufficiency of the evidence

Although Hendrickson has raised the issue of sufficiency of the evidence as his second point for reversal, this court must consider it before addressing other points on appeal. *Gunter* v. *State*, 313 Ark. 504, 857 S.W.2d 156 (1993). The issue was preserved by timely motions for a directed verdict, which amount to challenges to the sufficiency of the evidence. *Scroggins* v. *State*, 312 Ark. 106, 848 S.W.2d 400 (1993).

[redacted] The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, either direct or circumstantial. *Langley* v. *State*, 315 Ark. 472, 868 S.W.2d 81 (1993). Substantial evidence is evidence that is forceful enough to compel a conclusion one way or the other and that goes beyond suspicion or conjecture. *Banks* v. *State*, 315 Ark. 666, 869 S.W.2d 700 (1994).

[redacted] In his argument, Hendrickson offers various purportedly exculpatory "facts" to be weighed against the evidence presented at trial by the State. This court, however, views only the evidence that is most favorable to the jury's verdict and does

not weigh it against other conflicting proof favorable to the accused. *Coleman* v. *State*, 314 Ark. 143, 860 S.W.2d 747 (1993).

Hendrickson insists that there was "absolutely no evidence" to link him to the drugs and guns seized at the house other than a billfold and driver's license discovered in a downstairs bedroom and that it was "absurd speculation" to conclude that the location of those items indicated that the bedroom was his. At most, he contends, all that was established by the State was the fact that he was present along with four other persons at the time the premises were searched, yet he concedes in his brief that the building to which the search warrant was delivered was "Bill Hendrickson's house."

The State presented overwhelming evidence at trial of Hendrickson's guilt. Both Randy Lewis and Mandi Hendrickson Lewis, his son-in-law and daughter, testified that the house that was raided by Drug Task Force agents was the appellant's residence. Task Force Director Robert Walls stated that when he and his team of officers entered the house on February 19, 1993, Hendrickson was in the house together with two females, a young man, and a small child.

Director Walls personally conducted a search of the front bedroom on the ground floor of the house and found, in addition to the billfold and driver's license, men's clothing and certificates hanging on the wall bearing Hendrickson's name. Further, Mandi Lewis testified that the downstairs front bedroom was her father's and that he used and had clothing hanging in that room. She said, as well, that Hendrickson also used the entire upstairs of a new addition to the house as a bedroom.

In the downstairs front bedroom, Director Walls discovered scales, a green vegetable substance, a cylinder of some sort containing what appeared to be marijuana, a vacuum sealer, a bong pipe, a white powder substance, a bag containing a substance, two loaded pistols, and a rifle. Officer Henry Efird testified that he found a tray with white powder residue in the bedroom closet. Officer Tim Osborne stated that in the bedroom he discovered a grinder used for reducing rock cocaine to powder form, insulin syringes, and seventy-nine doses of LSD inside a New Testament Bible.

In the upstairs bedroom, Officer Efird found two loaded shotguns, a heater and grow-lights shining on "fully green and growing" marijuana plants estimated to be about three or four months old, twelve bags of green vegetable matter, a tray with a straw and two razor blades on it, scales used for weighing marijuana, and a marijuana seed separator. In a compartment beneath the floor at the top of the stairs, Officer Efird testified, he discovered a tool box containing several vacuumed bags of green vegetable matter and a number of guns.

The Saline County jailer, Lee Lobbs, stated that, upon frisking Hendrickson on his arrival at the jail, he found a small bag of white or yellowish powdery substance and $2,800 in cash. Added to the cash discovered in the house, the total amount seized was $3,573.

[redacted] Nick Dawson, a drug chemist with the Arkansas State Crime Lab, testified about his analyses of substances found at Hendrickson's house. He concluded that each item tested was a controlled substance. For instance, forty pounds of marijuana were seized at the house. One bag Mr. Dawson examined contained 1.275 grams of cocaine hydrochloride; another contained 0.0185 grams of cocaine; and another contained 112.6 grams of the substance. Under Ark. Code Ann. § 5-64-401(d) (Repl. 1993), the amounts of tested marijuana and cocaine seized more than satisfied the rebuttable presumption that Hendrickson possessed the controlled substances with intent to deliver.

[redacted] On the other hand, Mr. Dawson testified that the LSD found in the New Testament only amounted to 2.844 micrograms, which is less than the presumptive amount. This court, however, has upheld a conviction for trafficking when less than the presumptive amount was found in the possession of the accused but where other proof of intent to deliver was present. *Conley* v. *State*, 308 Ark. 70, 821 S.W.2d 783 (1992). In *Conley*, the appellant was charged with possession with intent to deliver, but the percentage of cocaine detected was .141 grams, which was less than the presumptive amount. This court held that the testimony of two detectives who observed Conley as he engaged in a transaction involving the sale of cocaine sufficed to prove intent. In the present case, the testimony of the law enforcement officers and the jailer established a connection between the controlled

substances seized and the large amount of cash found in the house and on Hendrickson's person.

In order to prove that a defendant is in possession of a controlled substance, constructive possession is sufficient. *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 251 (1982). Constructive possession can be implied when the controlled substance is in the joint control of the accused and another. *Id.* Joint occupancy, though, is not sufficient in itself to establish possession or joint possession. There must be some additional factor linking the accused to the contraband. *Littlepage* v. *State*, 314 Ark. 361, 863 S.W.2d 276 (1993); *Plotts* v. *State*, 297 Ark. 66, 729 S.W.2d 793 (1988). The State must show additional facts and circumstances indicating the accused's knowledge and control of the contraband. *Bailey* v. *State*, 307 Ark. 448, 821 S.W.2d 28 (1991).

Here, testimony revealed that a bag containing a white or yellowish powdery substance was found on Hendrickson's person and that numerous items, such as drugs and drug paraphernalia were found in two rooms identified as Hendrickson's bedrooms in the house that Hendrickson acknowledges was his.

As previously noted, the evidence was more than sufficient to support Hendrickson's conviction. We hold that the trial court did not err in refusing to grant his motions for directed verdict.

II. Trial court's refusal to sever drug and firearms charges

Hendrickson contends that the felon-in-possession charge should have been severed from the drug charges and that the trial court erred in simply bifurcating the trial. Part of his point for reversal is apparently based on arguments presented at a pre-trial suppression hearing of which no transcript has been lodged on appeal.

The record reflects that, at a hearing held just before the trial in this matter, counsel for the appellant and the State declared their positions regarding the propriety of severance as opposed to bifurcation. The trial court then announced its intention to employ a bifurcated procedure, presenting the felon-in-possession charge after delivery of the jury verdicts in the drug charges.

Although the reading of the information is not included in the record, it would appear, nevertheless, that no allusion was made to the felon-in-possession charge until the jury returned guilty verdicts on the drug charges. When the court instructed the jury on the drug charges, it made no reference to the issue of possession of firearms. Only after the verdicts on the drug charges had been read did the trial court inform the jurors that another charge was pending.

[redacted] Hendrickson also claims to have been prejudiced by the introduction of firearms during the portion of the trial devoted to his drug charges. However, the record shows that the issue of his status as a convicted felon was never broached prior to the second phase of the trial. No prejudice, therefore, was possible as a consequence of the introduction of the guns as evidence.

[redacted] Indeed, when an accused is charged with possession of a controlled substance with intent to deliver, evidence of the possession of firearms is relevant to prove intent. *Leonard* v. *State*, 265 Ark. 937, 582 S.W.2d 15 (1979). *See also United States* v. *Brett*, 872 F.2d 1365, 1370 (8th Cir. 1989), where the Eighth Circuit Court of Appeals held that "the presence of a firearm, generally considered a tool of the narcotics dealer's trade, also is evidence of intent to distribute."

[redacted] In addition, Hendrickson asserts that the trial court erred in failing to give a limiting instruction on the question of firearms. There is, however, no record of Hendrickson having requested such an instruction. It was clearly his responsibility to do so, and his act of omission will not be allowed to inure to his benefit on appeal. *Vick* v. *State*, 314 Ark. 618, 863 S.W.2d 820 (1993).

[redacted] The decision to sever offenses is committed to the discretion of the trial court. *Henry* v. *State*, 309 Ark. 1, 828 S.W.2d 346 (1992). Hendrickson has failed to show any abuse of that discretion.

III. Trial court's refusal to strike testimony and admonish jury

At trial, the following exchange occurred during the prosecutor's cross-examination of defense witness Robert Zimmerman, who had stated that the guns seized at Hendrickson's house

were his rather than the appellant's:

> Q. Robert, would it surprise you to know that most of these guns were reported stolen?
>
> A. No, sir.
>
> Q. It wouldn't surprise you?
>
> A. Because they are not.
>
> [DEFENSE COUNSEL]: Your Honor, I object and ask it be stricken.
>
> [THE PROSECUTOR]: He is on cross-examination. He said they were his guns.
>
> THE COURT (At the Bench): You can cross-examine if he knows they are stolen or not. If he denies it, you can prove it on rebuttal.

Questioning resumed, and the witness continued to insist that the guns belonged to him and were not stolen. No further objection was registered by counsel for the defense.

[redacted] Hendrickson argues that the jury was prejudiced by the prosecutorial implication that the guns had been stolen by a key defense witness and that the trial court should have given a limiting instruction to the jury. Yet Hendrickson never sought such a limiting instruction. Thus, the court's failure to give an admonitory instruction was not prejudicial error in the absence of a request. *Sheridan* v. *State*, 313 Ark. 23, 852 S.W.2d 772 (1993). The issue was not preserved for appeal.

Affirmed.

CORBIN, J., not participating.

Phyllis V. WILLIAMSON *v.* Robert MISEMER, et al.

93-772 871 S.W.2d 396

Supreme Court of Arkansas
Opinion delivered March 7, 1994
[Rehearing denied April 18, 1994.]

Ben E. Rice, for appellants.

Paul A. Schmidt, for appellees.

JACK HOLT, JR., Chief Justice. The appellants, Phyllis V. Williamson and Glenda Haney, appeal a decision of the Lonoke County Chancery Court finding that, under a subdivision's covenants and restrictions, they may keep no more than four dogs on their lot and must remove tarps from structures, modify a travel trailer, and maintain a daily and nightly presence on the property. In his order, however, the chancellor failed to rule upon the appellants' counterclaim or upon the appellees' motion to dismiss the counterclaim. Unfortunately, the record is silent on the question of the disposition of the counterclaim. Therefore, the order is not final and appealable, and this appeal must be dismissed. Ark. R. Civ. P. 54(b).

Ms. Williamson and Ms. Haney are twin sisters who main-

tain residences in Heber Springs and Cabot, respectively. In May 1991, Ms. Williamson purchased a lot in the Trailwood Subdivision in Lonoke County for the purpose of providing a shelter for an undetermined number of dogs. She and her sister placed a travel trailer on the property for their use when attending to the animals.

On August 23, 1991, the appellees, property owners in the Trailwood Subdivision, filed a complaint in Lonoke County Chancery Court, seeking monetary damages and enforcement of the covenants and restrictions filed as a bill of assurance for the subdivision. They alleged that Ms. Williamson and Ms. Haney had failed to comply with the subdivision's covenants and restrictions by moving the travel trailer on the lot and acquiring and keeping stray dogs.

Ms. Williamson and Ms. Haney filed an answer and counterclaim on September 12, 1991, admitting that the covenants and restrictions had been filed but denying that they were aware of the requirements. The appellants declared that the complaint had no basis in law or in fact but was premised on speculation regarding how the property might be used. Moreover, they asserted that "the filing of this matter is premature and constitutes harassment." Alleging consequential "mental anguish and expense," the appellants asked for damages in their counterclaim and for other proper relief.

A temporary agreement was reached between the parties, supported by a temporary order entered on October 3, 1991, which provided that Ms. Williamson and Ms. Haney could keep two dogs each, or a total of four dogs, on the property. It was agreed that the dogs would be cared for on a daily basis and that the sisters would take turns staying on the property. No additional animals were to be placed on the premises, and if any of the four dogs died, no other dog would be allowed as a replacement. The temporary order specifically noted that "It was further agreed by the parties that all other issues set forth in the Plaintiffs' Petition and the Defendants' Counter-Petition would be reserved for a final hearing."

On May 12, 1992, the appellees answered the appellants' counterclaim and prayed that it be dismissed. A hearing was held

on June 19, 1992, before the Lonoke County Chancery Court. Nowhere in the record of that proceeding is there so much as a whisper of a reference to the counterclaim. The testimony focused on the dogs and the trailer, as well as the covenants and restrictions of the subdivision.

In its order, filed of record on March 31, 1993, the chancery court found that (1) the covenants and restrictions run with the land, and the appellants had notice of the covenants and restrictions at the time of closing; (2) the appellants are limited to four dogs, which are to be properly cared for at all times; (3) the structures built for the dogs may remain standing, but the blue tarps must be removed; (4) the trailer used by the appellants is a "travel trailer" which must be modified to comply with restrictions by removing the tongue and placing the vehicle on a permanent foundation or else must be removed; and (5) at least one of the appellants must be on the property daily and must spend the night. No finding was made with respect to the appellants' counterclaim. In fact, the counterclaim was not mentioned in the court's order.

This court will only review final matters on appeal. Ark. R. App. P. 2(a). A judgment that adjudicates fewer than all of the claims of all of the parties does not terminate the action. Ark. R. Civ. P. 54(b). The failure to comply with Rule 54(b) through the absence of an order adjudicating the rights of all parties is a jurisdictional issue that we are obligated to raise on our own. *State Farm Mutual Auto Ins. Co.* v. *Thomas*, 312 Ark. 429, 850 S.W.2d 4 (1993). We have repeatedly held that it is not enough to dismiss some of the parties or to dispose of some of the claims; to be final and appealable, an order must cover all of the parties and all of the claims. *Smith* v. *Leonard*, 310 Ark. 782, 840 S.W.2d 167 (1992).

We hold that there is no final, appealable order before us, and we accordingly dismiss the appeal for failure to comply with Ark. R. Civ. P. 54(b).

Dismissed.

James PLEDGER, Director, Dept. of Finance and Administration of the State of Arkansas *v.* TROLL BOOK CLUBS, INC.

93-674 871 S.W.2d 389

Supreme Court of Arkansas
Opinion delivered March 7, 1994

Cora L. Gentry, for appellant.

Wright, Lindsey & Jennings, by: *John R. Tisdale* and *Troy A. Price*, for appellee.

ROBERT H. DUDLEY, Justice. This is another in the recent series of use tax cases. The chancellor ruled that Troll Book Club, Inc.'s sales of books in Arkansas were not subject to taxation under the Arkansas Compensating Tax Act of 1949. The Department of Finance and Administration appeals. We affirm.

Appellee Troll is a New Jersey Corporation with its principal place of business in Mahwah, New Jersey. It is neither incorporated nor registered to do business in Arkansas. It has neither a place of business, nor property, nor employees in this State. It markets and sells children's books throughout the United States by mailing catalogs to teachers who have either previously purchased books or who have requested the catalogs. Each catalog contains about thirty-two individual order forms listing the current book selections for a particular grade.

The catalogs instruct the teacher on how to collect student orders, how to consolidate those student orders, and how to collect the money for the orders. After collecting the student orders, the teacher fills out one master order form in his or her name and sends it to Troll. Payment is handled in one of three ways: Either (1) parents send checks payable to Troll and the teacher forwards the checks with the orders; or, (2) teachers receive cash from the students, and then, in turn, issue their personal check for the same amount to Troll; or, (3) teachers channel the order through the school's bookkeeping department and have the school issue the check to Troll.

When the books arrive, the teacher retrieves the student

order forms and distributes the books accordingly. Teachers can receive cash or merchandise "bonuses," depending on the size of the order. Troll estimates its total annual sales in Arkansas at 2.7 to 3 million dollars.

The Director of the Department of Finance and Administration initially assessed Troll a vendor's use tax in the arbitrary amount of $706,849.87 for the audit period from February 1, 1983, through January 31, 1989. After an administrative hearing, Troll agreed to allow the Department to examine its books, and the arbitrary assessment was recalculated to an assessment of $260,261.70 for the period for the period from 1983 through 1989. A second assessment in the amount of $104,801.85 was made for the period beginning February 1, 1989, and ending June 30, 1991. An administrative decision was issued upholding the Department's assessments. Troll subsequently posted a bond for the taxes and brought this suit under the Arkansas Tax Procedure Act. The chancellor ruled that Troll's sales of books to students in this State were not subject to the use tax.

The Standard of Review

The Arkansas Tax Procedure Act, Ark. Code Ann. § 26-18-101—904 (Repl. 1992 & Supp. 1993), provides for *de novo* review of administrative tax decisions by chancery courts. Ark. Code Ann. § 26-18-406(b)(1) (Repl. 1992). Troll was not claiming an exemption from a tax, but rather was claiming that a tax could not be levied upon it. Consequently, the Department had the burden of proving the propriety of the tax, *Leathers* v. *A & B Dirt Movers, Inc.* 311 Ark. 320, 325, 844 S.W.2d 314, 316 (1992), and all doubts and ambiguities had to be resolved in favor of the taxpayer. *Dunhill Pharmacies, Inc.* v. *State*, 295 Ark. 483, 749 S.W.2d 660 (1988). Although we review these cases *de novo*, we will not disturb the chancellor's finding of fact unless they are clearly erroneous. *Jones* v. *Ragland*, 293 Ark. 320, 323, 737 S.W.2d 641, 643 (1987).

The Applicable Law

Sections 26-53-101 to 129 of the Arkansas Code Annotated of 1987 impose a use tax on vendors selling personal property for use, storage, or consumption in this State. Section 26-53-102(4) provides that a "vendor" is: "Every person engaged in

making sales of tangible personal property by mail order, by advertising, by agent; or by . . . taking orders for sales [of tangible personal property] for use, consumption, or storage in this state;. . . ."

The foregoing statutes provide for the imposition of the tax upon a vendor located out of state if the vendor makes sales of personal property for use, storage, or consumption within this State. However, the Constitution of the United States, through the dormant Commerce Clause, art. I, § 8, cl. 3, limits a state's ability to tax out-of-state entities when such taxation would burden interstate commerce. The Supreme Court has recently considered this issue in relation to mail order sales and determined that, for such a tax to be upheld under the dormant Commerce Clause, the entity to be taxed must maintain a physical presence in the taxing state. *Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904 (1992). The Department sought to prove Troll's "physical presence" by proving that the teachers, who were physically present in this state, were the agents of Troll. Indeed, if Troll's agents were present in this State, Troll would be present in this State.

Procedure in This Case

In the trial court, the parties agreed that unless the Department could prove a formal agency relationship between the teachers and Troll, the necessary conclusion by the trial court would be that Troll lacked the "substantial nexus" required by the federal Constitution in order to be taxed by Arkansas. The Department's trial brief provides: "The only issue for this court to determine is whether the teachers were agents of Troll Book Club, Inc." Troll agreed and, in its brief to this court, states:

> Since appellee [Troll] had no offices, employees, or facilities in Arkansas, the parties agreed and the Chancery Court required appellant [Department] to prove that the teachers who purchased books were appellee's agents under Arkansas law in order to establish such "substantial nexus." The [trial] court also concluded, and the parties agreed, that in the absence of such a showing of agency, no substantial nexus between the New Jersey company and Arkansas would exist.

The chancellor ruled on the only issue submitted to her,

which was whether an agency relationship had been created. One paragraph of the final order provides:

> The Defendant [Department] alleged that teachers are the agents of the Plaintiff [Troll] in the State of Arkansas, thus attempting to bring Plaintiff within the definition of vendor under the Arkansas Compensating Tax Act and provide the substantial nexus between Plaintiff and the State of Arkansas which is required to impose the tax under the Commerce Clause under the United States Constitution. The Defendant has the burden of proof with respect to establishing that teachers are agents of the Plaintiff in the State of Arkansas. The Defendant and the Plaintiff further acknowledge that the Court finds that the Plaintiff does not have a "substantial nexus" with the State of Arkansas unless an agency relationship exists between the teachers and Plaintiff.

The chancellor initially opined that, in order to find an agency relationship, Arkansas law requires both a showing that an agent is authorized to perform for and to bind a principal, and that the principal has a right to control the agent. Next, the chancellor found that the evidence failed to show that Troll authorized the teachers to bind it. In addition, she found that the catalogs which directed the method of sales were for display and convenience, and did not constitute an implied contract to control the teachers' actions. Finally, the chancellor found that the bonus points were not compensation. In sum, the chancellor found that the Department had failed to prove an agency relationship. In the absence of proof of an agency agreement, the chancellor ruled that Troll could not be subjected to the use tax under Ark. Code Ann. §§ 26-53-101–129 (1987 & Supp. 1993) (R. 133-34).

In oral argument before this court, there was considerable discussion about whether a "substantial nexus" might be found with proof of something less than agency. However, that is an issue we do not reach because it was not raised below, and we have often written that we will not address an issue on appeal which was not raised below. *Hubbard* v. *The Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993). Accordingly, the holding in this case is limited to the one issue argued, whether an agency relationship existed.

The burden of proving an agency relationship lies with the party asserting its existence. *B.J. McAdams, Inc.* v. *Best Refrigerated Express, Inc.*, 265 Ark. 519, 579 S.W.2d 608 (1979). This court has used different definitions of agency that were appropriate for the particular cases, but each of them includes the element of control by the principal. In *Evans* v. *White*, 284 Ark. 376, 682 S.W.2d 733 (1985) and *Campbell* v. *Bastain*, 236 Ark. 205, 365 S.W.2d 816 (1968), we adopted the definition of agency contained in the Restatement (Second) of Agency. We said the two essential elements of an agency relationship are (1) that an agent have the authority to act for the principal and (2) that the agent act on the principal's behalf and be subject to the principal's control. In *Hinson* v. *Culberson-Stowers Chevrolet, Inc.*, 244 Ark. 853, 427 S.W.2d 539 (1968), we examined the Restatement definition together with a quote from 2 Am. Jur. 13, Agency § 2 and concluded that the essential elements for a showing of the agency relationship were authorization and control. *Id.* at 855, 427 S.W.2d at 541-42.

The Department contends that the chancellor's finding was clearly erroneous because Troll exercised control over the teachers through the language contained in its brochures. The brochures describe the books, set dates to tally and return the order forms and money, and instruct the teachers on distributing the enclosed newsletter and filling out the master order. Such instructions fall far short of establishing authorization and control. In fact, the testimony showed that about eighty percent of the teachers who received the brochures did nothing with them except to throw them away.

The Department, in its argument that the chancellor should have found an agency relationship, relies heavily on a California decision, *Scholastic Book Clubs, Inc.* v. *State Board of Equalization*, 255 Cal. Rptr. 77 (Cal. App. 1 1989). In that case, involving almost an identical arrangement for selling books, the appellate court held that (1) the teachers operated under the authority of Scholastic in taking the orders, (2) an implied contract existed between Scholastic and the teachers, and (3) Scholastic's use of teachers to solicit book orders was a sufficient nexus for the California use tax. *Id.* at 81. The case is on point, but it is clearly distinguished for two reasons. First, it was decided before the Supreme Court decided *Quill Corp.* v. *North Dakota*, 112 S. Ct.

1904 (1992), which mandated the bright-line physical presence test for interstate mail order sales. The California appellate court viewed physical presence as only *one* of the factors to be considered in determining whether a nexus should be found rather than viewing it as the *dispositive* factor. Second, California agency law, unlike Arkansas agency law, allows the relationship of agency to be implied retroactively by ratification. In Arkansas, the agency relationship must be shown to exist by proof of both authorization and control or else the doctrine of ratification is inapplicable. *See E.P. Dobson, Inc.* v. *Richard*, 17 Ark. App. 155, 158, 705 S.W.2d 893, 893 (1986) (citing *Runyan* v. *Community Fund of Little Rock*, 182 Ark. 441, 31 S.W.2d 742 (1930)).

Finally, the Department contends that its position is supported by our case of *Ragland* v. *Quality School Plan, Inc.*, 279 Ark. 256, 651 S.W.2d 447 (1983). Again the argument is without merit for the reason that the case is clearly distinguished. In that case the taxpayer, Quality, represented one hundred publishers of magazines. Quality's agents, who were present in this State, went to various school districts within the State and recruited students to sell magazines for the publishers. The students sold the magazines throughout the State. The Department assessed a use tax against Quality. Quality sought a refund of the use tax and argued that the students, rather than Quality, were the vendors. *See Quality School Plan*, 279 Ark. at 257-58, 651 S.W.2d at 448. We held that, under the language of the statute, Quality was a vendor. Id. at 257, 651 S.W.2d at 448-49. The case has no application to the sole issue now before us, whether an agency relationship was proven between Troll and the teachers.

The chancellor's finding that an agency relationship was not proven is not clearly erroneous.

Affirmed.

HAYS, J., dissents.

BROWN, J., concurs.

ROBERT L. BROWN, Justice, concurring. The Department hints at what to me might be a winning argument in this matter but failed to articulate it sufficiently to the chancery court. That argument is that our vendor statute does not mandate an agency

relationship as defined by Arkansas case law but rather an agency relationship as defined by statute. The statute reads:

> (4) "Vendor" means and includes every person engaged in making sales of tangible personal property by mail order, by advertising, by agent; or by peddling tangible personal property, soliciting, or taking orders for sales of same for storage, use, or consumption in this state; and includes all salesmen, solicitors, hawkers, representatives, consignees, peddlers, or canvassers as agents of the dealers, distributors, consignors, supervisors, principals, or employers under whom they operate or from whom they obtain the tangible personal property sold by them. Irrespective of whether persons are making sales on their own behalf or on behalf of dealers, distributors, consignors, supervisors, principals, or employers, they must be regarded as vendors; and the dealers, distributors, consignors, supervisors, principals, or employers must be regarded as vendors for purposes of this subchapter.

Ark. Code Ann. § 26-53-102 (4) (1987). In my opinion, teachers soliciting on behalf of Troll Book Clubs, Inc. might well qualify as representatives, canvassers, and so forth under the statute. There is no requirement under the statute that control of the teachers is a necessary factor, although control is clearly an essential element of common law agency.

Again, the Department failed to bring this argument sufficiently to the attention of the chancery court and for that reason, our review of this facet of the case is foreclosed. I concur in the affirmance.

STEELE HAYS, Justice, dissenting. This case presents a legal question of singular importance: Whether certain merchandising methods of Troll Book Club, Inc. (Troll) above and beyond mere mail order solicitation provide a "substantial nexus" consistent with the Commerce Clause for purposes of state taxing authority. The case is important to Troll, a nationwide distributor of books and materials, and to the State of Arkansas. It is the first case to reach this court since *Quill Corporation* v. *North Dakota*, ____U.S.____, 112 S.Ct. 1904 (1992), was decided in May, 1992.

The problem with the case from our standpoint is that there

are segments of the record which are susceptible of differing interpretations. The majority finds that the parties agreed in the trial court that unless the Department could prove "a formal agency relationship between the Teachers and Troll, the necessary conclusion by the trial court would be that Troll lacked the substantial nexus required by the federal Constitution in order to be taxed by Arkansas." I am not persuaded that such was the understanding, as I interpret the Department's position before the trial court and renewed in this *de novo* appeal, to be whether the Teachers were agents of Troll *within the meaning* of Ark. Code Ann. §§ 26-53-101 and 102(4) (1987). Section 26-53-101 imposes a use tax on vendors of personal property for use, storage or consumption in Arkansas. Section 26-53-102(4) defines a vendor as:

> "Every person making sales of tangible personal property by mail order, by advertising, by *agent*; or by *peddling . . . .soliciting*, or *taking orders* . . . including all *salesmen, solicitors, members, representatives, consignees, peddlers*, or canvassers as agents of the dealers, distributors, consignors, supervisors, principals, or employers under whom they operate or from which they obtain the tangible personal property sold by them." [My emphasis.]

By focusing entirely on the word "agent" and disregarding the statute as a whole, the trial court misconstrued the issue to be decided. "A statute must be analyzed in its entirety and meaning given to all portions." *Callahan* v. *Little Rock Distributing Co.*, 220 Ark. 443, 248 S.W.2d 297 (1952). "Where it was unnecessary to resort to the rule of *ejusdem generis* to ascertain legislative intent, the court was without power to disregard any of the terms of an act, but was required to give effect to all words, provisions, and terms employed." *Wiseman* v. *Affolter*, 192 Ark. 509, 92 S.W.2d 388 (1936). And *see Ledbetter* v. *Hall*, 191 Ark. 791, 87 S.W.2d 996 (1936) ("Courts must give effect to every part of the act"); *Kifer* v. *Liberty Mutual Ins. Co.*, 277 F.2d 1325 (C.A. Ark. 1985) ("Particular provision of a statute must be construed with reference to the statute as a whole, not in isolation.") But even if one accepts the issue as being whether a "formal agency relationship" exists between the teachers and Troll, I believe the majority errs in its application of the law.

The majority notes that Troll sends teachers materials describing books offered for sale, which the teacher distributes to the students, sets a time limit for orders, gives direction for filling out the orders, accepts the orders and money, converts the individual orders to a master order, forwards the master order to Troll, receives and distributes the merchandise when the order is filled and earns a commission based on the amount of merchandise sold. The majority concludes that no agency exists because the foregoing activities by the teachers fall short of authorization and control. Up until the point at which the materials have merely been received by the teachers, the majority is correct.

However, once the teacher undertakes to participate by sending in the orders, the picture changes. At that point a contract between the teacher and Troll has been established. Troll has made an offer to the teacher which the teacher accepts by participating in the program. Once the teacher engages in the invited arrangement, an acceptance occurs and a contract of agency exists. *Restatement of Contracts Second*, §§ 1, 17, 50, 71 (1979); 1 Lord, *Williston on Contracts*, § 4:5 (1992); *Restatement of Agency*, 2d § 15 (1958), Comment a and b. *Id.* at 83.

> a. *Manifestation by principal.* One becomes an agent only if another in some way indicates to him consent that he may act on the other's account. This consent can be communicated by any of the means stated in Section 26, including acquiescence by the principal in a series of acts previously done by another as agent. A person is not an agent merely from the fact that he believes he had been authorized to act as agent for another or purports to act as such. It is only where the person acting believes reasonably, from conduct for which the other is responsible, that he is authorized so to act that there is an agency relation. The same consequences as if there were an agency may result, however, from the ratification by the person on whose account the act is purported to be done. *See* §§ 100-101.
>
> b. *Consent by agent.* The agency relation exists only if the agent consents to it. A person may, by his sole act, create a power in another to act on his account, but since agency is a fiduciary relation, it can exist only if the other

> accepts the power. As in the case of contractual relations, the manifestation of the principal may be such that it is not necessary for the acceptance to be communicated to him. Thus, if the principal requests another to act for him with respect to a matter, and indicates that the other is to act without further communication and the other consents so to act, the relation of principal and agent exists. If, under such circumstances, the other does the requested act, it is inferred that he acts as agent unless he manifests that he does not so intend or unless the circumstances so indicate. This inference is strengthened if, being requested to act in the matter, the other does something which he could properly do only as an authorized agent.

Id. at 83.

These comments from the Restatement are applicable to the facts in this case and demonstrate that an agency relationship was established between Troll and the teachers.

Similarly, in *Ragland* v. *Quality School Plan, Inc.*, 279 Ark. 256, 651 S.W.2d 447 (1983), this court considered marketing methods of Quality School to sell magazine subscriptions in Arkansas by students at various schools. The schools collected the subscription orders, retained a percentage, and submitted the balance of the subscription price to Quality. Quality maintained it was not the vendor within the meaning of our statute. We cited an Alabama case as "persuasive" — *Quality School Plan, Inc.* v. *Alabama*, 53 Ala. App. 418, *cert. den.* 293 Ala. 771 (1974):

> There it was found that the students selling subscriptions *were salesmen or agents*. In the present case it was agreed to by the parties and subsequently held by the court, that magazine subscriptions were items of tangible personal property. Someone was the vendor and we think that of all the candidates the appellee best fits the statutory description of a vendor.
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> ********
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> Considering the facts of the instant case we think our conclusion must be that the appellee, *through its agents*, made sales of tangible personal property within the State

of Arkansas. [My emphasis.]

The majority opinion states that *Scholastic Book Clubs Inc.* v. *State Board of Equalization*, 207 Cal. App. 734, 255 Cal Rptr. 77 (Cal. App. Dist. 1989), involving an arrangement for selling books, is "almost identical" to this case. However, it finds that California law of agency allows the relationship of agency to be implied retroactively by ratification, whereas in Arkansas agency must be shown to exist by proof of authorization and control. The majority has misread the case. The Scholastic court found the agency relationship to be established *in the first instance*, finding the offer to have occurred when the bookseller sent its materials to the teachers, the acceptance occurring when the teachers participated in the program. Ratification was only seen as an alternative basis for the agency:

> Appellant stresses the fact that the teachers have no initial obligation to act, and argues therefrom that they are not acting under its authority. We conclude otherwise. The teachers are certainly not acting under anyone else's authority, and once they undertake to act, they are obviously acting under appellant's authority, and certainly as appellant's agents or representatives. "An agent is one who represents another, called the principal, in dealings with third persons." (Civ. Code, § 2295.) The creation of an agency relationship is not dependent upon the existence of a written agreement. The relationship may be implied based on conduct and circumstances.

Thus, the decision in the *Scholastic* case fully supports the Department's position here. I suggest that a contract for agency was formed and that the teachers were acting as representatives for Troll. Consequently, there is no question but that Troll is subject to the tax.

As to the matter of substantial nexus, in my estimation Troll's merchandising operation in Arkansas falls plainly within the broad language of § 26-53-101, limited only by the Commerce Clause as measured by the factors established in *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U.S. 753, 87 S.Ct. 1389 (1967), *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S.Ct. 1076 (1977) and *Quill Corporation* v.

North Dakota, ____ U.S. ____, 112 S.Ct. 1904 (1992).

Nor is a substantial nexus dependent upon a finding of an agency relationship. Indeed, even independent contractors have been held to constitute a substantial nexus for purposes of state taxing authority. *See Scripto Inc.* v. *Carson*, 362 U.S. 207, 80 S.Ct. 619 (1960) and *Ragland* v. *Quality School Plan, Inc., supra.* The most recent case on this subject is *Quill Corporation* v. *North Dakota*, ____U.S. ____, 112 S.Ct. 1904 (1992), where the Supreme Court reviewed *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U.S. 753, 87 S.Ct. 1389 (1967), and *Complete Auto Transit, Inc.* v. *Brady* 430 U.S. 274, 97 S.Ct. 1076 (1977), among others, in determining whether North Dakota's use tax impinged on either the Commerce Clause, or the Due Process Clause, and distinguishing the substantial nexus requirements of the two provisions. The court reaffirmed the rule of *Bellas Hess*, drawing a "sharp distinction" between mail order sellers with "a physical presence" in the taxing state and those which do no more than communicate with customers in the state by mail or common carrier as part of a general interstate business. In this case, it is beyond serious contention that Troll engages in considerably more than mail order mailings and follow-up deliveries as in *Quill.* Troll capitalizes on the time, position and presence of Arkansas teachers to distribute, promote, gather, consolidate, collect, forward the orders, and to receive and distribute the merchandise, for all of which the teachers earn a commission.

In sum, Troll Book Club has chosen to avail itself of a market for its products consisting of Arkansas school children and their parents and reaches that market through the instrumentality of classroom teachers, a market producing annual sales of $2,700,000 to $3,000,000. It mails 170,000 brochures a year at monthly intervals to coincide with the school year to the teachers at the schools. The brochure contains thirty to forty color tear-outs which the participating teacher distributes to the students. The tear-outs include the order forms and there are forms for use of the students during the summer break. The teachers collect the money, in cash or checks payable generally to *Troll*, and the merchandise comes to the teacher, who then distributes it to the buyer. In addition to the numerous other activities mentioned, Troll maintains a toll free telephone available for use. That the

children, and not the teachers, are Troll's targeted consumer is plain. In light of those activities, far in excess of anything existing in *Quill*, I can see no sound reason why the sale of Troll's merchandise by these methods should not be subject to a reasonable, nondiscriminatory tax in Arkansas. For those reasons I respectfully dissent.

Marvin V. CARMICAL and Margaret E. Carmical *v.* CITY OF BEEBE, Arkansas; Roy E. Simmons, Former Mayor of the City of Beebe, Individually and in his Former Official Capacity; Jessie R. Lay, Individually and in his Former Official Capacity as Code Enforcement Officer of the City of Beebe, Arkansas; Robert W. Herman; Orval Devore; Mary Jane Chudomelka; Eugene McQueen; Bobby Burns, Individually and in their Official Capacity as Members and Former Members of the Beebe Planning Commission and Board of Adjustment

93-989 871 S.W.2d 386

Supreme Court of Arkansas
Opinion delivered March 7, 1994
[Rehearing denied April 18, 1994.*]

*Corbin, J., not participating.

Rhonda K. Slayden, P.A., for appellants.

Richard B. Berry, for appellees.

STEELE HAYS, Justice. Appellants, Margaret and Marvin Carmical, challenge actions of the White County Circuit Court in dismissing their complaint based on grounds of res judicata and statute of limitations. This is the second time they have appealed to this court, therefore we have jurisdiction pursuant to Rule 1-2(a)(11). We dismissed the first appeal because counterclaims were still pending in the trial court and there was not an appealable order pursuant to ARCP Rule 54(b). *Carmical* v. *City of Beebe*, 302 Ark. 339, 789 S.W.2d 453 (1990). We do not reach the merits of this appeal because the abstract does not contain all the information necessary to our resolution of the issues presented. Accordingly, we affirm pursuant to Ark. Sup. Ct. R. 4-2(6).

Rule 4-2(6) requires that the abstract be included as part of the brief and contain only the information in the transcript that is "necessary to an understanding of all questions presented to the Court for decision." We have said that as long as we can determine from a reading of the briefs and appendices material parts necessary for an understanding of the questions at issue, we will render a decision on the merits. *Montgomery* v. *Butler*, 309 Ark. 491, 834 S.W.2d 148 (1992). However, the briefs and abstract do not afford such an understanding.

Appellants are a mother and son who applied for and were granted a building permit by appellees, various Beebe city officials. Apparently, in reliance on the building permit, appellants contracted for the construction of a building. Thereafter, appellees issued an order requiring appellants to cease the construction of the building.

Appellants filed suit in federal district court alleging violations of 42 U.S.C. § 1983 as well as other state law violations. The abstract does not tell us what specific state law violations were alleged. The federal district court granted summary judgment for appellees. However, the abstract does not indicate the particular claims that were included in the summary judgment or whether the summary judgment was with or without prejudice. The Eighth Circuit Court of Appeals affirmed the summary judgment and then denied requests for rehearing.

Appellants then filed suit in White County Circuit Court. The abstract tells us only that appellants "alleg[ed] tort and contract causes of action." The circuit court ruled the case should be dismissed due to res judicata. We dismissed the appeal of that ruling because appellees' counterclaims for mental anguish were still pending. *Carmical*, 302 Ark. 339, 789 S.W.2d 453.

Upon appellants' request, the White County Circuit Court reconsidered its dismissal and set it aside. Appellants amended their complaint, adding additional parties and additional claims. The abstract of the amended complaint does not specify the additional claims; it merely states that constitutional and civil rights violations were alleged in addition to the tort and contract violations. The circuit court then ruled that res judicata did apply to the action because of the federal court decisions, that the complaint should be dismissed because the limitations period had expired, and granted summary judgment to one of the defendants. The abstract does not reveal on what basis the partial summary judgment was entered or whether it was with or without prejudice. The trial court entered two more orders, one dismissing another defendant, and the other dismissing without prejudice the defendants' counterclaims. This appeal followed.

The two questions presented for our decision in this appeal are whether a federal court judgment operates as res judicata to

bar a state court action and whether a complaint filed in state court can relate back to a complaint filed in federal court so as to toll the statute of limitations. The abstract does not contain sufficient information for us to decide either question.

Under the doctrine of res judicata or claim preclusion, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim or cause of action. *Robinson* v. *Buie*, 307 Ark. 112, 817 S.W.2d 431 (1991). This court has stated that "the test in determining whether res judicata applies is whether the matters presented in a subsequent suit were necessarily within the issues of the former suit and might have been litigated therein." *American Standard, Inc.* v. *Miller Eng'g, Inc.*, 299 Ark. 347, 351, 772 S.W.2d 344, 346 (1989). The claim preclusion aspect of the doctrine bars relitigation in a subsequent suit when: (1) the first suit resulted in a judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or a cause of action which was litigated or could have been litigated but was not; and (5) both suits involve the same parties or their privies. *Ward* v. *Davis*, 298 Ark. 48, 765 S.W.2d 5 (1989).

Before we can determine if res judicata applies to the present case, we must be able to determine the specific claims that were presented in both the federal court action and the state court action. *Ward*, 298 Ark. 48, 765 S.W.2d 5. The abstract of the complaint filed in federal district court states only that "The appellants alleged a 42 U.S.C. Section 1983 action as well as state law claims." The abstract of the order granting summary judgment does not offer any clarification; it merely states that summary judgment was entered on appellees' motion and that "The Court dismissed the federal as well as the pendent state claims." The abstract of the complaints filed in circuit court states only that tort and contract causes of action were alleged in addition to constitutional and civil rights violations. The abstract of the circuit court's orders does not supply the missing information. The identification of the specific claims that were raised in both suits is necessary to an understanding of the res judicata issue. Therefore, appellants' abstract is flagrantly deficient on this point.

As for the second question presented for our decision, the relation back of the state court complaint to the federal court complaint, appellants' abstract is also deficient. According to ARCP Rule 15(c) and *Bridgman* v. *Drilling*, 218 Ark. 772, 238 S.W.2d 645 (1951), the primary authorities on which appellants rely, we must have the following information to decide the relation back question and it does not appear in the abstract: the specific claims raised in both complaints; the facts sufficient to determine whether the two cases arose out of the same conduct, transaction or occurrence; and whether all parties received notice of the subsequent complaint. Therefore, even assuming, without deciding, that ARCP Rule 15(c) applies to two separate complaints filed in federal court and state court, the abstract is flagrantly deficient and we cannot reach the merits of this point.

In summary, the transcript of this case is 1419 pages. Appellants' abstract is four and one-half pages. The notice of appeal is completely omitted from the abstract. The entire abstract, including the pleadings, is written in narrative form and contains only the barest terms. Previously, we have held such an abstract to be flagrantly deficient. *D.J.* v. *State*, 308 Ark. 37, 821 S.W.2d 7 (1992). While nearly all the required pleadings and orders are noted in the abstract, their essential components are missing, rendering a decision on the merits impossible. This court has held that "When an abstract's deficiencies are so flagrant that a decision is well nigh impossible, we will affirm." *Haynes* v. *State*, 313 Ark. 407, 409, 855 S.W.2d 313, 315 (1993).

For the reasons stated, the abstract in the present case renders a decision on the merits impossible and the case must be affirmed for failure to comply with Rule 4-2(6).

CORBIN, J., not participating.

Ravin Donnell EVERETT *v.* STATE of Arkansas

CR 93-1214 871 S.W.2d 568

Supreme Court of Arkansas
Opinion delivered March 7, 1994

William R. Simpson, Jr., Public Defender, by: *Kent C. Krause*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. This appeal comes from a conviction for capital murder. The only issue is the trial court's refusal to suppress a statement made by appellant to the police. There is no merit to the argument.

Ravin Everett, appellant, was charged with the capital murder of Marvin Donley on September 5, 1992. On September 8,

1992, appellant was taken into custody by the Little Rock Police Department and while in their custody, gave an inculpatory statement. On April 2, 1993, a hearing was held on the appellant's motion to suppress the custodial statement. The motion was denied. On July 21, 1993, a jury trial was held and appellant was found guilty of capital murder and sentenced to life without parole. Appellant appeals from that conviction. Appellant argues his statement to the police should have been suppressed for three reasons: 1) he was intoxicated at the time of the interrogation; 2) he asked for an attorney and that the questioning cease, but the interrogation continued; and 3) the interrogation tactics of the police render the confession involuntary.

Custodial statements are presumed to be involuntary, *Moore* v. *State*, 301 Ark. 1, 791 S.W.2d 698 (1990), and on appeal the burden is on the state to show the confession was made voluntarily, freely, with understanding, and without hope of reward or fear of punishment. *Sanders* v. *State*, 305 Ark. 112, 805 S.W.2d 953 (1982). The issue of voluntariness of an inculpatory statement given by an accused in custody is one this court determines after considering the totality of the circumstances in the case. It is for the trial court to decide questions of credibility and conflicts in testimony and we will not reverse unless the decision is clearly erroneous. *Patterson* v. *State*, 306 Ark. 385, 815 S.W.2d 377 (1991).

The officers who interrogated appellant testified that a *Miranda* form was completed advising appellant of his constitutional rights. Detective Ronnie Smith testified Everett told them he had completed the ninth grade, repeated the tenth grade and could read and write. Smith said Everett read the rights form along with them, indicated he understood it and signed the waiver portion of the form.

Smith further testified Everett was interrogated in a 10 x 12 room and did not appear to be under the influence of alcohol or drugs, nor did he exhibit erratic or unusual behavior. Smith said at no time did Everett request an attorney or ask that the interrogation cease. Other detectives testified to the same effect.

Appellant testified he was under the influence of drugs and alcohol at the time of the interrogation and had requested an

attorney. Appellant's mother corroborated his claim that he had been drinking heavily that day. While being under the influence of alcohol or drugs is not in itself sufficient to invalidate a confession, *Davis* v. *State*, 308 Ark. 481, 825 S.W.2d 584 (1992), the issue was resolved by the trial court as a matter of credibility. We discussed the voluntariness of custodial statements in some detail quite recently in *Thomas* v. *State*, 315 Ark. 504 (CR93-520, January 18, 1994).

Obviously, the trial court discounted appellant's claim that he had requested an attorney.

Appellant argues the police used impermissible tactics — they admitted they wanted to get a confession from him and that a second set of detectives interrogated him, thus the confession was involuntary. Appellant has cited no authority except *Miranda*, and we find nothing in that opinion pertinent to the facts of this case which would prohibit such methods. Having reviewed independently the testimony of the detectives who interrogated appellant, we are satisfied the interrogation was handled in accordance with *Miranda*.

Affirmed.

CORBIN, J., not participating.

John L. CHRISTOPHER *v.* Mary N. CHRISTOPHER

93-960 871 S.W.2d 398

Supreme Court of Arkansas
Opinion delivered March 7, 1994

Michael Knollmeyer, for appellant.

Hubert W. Alexander, for appellee.

DAVID NEWBERN, Justice. This is a divorce case. The question presented is the extent to which the appellee, Mary N. Christopher, is entitled to share in the military retirement pay of the appellant, John L. Christopher. The parties were first married for some 11 years while Mr. Christopher was on active duty in the United States Air Force. They divorced before Mr. Christopher's right to military retirement pay vested. Some eight months later they remarried and remained so for an additional nine years during which Mr. Christopher completed 20 years of service and his right to retirement pay vested. He retired in 1991. They again divorced in 1993, and the Chancellor held that Mrs. Christopher was entitled to a percentage of the retirement pay based upon the total number of years she was married to Mr. Christopher. Mr. Christopher contends the Chancellor should have considered only the years of the second marriage. We affirm the decree.

If a divorcing spouse has achieved an entitlement to military retirement pay, that entitlement is an asset which may be divided between the parties to the divorce. *Young* v. *Young*, 288

Ark. 33, 701 S.W.2d 369 (1986). If, however, the divorcing military spouse has not served for a time sufficient to have earned the right to receive military retirement pay, the right has not "vested" and there is no asset to be divided upon divorce. *Burns* v. *Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993); *Durham* v. *Durham*, 289 Ark. 3, 708 S.W.2d 618 (1986).

Mr. Christopher cites *Bagwell* v. *Bagwell*, 282 Ark. 403, 668 S.W.2d 949 (1984), for the proposition that, "when parties are married to each other twice, property which either received in the first divorce is not marital property in the second divorce." That case involved a division of land between the parties upon the first divorce, and we held that, upon the second divorce, the asset divided in the earlier proceedings was not to be considered. As there was no military retirement pay asset to be divided upon the first divorce in this case, we cannot find the relevancy of the *Bagwell* case.

Perhaps equally inapplicable is Mrs. Christopher's citation of *McMurtray* v. *McMurtray*, 275 Ark. 303, 629 S.W.2d 285 (1982), where in the first divorce property settlement agreement the wife gave up her interest in a non-transferable stock account in exchange for receiving the equity in a home. There it was held that it was the intention of the parties, upon second marriage, to abrogate their earlier property settlement agreement. Again, in the case now before us there simply was no asset to be dealt with upon dissolution of the first marriage.

Mr. Christopher has also presented cases from other jurisdictions in an attempt to bolster his position. We do not find these cases persuasive. Our previous holdings along with Ark. Code Ann. § 9-12-315(b) (Supp. 1993) control the issue involved in this case.

Our marital property statute, § 9-12-315(b), defines "marital property" as "all property acquired by either spouse subsequent to the marriage," with exceptions not relevant here. The right to military retirement pay was acquired by Mr. Christopher subsequent to the second marriage.

Section 9-12-315(a) provides:

> All marital property shall be distributed one-half (1/2) to

> each party unless the court finds such a division to be inequitable. In that event the court shall make some other division that the court deems equitable taking into consideration: . . . (viii) Contribution of each party in acquisition, preservation or appreciation of marital property, including services as a homemaker. ... .

In cases where there has been continuous marriage between parties such as Mr. and Mrs. Christopher, we have approved a division of the vested right to military retirement pay based upon the contribution of the non-military spouse calculated in terms of the number of years of marriage during the service of the military spouse. *Askins* v. *Askins*, 288 Ark. 333, 704 S.W.2d 632 (1986); *Marshall* v. *Marshall*, 285 Ark. 426, 688 S.W.2d 279 (1985). That was the Chancellor's approach here. She held the parties were married for 16 of the 24 years Mr. Christopher served in the Air Force, thus Mrs. Christopher was entitled to 50% of 2/3, *i.e.*, 1/3, of Mr. Christopher's military retirement pay.

We find no fault in the result reached. We are given no reason to hold that Mrs. Christopher's contribution was of less value because some of it occurred during the first marriage. As this asset was one acquired by Mr. Christopher subsequent to the second marriage and did not exist for the purpose of consideration or division in the earlier divorce, it was not improper to assess Mrs. Christopher's total contribution to the acquisition of it. Affirmed.

BROWN, J., concurs.

CORBIN, J., not participating.

Billy Joe BRITTON *v.* STATE of Arkansas

CR 93-832 870 S.W.2d 762

Supreme Court of Arkansas
Opinion delivered March 7, 1994
[Rehearing denied April 18, 1994.*]

Kearney Law Offices, by: *John L. Kearney*, for appellant.

Winston Bryant, Att'y Gen., by: *Sherry L. Daves*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. On April 7, 1993, Billy Joe Britton was convicted as a habitual for the delivery of a controlled substance. At trial, the state offered evidence that, on October 14, 1989, Officer Willie Robinson, an undercover investigator, and a confidential informant made a controlled buy from Britton of one small plastic bag of cocaine for twenty dollars. Britton was not charged with the offense until the state arrested him on August 19, 1992, and filed an information on September 11, 1992. The original and a later amended information filed on March 10, 1993, both reflected the date of the offense was October 14, 1991. The first amended information added that Britton was a habitual offender. On April 6, 1993, the day before Britton's trial, the state again amended the prior information to reflect that Britton's alleged criminal offense occurred on October 14, 1989.

For reversal, Britton presents four points, but none of them are properly preserved on appeal. He claims that (1) the

*Corbin, J., not participating.

state's information as amended did not correctly charge him with delivery of cocaine or as a habitual, (2) the delay in bringing the charges prejudiced him, (3) he was improperly denied the testimony of his sole alibi witness, and (4) a prison photograph of him was improperly displayed to the jury. As pointed out by the state, the trial court's rulings on each of these objections are fatally absent from the abstract of record. *Lenell* v. *State*, 283 Ark. 162, 671 S.W.2d 741 (1984).[1] Our rule is clear that, without proper abstracting, seven justices would be constrained to pore through the sole record of the case on file with the clerk of the supreme court in search of the error(s) propounded by the defense. We have said repeatedly, and our rule so states, that we will not go to the record in search of prejudicial error. *Haynes* v. *State*, 313 Ark. 407, 855 S.W.2d 313 (1993).

Besides not having the trial court's rulings before us, we must also mention the extreme difficulty we have in understanding or reaching the errors assigned in this appeal because of the abbreviated or limited abstract provided the court. Britton's abstract consists of nine pages and omits pertinent pleadings and testimony set out in a transcript which contains 286 pages. Such omissions prevent us from having a full and fair understanding of the arguments made by the parties in this appeal. For example, much of Britton's argument for seeking reversal involves his contention that he was misled to believe up until the trial date that he was defending against an offense which purportedly occurred on October 14, 1*991* — a date which provided him a perfect alibi because he was then in the penitentiary serving a sentence for yet another criminal offense. He claims the state's amending its information a day before trial caused him to defend against a different crime, namely, one occurring on October 14, 1*989*, not October 14, 1*991* as originally charged.

Important documents contained in the transcript are omitted from Britton's abstract and support the state's position that the October 14, 1991 date in the original and first amended information was a typographical error and should have read 1989. In

[1]We note that one justice's review of the sole transcript of the proceedings below sets forth concise reasons given by the trial court for ruling as it did on each objection that Britton made below and now argues on appeal. Britton, however, fails to abstract these rulings or mention them in his argument.

fact, those documents and pleadings reflect Britton was well aware that the state's case from its inception centered on Britton's having committed the alleged offense on October 14, 1989. The state's affidavit and arrest warrant and attached police report reflect the offense occurred on October 14, 1989, as did the state's criminal laboratory report. Even Britton's pro se motions referred to October 14, 1989 as being the date of the offense. The state's documents were filed and available as early as September 11, 1992, the date of filing of the original information.

Other pertinent matters, including exhibits (prosecutor's letters to Britton's counsel), state responses, and colloquy between the court and counsel, are absent from the abstract that would be relevant to this appeal, but we need not belabor our point further. Suffice it to say, the abstract of record before this court is seriously insufficient and fails to provide a record which would allow us a full and fair understanding of the issues presented or to permit a decision in this case. Therefore, we affirm.

CORBIN, J., not participating.

Frances HOUSE *v.* WAL-MART STORES, INC.

93-970 872 S.W.2d 52

Supreme Court of Arkansas
Opinion delivered March 7, 1994

Delay Law Firm, by: *R. Gunner Delay*, for appellant.

Daily, West, Core, Coffman & Canfield, by: *Jerry Lee Canfield*, for appellee.

TOM GLAZE, Justice. This appeal involves a slip and fall case. Appellant Frances House slipped in a liquid disinfectant and fell at a Wal-Mart Store in Waldron. Ms. House brought this action against appellee Wal-Mart Stores, Inc. for injuries sustained in the slip and fall. Wal-Mart moved for a directed verdict at the close of the evidence, and the trial court granted the motion. Ms. House argues on appeal that the trial court should have permitted the issue of Wal-Mart's negligence to be decided by the jury.

On July 27, 1992, Ms. House was shopping in the Wal-Mart store. As the appellant neared the check-out line, she noticed a liquid on the floor. The liquid was a disinfectant which had a pine odor, and the spill was approximately ten to twelve inches in diameter. Ms. House walked around the spill and took her

place in the check-out line. While Ms. House was standing in line, she stepped towards a display rack to pick up a cigarette lighter. As she was stepping back to the check-out line, Ms. House slipped and struck her foot on the display table. As a result, Ms. House sustained a fractured toe.

The law is well-settled that a property owner has a general duty to exercise ordinary care to maintain the premises in a reasonably safe condition for the benefit of invitees. *Mankey* v. *Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993). In order to prevail in a slip and fall case, a plaintiff must show either (1) the presence of a substance upon the premises was the result of the defendant's negligence, or (2) the substance had been on the floor for such a length of time that the appellee knew or reasonably should have known of its presence and failed to use ordinary care to remove it. And the mere fact a person slips and falls does not give rise to an inference of negligence. *Sanders* v. *Banks*, 309 Ark. 375, 830 S.W.2d 86 (1992); *Boykin* v. *Mr. Tidy Car Wash, Inc.*, 294 Ark. 182, 741 S.W.2d 270 (1987). Also, the presence of a foreign or slick substance which causes a slip and fall is not alone sufficient to prove negligence, but instead, it must be proved that the substance was negligently placed there or allowed to remain. *Mankey*, 324 Ark. 14, 858 S.W.2d 85.

Here, House makes no contention that the presence of the disinfectant was on the floor as a result of Wal-Mart's negligence. Nor do the parties dispute the testimony or evidence below, although they do draw different inferences. House's sole argument is that the pine odor of the disinfectant was strong enough to put Wal-Mart employees, who were within a fifteen-to-twenty foot radius of the spill, on notice that the disinfectant was present. Having such notice, House claims the employees failed to use ordinary care to remove the spill.

House specifically contends that, a few minutes before her fall, Sue Young, a Wal-Mart employee, had walked in the alley where the spill was present and House argues that it was inconceivable that, because of the pine scent, Young would not have detected the spill. House also points out the Wal-Mart manager testified that he smelled the disinfectant when he was about fifteen feet from the spill. Based upon the manager's testimony, House further asserts that a Wal-Mart check-out employee, located

only twenty feet from the spill, should also have been aware of the disinfectant's presence because of the strong pine smell.

Wal-Mart counters, saying that no evidence was presented showing that any Wal-Mart employee had knowledge of the spill prior to House's fall or that anyone reported the spill. To the contrary, Wal-Mart employees testified, indicating they had no such knowledge. And the manager further observed that, when he saw the spill after House's fall, he saw no tracks through the spill, thus suggesting the spill had been present a short duration.

[redacted] We have recognized the length of time a substance is on the floor is a key factor, and the burden is on the plaintiff to show a substantial interval between the time the substance appeared on the floor and the time of the accident. *Mankey*, 314 Ark. at 17-18, 858 S.W.2d at 87. The fact an employee was in the vicinity where a foreign substance was later discovered is not sufficient to raise an inference that a spill was negligently overlooked. *Id. See also Safeway Stores, Inc.* v. *Willmon*, 289 Ark. 14, 708 S.W.2d 623 (1986) (employees had been up and down the aisle for an hour and fifteen minutes before the fall and did not see the substance); *Sanders*, 309 Ark. 375, 830 S.W.2d 861 (employee had gone down the aisle ten to fifteen minutes before the accident and saw no spill on the floor); *Skaggs* v. *White*, 289 Ark. 434, 711 S.W.2d 819 (1986) (employee had walked down the aisle five minutes before the occurrence and did not observe the foreign matter).

[redacted] In sum, in viewing the evidence in the light most favorable to House, we conclude her proof is insufficient to show the substance or disinfectant in issue here was on the Wal-Mart floor for such a period of time that Wal-Mart reasonably should have known of its presence. No one knew when the spill occurred, and at most, the evidence reflects the liquid had been on the floor for five or six minutes before House's fall. While House suggests that the disinfectant's strong odor should have caused a quick discovery and removal of the spill by Wal-Mart employees, it would be pure conjecture to draw such an inference. The evidence was clear that the Wal-Mart employees were unaware of the spill, and none of them smelled the disinfectant prior to House's fall. Again, although Wal-Mart employee Young may have been in the vicinity of the spill before the fall, this court,

as previously mentioned, has held such presence is insufficient to raise an inference that a spill was negligently overlooked. Here, Young denied smelling or seeing the disinfectant.

Because we hold House failed to present substantial evidence showing an inference of negligence on Wal-Mart's part, we affirm the trial court's decision directing a verdict in Wal-Mart's favor.

DUDLEY and CORBIN, JJ., not participating.

John Floyd YOUNG *v.* STATE of Arkansas

CR 93-181 871 S.W.2d 373

Supreme Court of Arkansas
Opinion delivered March 7, 1994

David E. Smith, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant, John Floyd Young, appeals a judgment of the Saline Circuit Court convicting him of the capital murder of Raymond Jacobs and sentencing him to life in prison without parole. He asserts nine points for reversal of the judgment. We find merit to the arguments concerning the luminol evidence and the testimony of Larry McGuire; therefore we reverse and remand for a new trial.

I. SUFFICIENCY OF THE EVIDENCE

Appellant moved for a directed verdict of acquittal at the close of the state's case and again at the close of all the evidence. On appeal, appellant argues in effect that all the evidence used against him was tainted and that if the evidence he alleges was improperly admitted had been excluded, the remaining evidence is insufficient to support his conviction.

The preservation of an appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of any asserted trial errors. *Lukach* v.

State, 310 Ark. 119, 835 S.W.2d 852 (1992) (citing *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984)). Therefore, although raised as the final point of error, we address appellant's challenge to the sufficiency of the evidence prior to the remaining points of trial error. In determining the sufficiency question, we disregard any alleged trial errors. To do otherwise would result in the avoidance of the sufficiency argument by remanding for retrial on other grounds. *Harris*, 284 Ark. 247, 681 S.W.2d 334.

On appeal, the appellate court does not weigh the evidence but simply determines whether the evidence in support of the verdict is substantial. *Sheridan* v. *State*, 313 Ark. 23, 852 S.W.2d 772 (1993). Substantial evidence is that which is forceful enough to compel reasonable minds to reach a conclusion one way or another. *Id.* In determining whether there was substantial evidence, the appellate court reviews the evidence in the light most favorable to the appellee, and it is permissible to consider only that evidence which supports the guilty verdict. *Thomas* v. *State*, 312 Ark. 158, 847 S.W.2d 695 (1993).

The evidence revealed that the victim, Raymond Jacobs, was age sixty-two years when he was murdered; he was retired and raised horses and bird dogs in Benton, Arkansas. The victim's wife left him at home on May 8, 1992, at approximately 7:30 a.m. She was unable to reach her husband by telephone throughout the day. When Mrs. Jacobs returned home from work she realized her husband was missing. Mrs. Jacobs contacted her son, Keith Jacobs, who had not seen his father all day. Keith Jacobs went to his father's barn to look for him and found his father inside the barn lying face down in a pool of blood. His father's body was lying on a pitchfork so that the handle was raised into the air. His father had sustained numerous blows to the head. Keith Jacobs observed a claw hammer his father usually kept in the barn was missing and saw a large amount of blood splattered on the inside walls of the barn. Keith Jacobs opined that his father had been dead for some time as his body was cold and stiff to the touch.

Keith Jacobs was at the barn on April 29, 1992, when his father bought several dogs from appellant for $2,500.00. Upon discovering his father's body, he also observed that all but one of the dogs his father had purchased from appellant were miss-

ing. Larry McGuire of Greenville, Missouri, testified that he purchased a dog from appellant in the fall of 1991; that he reported the dog stolen around April 28, 1992; and that he subsequently found his dog at the victim's kennels in August 1992.

Chief Deputy Jerry Easom of the Saline County Sheriff's Department investigated Raymond Jacobs's murder. He and Deputy David Smith traveled to Springfield, Missouri, to investigate the missing dogs as a lead in the murder investigation. They talked with appellant at his home where he admitted to being at the victim's barn, along with his driver Kenneth Thomas Trimble, around 7:30 or 8:00 a.m. on the day Raymond Jacobs was murdered.

Jerry Hailey of Springfield, Missouri, testified that he sent a dog with appellant on the 28th or 29th of April 1992 to be sold to a possible buyer in Texas. Hailey received the dog back from appellant nine or ten days later. Keith Jacobs identified that dog as one his father purchased from appellant.

Ray Marquis of Weaubleau, Missouri, testified that he sent his female dog with appellant on April 28, 1992, to be bred in Texas. He wanted the dog back, and Tom Trimble returned the dog on May 8, 1992. Keith Jacobs identified that dog as one his father purchased from appellant which was later missing after the murder.

Trimble initially refused to testify at appellant's trial but was immunized by the trial court and ordered to testify. He had already been tried for the murder of Raymond Jacobs. At appellant's trial, Trimble stated he went with appellant to Raymond Jacobs's kennels late on Thursday, May 7, 1992. Trimble understood appellant had made arrangements to pick up some dogs without contacting the victim. Appellant then informed Trimble that the victim had bought and paid for the dogs. Trimble informed appellant he would not have any part in stealing the dogs. Appellant decided to return for the dogs at daybreak since he was unable to identify the dogs in the dark. The two spent the night at a motel in Benton and returned to the victim's house the next morning, May 8, 1992. Appellant went inside the Jacobs's house for thirty to forty-five minutes. All three men then went to the victim's barn and kennels.

Trimble testified he entered the victim's barn to get an air crate for the dogs. Trimble took the crate to appellant's truck and began fiddling with a broken latch on a dog pen in the truck. Trimble then went to the barn to check on appellant and the victim. Trimble observed appellant backing out of the barn door. When appellant turned around he had blood all over him and was carrying a raincoat and an object inside a paper bag. Appellant stated to Trimble, "The old son of a bitch wouldn't sell them back. He wanted cash, not a check." The two men headed for Springfield, and along the way disposed of their shoes, clothing, the raincoat, and the hammer which was apparently inside the paper bag. They arrived in Springfield and returned the dogs to their owners.

Dr. William Q. Sturner, Chief Medical Examiner for the Arkansas State Crime Laboratory, performed the autopsy on Raymond Jacobs. He testified Jacobs died of cranial cerebral trauma or injuries to the head including the scalp, skull and brain. Dr. Sturner found multiple fragmented fractures on Jacobs's skull and extensive hemorrhaging to the brain. He testified Jacobs's hands had numerous lacerations which occurred prior to death that indicated Jacobs had struggled in a defensive manner. Dr. Sturner observed a total of sixty-six injuries on Jacobs's body, some of which could have been caused by a hammer, others which could have been caused by a pitchfork, with the most significant being the head injuries.

When considering the foregoing evidence, the jury could reasonably conclude that appellant murdered Jacobs. The evidence is substantial evidence in support of a guilty verdict. We cannot say the trial court erred in denying the motion for directed verdict of acquittal.

II. LUMINOL TESTING

Appellant argues the trial court erred in allowing the testimony of Dr. Phillip Whittle, Ph.D., as to the results of luminol tests he performed on appellant's truck. The luminol tests were ordered after law enforcement officials observed what they thought was blood on the exterior and various parts of the interior on the passenger side of appellant's truck. Dr. Whittle testified that he performed luminol tests on the interior and exterior of appel-

lant's pick-up truck that produced positive results for blood. He stated that luminol is an organic chemical compound that reacts with blood and other substances such as nickel, copper, and hydrochloride bleach. He also stated that luminol reacts with any kind of blood that has hemoglobin in it, including animal and human blood.

Dr. Whittle's report was also admitted into evidence. His report indicated positive luminol reactions on six areas of appellant's truck. However, his report also contained the following language: "Note: Luminol provides a very sensitive presumptive test for the presence of blood; other confirmation tests must be conducted to verify the presence of blood."

The only evidence appellant presented in his behalf were some reports from the Arkansas State Crime Laboratory showing that follow-up tests did not confirm the presence of human blood on appellant's truck.

[redacted] In *Brenk* v. *State*, 311 Ark. 579, 847 S.W.2d 1 (1993), we held it was reversible error to admit evidence of luminol testing showing positive results for blood without also admitting evidence of follow-up tests confirming the presence of blood. We stated 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. Recently in *Palmer* v. *State*, 315 Ark. 696, 870 S.W.2d 385 (1994), we affirmed the *Brenk* case stating that "[t]he *Brenk* decision settles the issue that the mere presence of human blood by luminol testing without factors which relate that evidence to the crime is not admissible[.]" *Id.* at 698, 870 S.W.2d at 386. Thus, when positive luminol tests cannot be confirmed by other evidence, the luminol test results become irrelevant and their admission into evidence confuses the jury.

Given that the follow-up tests from the State Crime Laboratory did not confirm the presence of human blood in the present case, *Brenk* indicates that error occurred here. The state concedes that error occurred, but argues there was no prejudice to appellant.

We cannot agree that the luminol evidence constituted harmless error. There was conflicting evidence presented as to whether

human blood was present in appellant's truck. In addition to the luminol test results and Dr. Whittle's testimony, there was Trimble's testimony that appellant returned from the barn with blood "all over his bibs [overalls] and shirt and collars and hands and arms" and that appellant later rode home in the passenger seat of his truck. Contradictory to this evidence was the State Crime Laboratory report that did not confirm the presence of human blood on appellant's truck. Trimble was accused of the same crime for which appellant was tried. Trimble's credibility was therefore subject to question by the jury. The jury could have reasonably chosen not to believe Trimble's testimony and thereby placed more reliance on the luminol evidence.

Accordingly, we cannot conclude the admission of the luminol evidence was harmless error. We reverse on this point and remand for a new trial.

III. EVIDENCE ACQUIRED PURSUANT TO IMMUNITY — TESTIMONY OF LARRY MCGUIRE

Appellant argues the trial court erred in admitting evidence acquired pursuant to his grant of immunity. However, the only specific piece of evidence appellant challenges is the testimony of Larry McGuire. Therefore, we limit our discussion to that particular evidence. Appellant contends the trial court erred in allowing Larry McGuire to testify at trial because his testimony was a direct result of statements given to the police by appellant pursuant to the grant of immunity and because his testimony involved evidence of appellant's prior bad acts.

First, we consider the argument that McGuire's testimony should have been excluded by the trial court because it was a direct result of appellant's grant of immunity. Appellant relies on *Kastigar* v. *United States*, 406 U.S. 441 (1972), and *Murphy* v. *Waterfront Comm'n*, 378 U.S. 72 (1964), and argues the state had the burden of proving a legitimate source for the testimony independent of appellant's cooperation under immunity.

We agree the state had the burden of proving an independent legitimate source for the disputed evidence used in appellant's trial. *Hammers*, 261 Ark. 585, 550 S.W.2d 432 and *Kastigar*, 406 U.S. 441; *Murphy*, 378 U.S. 52. Appellant filed an appropriate motion for a "*Kastigar* hearing" requesting the court

to conduct a hearing at which the prosecution should present all the evidence it proposed to use against appellant and prove such evidence to be derived from a legitimate source wholly independent of the information appellant gave while under immunity. In support of this request for a hearing, appellant filed a second motion in limine asking the court to exclude McGuire's testimony and to prohibit the prosecutor from mentioning the anticipated testimony of McGuire during *voir dire*, opening statement, the questioning of witnesses, and in closing arguments.

In furtherance of his second motion in limine, appellant further stated to the trial court that McGuire's testimony was not admissible under A.R.E. Rules 403 and 404 as it was not independently relevant and unfairly prejudicial. Appellant also stated that McGuire's testimony constituted evidence of "other crimes," the total affect of which would be proving the character of appellant and that he acted in conformity therewith in the Jacobs homicide.

At the threshold of trial, the trial court stated that before it would go into the question of a "*Kastigar* hearing," it would consider the motions to suppress. At that time it was brought to the trial court's attention that appellant's second motion in limine was pending with reference to McGuire's anticipated testimony. The following discussion ensued:

> MR. SMITH: I also filed a motion concerning Larry McGuire's testimony. If he's not to be called then that will moot that particular motion.
>
> MR. HARMON: I had informed Mr. Smith that I had information that Mr. McGuire might not show up and I didn't want Mr. Smith depending on my subpoena to get Mr. McGuire here if he wanted him here.
>
> MR. SMITH: Mr. McGuire testified in Mr. Trimble's trial that he thought Mr. Young sold him a dog and later that dog turned up missing. That he suspected Mr. Young had the dog stolen and the dog was later identified by a picture by Mr. McGuire as being his dog that was found at Mr. Jacobs' kennels. I don't know why Mr. McGuire's testimony would be pertinent in this case. I don't know for what purpose it would be offered by the prosecution other

than to insinuate that Mr. Young either stole the dog he sold to Mr. McGuire or had it stolen.

MR. HARMON: Mr. McGuire had a dog that he had bought from Mr. Young. The dog came up missing. Mr. Young called him after the dog was missing and offered to buy the dog. The dog was then found after Mr. Jacobs' death in his kennel as one of the dogs that Mr. Young had brought to him.

MR. SMITH: That's not quite the story. He testified in the Trimble trial that Mr. Young had called him sometime after the dog turned up missing and discussed another dog, but not the dog that was allegedly stolen, which was not even discussed during that telephone conversation. He testified that he thought Mr. Young was trying to feel him out about the white dog. They don't have any evidence that Mr. Young committed a prior wrong.

THE COURT: He can testify that he bought the dog from Mr. Young, that the dog was stolen, and that he can identify the dog, and that is the dog. He can't say anything that would be no more than just a bare suspicion that Mr. Trimble or Mr. Young stole the dog. This is a situation where I'm going to have to know precisely what his testimony is before I can rule further than that.

MR. HARMON: It can prove just exactly what happened in this case. That Mr. Young sold dogs to individuals and then stole them back, which is the exact method and mode of operation in this case.

MR. SMITH: The problem is, this dog wasn't stolen from Raymond Jacobs' kennels.

THE COURT: The motion is premature and I can't rule on it yet because there's a certain foundation that has to be laid. I have to know what evidence precedes the offer of this evidence before I'll know whether it is or is not relevant. The motion will be denied at this time.

In chambers, during a recess of the trial, appellant again voiced his objection to McGuire's anticipated testimony. The following scenario took place:

MR. HARMON: The only other thing I think we need to bring up at this time is Mr. McGuire's testimony, Mr. Smith is objecting to his testifying. Mr. McGuire is the owner of the dog that was missing but showed up in Mr. Jacobs' kennel after his death. One of the dogs that was purchased from John Young.

THE COURT: Well, I may need, someone needs to proffer the testimony and let me make—

MR. HARMON: I'll get that transcript, Your Honor.

LARRY McGUIRE

DIRECT EXAMINATION

My name is Larry McGuire, I live in Greenville, Missouri, Rt. 2, Box 282. I am the County Clerk of my County. I've bought several bird dogs from John Young. The dog I bought later turned up missing from my pen. It would have been somewhere around probably September, September or October, '91. I'm going to say I reported the dog missing to the Sheriff's Department at Dade County probably April 28th. The dog was found in Jacobs' kennel right here in Benton, Arkansas. It has been returned to me.

CROSS EXAMINATION

I think it's been admitted who stole my bird dog. It's my understanding that John admitted stealing my bird dog, John Young admitted stealing my bird dog. On the 28th day of April, I did not have any facts of who stole my bird dog. I suspected the dog had been stolen. I later received a phone call from John Young at which time he offered to buy back a black dog. This was not the dog that was stolen. I have nothing other than supposition to support any assertion that John Young stole my bird dog.

THE COURT: The proffer that was made did not go to the question of who stole the bird dog. Is that all you're going to offer?

MR. HARMON: That's all I'm going to offer.

THE COURT: What you have offered will be admitted into evidence.

MR. SMITH: May I ask, Your Honor, for what purpose?

THE COURT: I think it has some relevancy with regard to the possession and identity of the dog.

MR. HARMON: Keith Jacobs testified that he was there the day that John Young brought that dog to Raymond Jacobs. That's the relevancy.

MR. SMITH: That's not relevant.

THE COURT: Yes, it is, too.

MR. SMITH: What issue is it relevant?

THE COURT: I'm not going to argue with you about it, I've ruled that it is and it's going to be admitted into evidence you and Mr. Harmon can argue about it if you want to.

MR. SMITH: I want my record clear on this that I object to it based upon the facts brought forth in my motion in limine. It can prove absolutely nothing. It is an attempt to prove a prior bad act, which is totally inadmissible to prove that someone acted in conformity therewith. This dog was not taken from Mr. Jacobs' kennel. It cannot be proof of an attempt to steal dogs because that dog was not stolen. It can't be proof of motive for the killing of Raymond Jacobs because that dog was not stolen from Raymond Jacobs. It can't prove anything. I'm just trying to make a record.

THE COURT: The Court has ruled that the proffer of evidence has some relevance and that there is no prejudice that would be caused that would down play the relevance of the proffered testimony.

(Witness excused.)

MR. SMITH: Your Honor, I simply want to make the additional objection that the proffered testimony of Larry McGuire even as it stands under the proffer, is obviously

tainted by his knowledge that statements given by John Young pursuant to a grant of immunity, which were obviously well after the fact, it was a derivative use of that information used as a result of the grant of immunity. For that reason, I believe it's inadmissible.

THE COURT: That's it.

(THEREUPON, the Court, Counsel for the State and Defense and the Defendant returned to the courtroom[.])

Prior to McGuire's testimony at trial, appellant again voiced his objection:

MR. SMITH: Your Honor, for the record please note by Rule 403 and 404 B objection to this testimony.

THE COURT: Yes, sir.

Although the trial court did not make a specific finding or ruling as to whether McGuire's testimony was derived from a legitimate source independent of appellant's cooperation while under immunity or that it violated A.R.E. Rules 403 and 404, it is obvious that counsel for Young made appropriate objections which were rejected by the trial court, thus, preserving his rights under *Kastigar* and our rules of evidence.

At trial, McGuire testified that he lived in Greenfield, Missouri; that he knew appellant; that he bought a dog from appellant in the fall of 1991; that in April 1992 he reported the dog missing to the sheriff's department; and that he later found the same dog at the victim's kennels in Benton, Arkansas, in August 1992. Given the contents and nature of McGuire's testimony as summarized above, it is obvious McGuire's testimony does much more than imply confirmation of evidence presented from other sources indicating that appellant sold Jacobs a dog prior to the murder. Granted, McGuire did not testify that appellant admitted stealing McGuire's dog. However, this is of no moment, for, in fact, McGuire's testimony dictates only one conclusion — that appellant sold McGuire a bird dog, reacquired the dog without McGuire's knowledge or consent, then transported the dog to Arkansas and sold it to the victim, Mr. Jacobs. Simply put, appellant's conduct displayed a prior bad act and involvement in "other crimes." By accepting this testimony in evidence, the trial court

violated A.R.E. Rules 403 and 404; this evidence was not independently relevant and unfairly prejudicial in that this evidence of another crime, as accepted, proved the character of appellant and that he acted in conformity therewith in Jacobs's homicide. In addition, this conduct on the part of appellant, as testified to by McGuire, is not dissimilar to the facts of this case in that appellant had sold several dogs to Jacobs, received money therefor, and was then in the process of reacquiring these dogs without Jacobs's knowledge or payment to Jacobs when a confrontation took place between appellant and Jacobs at which time Jacobs was killed.

Recapitulating, McGuire's testimony was brought about as a direct result of appellant's grant of immunity by the trial court, and the state has failed in its burden to prove a legitimate source for this testimony independent of appellant's cooperation under immunity. *Kastigar* v. *United States*, 406 U.S. 441 (1972), and *Murphy* v. *Waterfront Comm'n*, 378 U.S. 72 (1964). Further, McGuire's testimony showed a prior bad act on the part of appellant, appellant's involvement in "other crimes," that McGuire's acquired testimony was more prejudicial than probative, and that such testimony was not admissible under A.R.E. Rules 403 and 404. For these reasons, the trial court abused its discretion in letting this testimony into evidence; the evidence was prejudicial and as such it is necessary that we reverse and remand this case for retrial. We address the remaining points only to the extent they are likely to arise on retrial.

IV. REVOCATION OF IMMUNITY

The trial court entered an order on June 4, 1992, granting appellant immunity from prosecution of any crimes arising from Jacobs's death. In return for immunity, appellant agreed to supply complete and truthful information relating to the investigation of the murder. Appellant also agreed to testify truthfully at any hearing or trial relating to Jacobs's murder. The state filed a petition to revoke appellant's immunity alleging that appellant breached the agreement by providing false information to the prosecutor and law enforcement officers. On August 24, 1992, the trial court held a hearing on the state's petition to revoke appellant's immunity and granted the petition.

Appellant contends the order granting him immunity from prosecution was improperly revoked on a pretext after he had supplied sufficient evidence to convict his co-defendant, Kenneth Thomas Trimble, of capital murder. The state contends the immunity was justifiably revoked because appellant did not honor the immunity agreement.

At the hearing on the petition to revoke appellant's immunity, the state introduced various statements appellant had given which were inconsistent with each other and with the physical evidence. These statements are summarized in the following paragraphs.

Prior to receiving immunity on June 4, 1992, appellant gave two statements. On May 10, 1992, appellant was interviewed at his home as a possible witness; he admitted to being at Jacobs's barn on the morning of Jacobs's murder but said that Jacobs was alive when he and Trimble left. On May 11, 1992, appellant waived his *Miranda* rights and was interviewed as a possible suspect. In the May 11 statement, appellant maintained Jacobs was alive when he and Trimble left the barn. Also in the May 11 statement, appellant was questioned about the possible presence of blood in his truck and denied it was Jacobs's blood. Appellant then invoked his right to counsel.

After appellant was granted immunity on June 4, 1992, he accompanied Saline County Sheriff's deputies on a trip to recover physical evidence. Deputy Smith's notes of that trip reflect the following:

> *INTERVIEW OF WITNESS*
>
> This date, June 4, 1992, Captain Easom and myself traveled to Clinton, Arkansas with John Floyd Young.
>
> During the trip, Young told investigators that the following scenario occurred during the death of Raymond Paul Jacobs:
>
> . . . .
>
> . . . Young stated that after arriving at the kennels, he and Jacobs walked around for a few minutes as he was attempting to talk him out of the dogs. Young stated that

> Trimble was inside the barn at this time and that Jacobs had walked into the barn. Young stated that he walked over to look at one of the dogs and heard a thump and then heard a groan and went into the barn to find that Trimble had struck Jacobs on the head with a hammer. Young stated that Trimble ordered him to get the dogs out of the pens and to load them onto the truck. Young stated that he did that and that they then left. Young stated that he was afraid that Trimble might kill him too.

Also after he was granted immunity, appellant gave a statement on July 16, 1992. In the July 16 statement, appellant's version of his involvement in the crime changed considerably from the version he gave on the trip to Missouri as he admitted to participating in the murder:

> [H]e [Jacobs] just turned and walked into the barn and I'm and I go in with him and I'm arguing with him . . . . And Mr. Jacobs just kinda turned and walked away from me, as he did Mr. Trimble picked up a pitch-fork and said, Stop. And when he did Mr. Jacobs kinda turned and come back towards me, and he said, Grab me [him]. And like a idiot I grabbed him. And in the process I feeling you know I fell his body flinch and Mr. and Mr. Trimble hits him with a hammer. I don't' remember if it was two, I feel him go limp in my arms. He's heavy I mean I not that you know, I let him fall down. Mr. Trimble turns towards me and says, Load the "F" dogs. And I said, what are we gonna do? And he said, Load the "F'en" dogs! So I went outside loaded the dogs, and me and Mr. Trim, him and Mr. Trimble was in the barn. I loaded my dogs, three dogs, the four, three was on one side, over toward his house on his house side. And I come back Mr. Trimble is outside washing off.

In addition to presenting the preceding documents, the state also presented witnesses at the hearing to revoke appellant's immunity. The state called the medical examiner, Dr. Sturner, who testified that he was familiar with appellant's July 16, 1992 statement. Dr. Sturner opined to a reasonable degree of medical certainty that Jacobs's death could not have occurred in the manner described in the July 16, 1992 statement. His opinion was based on the fact that the statement that Jacobs was struck twice

with a hammer was inconsistent with Jacobs's injuries. Dr. Sturner testified that Jacobs had multiple injuries to the head, between fifteen and twenty, possibly more; that Jacobs had multiple fragmented fractures; and that the severity of the brain injuries indicated more than two blows occurred. Dr. Sturner also stated that Jacobs had numerous defensive injuries to his hands indicating Jacobs struggled, which was possible but unlikely if appellant pinned Jacobs's arms to his sides.

Appellant testified at the hearing to revoke his immunity and admitted he lied in several of his prior statements. On cross-examination, he stated that he lied in the May 10, 1992 statement. He also stated that he lied on June 4, 1992, the day he was granted immunity. He admitted that he had lied about being in the barn and holding the victim while Trimble struck him. He explained that he left out parts of his involvement in the murder because he was ashamed. He stated, "The only thing I've ever lied about was holding him. Since the sixteenth you got the truth and you know you did."

On cross-examination, appellant read from the above-quoted portion of his July 16, 1992 statement and then stated as follows:

> [Reading from the July 16 statement] "We got in the truck and went the opposite way than we normally do. You go out, other words, when your leaving Mr. Jacobs' barn, if you're standing —" [Resuming testimony on cross-examination] And that's when he hit him about fifty, that's when his head was beat off. I didn't say, and I told you numerous times, I didn't tell you he just hit him the two times and you know that.

Despite appellant's testimony to the contrary, the July 16, 1992 statement does not reflect that appellant stated Jacobs was struck fifty times.

The trial court heard all the foregoing evidence and concluded that the state had not acted in bad faith in revoking appellant's immunity. The trial court considered only those statements made subsequent to the immunity and determined that appellant had contradicted himself and that his statements did not match the physical evidence. The trial court also observed that appellant's testimony at the hearing was inconsistent with his prior

statements. The trial court then granted the state's petition to revoke appellant's immunity and stated that none of the information gained from appellant as a result of his immunity could be used in his trial.

This court has previously stated that the determination of a claimant's equitable entitlement to immunity, when opposed by the prosecuting attorney, should lie within the sound judicial discretion of the trial court. *Hammers* v. *State*, 261 Ark. 585, 550 S.W.2d 432 (1977). The trial court should ensure that the promise made by the prosecutor is kept when the claimant has fulfilled the agreement in good faith. *Id.* It is appropriate to consider the extent of the claimant's performance of the bargain and that the primary purpose of the exchange is to facilitate the prosecution of the crime, not to grant the immunity. *Id.* The burden of proving the agreement and compliance with it rests with the claimant. *Id.*

We cannot say the trial court abused its discretion in granting the state's petition to revoke appellant's immunity. The trial court determined the immunity agreement was a matter of record and therefore need not be proven by appellant. Appellant admitted he lied about his participation in Jacobs's murder. That lie occurred after appellant was granted immunity. Therefore, there is a factual basis to support the trial court's determination that appellant breached the terms of the immunity agreement. *See Abner* v. *State*, 479 N.E.2d 1254 (Ind. 1985) (holding that a defendant who admits to lying is not entitled to the benefit of an immunity agreement). Accordingly, we cannot find an abuse of discretion.

We are well aware of appellant's contention that the state's justification for the revocation is merely a pretext and that the revocation was actually based on appellant's refusal to take a polygraph examination. However, as previously stated, there is a factual basis to support the revocation, and appellant has offered no proof of pretext.

V. TESTIMONY OF KENNETH THOMAS TRIMBLE

During Trimble's trial, Trimble's videotaped statement was entered into evidence; during closing argument, the prosecutor commented that Trimble's statement was hogwash and a lie. The

prosecutor also told the jury that Trimble lied to save his own life. During appellant's trial, Trimble testified under immunity as the state's witness; his testimony was consistent with his videotaped statement entered at his own trial. However, during closing argument at appellant's trial, the prosecutor told the jury that Trimble was telling the truth.

Appellant argues that the prosecutor's conduct amounts to the knowing use of false evidence and therefore, in addition to being an ethical violation of Rule 3.3(a)(4) of the Rules of Professional Conduct, violates his Fourteenth Amendment due process rights according to *Miller* v. *Pate*, 386 U.S. 1 (1967).

Miller does stand for the proposition that the knowing use of false evidence violates a defendant's Fourteenth Amendment rights. However, appellant has not demonstrated that the prosecutor knew Trimble's statement and testimony to be false. Such proof is required to demonstrate a deprivation of appellant's Fourteenth Amendment rights. Such proof would also be required to exclude the evidence on remand.

VI. MAY 11, 1992 VIDEOTAPED STATEMENT

Appellant argues reversible error occurred when the trial court admitted a videotaped statement given by appellant on May 11, 1992, in Springfield, Missouri, prior to the granting of immunity. The videotape in question was admitted at a suppression hearing, and the trial court ruled admissible the portion of the statement up to the point at which appellant invoked his right to counsel. However, as the state points out in its brief, the videotaped statement was never shown to the jury nor was it ever admitted into evidence at trial. Obviously then, no error occurred here and it is unlikely the state will seek its admission on remand.

VII. TRIAL JUDGE'S RECUSAL

Appellant contends that Canons 2 and 3(C)(1) of the Arkansas Code of Judicial Conduct required the trial court's recusal in this case. Specifically, appellant argues the trial judge should have recused because his son was employed in the prosecutor's office. At the hearing on the motion to recuse, the trial judge stated that his son was twenty years old, that he no longer lived in the judge's home, and that he was a part-time temporary employee as an

errand boy in the hot checks division of the prosecutor's office. The trial court stated the relationship was so insignificant it was simply not a factor and denied the motion to recuse.

Appellant urges the appearance of impropriety resulting from his son's employment was complicated further by the fact that the trial judge's impartiality might reasonably be questioned when he would have to rule on the allegations of professional misconduct made against his son's employer in this case.

This point is addressed in Part IV of our opinion in *Trimble* v. *State*, 316 Ark. 161, 871 S.W.2d 562 (1994). We do not discuss the reasoning of this issue here, but simply state that no canons were violated.

VIII. DISQUALIFICATION OF PROSECUTOR'S OFFICE

Appellant contends the only way to ensure that no information derived from appellant's immunity could be used against him was to disqualify the prosector and all members of his office. However, appellant cites us to no authority requiring such a far-reaching disqualification. Appellant does cite *Kastigar*, 406 U.S. 441, as authority under this point. However, that case does not require a prosecutor's recusal; rather, it requires the state to prove that any evidence presented against a defendant came from a legitimate source independent of the defendant's immunity. In the absence of authority requiring such, we cannot say that the prosecutor's office must disqualify on retrial.

IX. AUDIOTAPED STATEMENT OF MAY 10, 1992

Appellant challenges the admission of a statement he gave as a possible witness on May 10, 1992, when Deputies Easom and Smith went to appellant's home in Springfield, Missouri. The deputies were investigating the theft of the victim's dogs. The deputies audiotaped appellant's statement, did not read him any *Miranda* warnings, and told appellant he was a possible witness in the victim's murder case. At the suppression hearing, the trial court ruled appellant's statement was voluntary and non-custodial, and therefore appellant had not met his burden of proving the statement's inadmissibility.

On appeal, appellant admits the admission of the tape itself was not error, but argues that as a result of its admission,

the prosecutor was allowed, in effect, to put appellant on the stand and then impeach his credibility with other inconsistent evidence. As the statement was given in appellant's home when he was not yet a suspect, there was no requirement that he be advised of his *Miranda* rights. This court has often stated that a defendant's false and improbable statements explaining suspicious circumstances against him are admissible as proof of guilt. *Thomas* v. *State*, 312 Ark. 158, 847 S.W.2d 695 (1993) (citing *Bennett* v. *State*, 297 Ark. 115, 759 S.W.2d 799 (1988), and *Surridge* v. *State*, 279 Ark. 183, 650 S.W.2d 561 (1983)). In the statement, appellant admitted to being at the victim's barn on the morning of the murder but says the victim was alive when he and Trimble left. In subsequent statements, appellant admitted that Jacobs was not alive when he and Trimble left the barn. On retrial, the inconsistent statement would therefore be admissible to show appellant's guilt.

X. ARK. SUP. CT. R. 4-3(h)

Although appellant makes no certification that he has abstracted all objections decided adversely to him, the state does make such a certification. We have determined there are no such objections requiring reversal.

The judgment of conviction is reversed and the case remanded for a new trial.

BROWN, J., concurs.

HAYS, J., dissents.

ROBERT L. BROWN, Justice, concurring. I would reverse this case, but I would do so on the basis that the admission of Larry McGuire's testimony violated Young's privilege against self-incrimination — not on the basis of luminol testing.

Larry McGuire's testimony was important to the State and damaging to Young. McGuire testified that Young sold him a hunting dog which then turned up missing. Later, McGuire retrieved the dog from Jacobs's premises after the murder. The fact that McGuire's missing hunting dog had been sold by Young to Jacobs tied Young directly to Jacobs's murder. It also provided a motive for the murder. Saline County investigators without question were lead to McGuire by Young's statements after the

grant of immunity. When that immunity was revoked, evidence gleaned under the cloak of immunity was not admissible absent an independent source for the testimony or prejudice. An objection was made at trial by the defense to McGuire's testimony on that basis, and a hearing was conducted by the trial court in chambers. Neither an independent source for the McGuire testimony nor lack of prejudice was shown. Yet, the objection was overruled.

The trial court abused its discretion in not excluding McGuire's testimony, which to my way of thinking was clearly prejudicial. The fact that there was testimony from other dog owners does not minimize its grievous impact. Only McGuire testified that he bought a dog from Young which was then missing and ultimately found at Jacobs's farm. The other Missouri residents testified that Young returned the dogs to them. They had given the dogs to Young either to sell on consignment or for breeding purposes.

Reversal on the basis of the luminol testing is not warranted, however. There was testimony at Young's trial by Kenneth Thomas Trimble, who was also charged and tried for the murder of Jacobs, that Young had blood on his clothes from the victim and even got some blood on Trimble when they scuffled briefly after the killing. The two men wearing bloody clothing then got in the truck. Trimble testified that he bought new clothes at a Wal-Mart store because of the bloody condition of Young's clothes. That a substance found in the truck was initially screened for blood by luminol testing appears innocuous when Trimble's testimony is factored into the equation.

The majority writes that Trimble's credibility was at issue, and the luminol test might have tipped the balance in the jury's minds. But Trimble had already been convicted of Jacobs's murder by the time of Young's trial, and this fact was imparted to the jury on cross examination. Also, the fact that the luminol test was not conclusive for human blood, or even blood at all, was made clear to the jury by Dr. Whittle. Reversible error seems lacking under these circumstances. The luminol evidence was simply not sufficiently prejudicial to warrant a new trial.

STEELE HAYS, Justice, dissenting. I adopt by reference Jus-

tice Brown's analysis of the luminol issue and join in his opinion to that extent.

As to the testimony of Larry McGuire, I find no error in the admission of that evidence at trial. The trial court's ruling violated neither Rule 403 or 404(b) of the Arkansas Rules of Evidence, nor appellant's Due Process rights. Appellant relies on *Kastigar* v. *United States*, 406 U.S. 441 (1972) and *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964). Neither is especially pertinent to this case. In *Kastigar*, a defendant had been granted immunity in a state court proceeding and the court held that in a federal proceeding the burden was on the prosecution to show that its evidence was obtained independently. Similarly, in *Murphy*, the petitioners had been granted immunity under state laws and they had refused to answer questions in a proceeding before the Waterfront Commission of New York Harbor on grounds that it would incriminate them under federal law. In their appeal from a civil contempt penalty the Supreme Court held that, absent an immunity provision, one jurisdiction may not compel a witness to give testimony which might incriminate him under the laws of another jurisdiction. Unlike the case before us, in neither of those had the defendant violated his agreement to give full and truthful information and testimony on which the immunity agreement was based. Appellant has cited nothing that would sustain the right to breach an immunity agreement by giving false statements and then object to the use of any information which was given.

The argument is comparable by analogy to *Ricketts* v. *Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed 2nd 1 (1987), where the Supreme Court held that a defendant charged with first degree murder who agreed to testify against co-defendants in exchange for a plea agreement to second degree murder was not protected by the Double Jeopardy Clause against reinstatement of the first degree murder charge when he reneged by refusing to testify against co-defendants in their retrial where such a consequence was part of the agreement.

As to Rule 403, the theft of Larry McGuire's dog was relevant to prove the plan of appellant and his accomplice which led to the murder of Raymond Jacobs. There was no abuse of discretion by the trial court in allowing this evidence.

I believe the judgment of conviction should be affirmed.

Herbert F. BRENK *v.* STATE of Arkansas

93-776 871 S.W.2d 372

Supreme Court of Arkansas
Opinion delivered March 7, 1994

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. Appellant, Herbert F. Brenk, pursues an interlocutory appeal from the Baxter Circuit Court's June 8, 1993 order removing one of his two court appointed attorneys, Mr. Larry Dean Kissee, from representing appellant in his second trial for murder. Appellant argues this action has deprived him of his right to counsel. Appellant bases jurisdiction on Ark. R. App. P. 2(a)(8) which allows an appeal to this court from an order "which disqualifies an attorney from further participation in the case." The attorney in the instant case was not disqualified from further participation, and in fact was specifically granted permission to continue to participate in appellant's retrial at his own expense.

"Disqualify" is defined as "to divest or deprive of qualifications; to incapacitate" or "to render ineligible or unfit" in *Black's Law Dictionary* 424 (5th ed. 1979). The attorney in appellant's case was certainly not "disqualified," especially in light of the fact that the order clearly noted that the trial court did not prohibit the attorney from participating. There must be

a more substantive basis on ethical grounds to meet the definition of "disqualify" under our appellate rules. *See e.g. First American Carriers, Inc.* v. *The Kroger Co.*, 302 Ark. 86, 787 S.W.2d 669 (1990). The trial court's order in this case does not meet this definition.

Since this is not an appeal of a final order as required under our rules and does not fall within any other exception provided, this appeal is hereby dismissed.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. I dissent. The trial court's order removed Mr. Larry Kissee as Mr. Brenk's court-appointed attorney, finding it is not necessary for the state or county to pay for two court-appointed attorneys. The effect of the trial court's order left Brenk represented by the Baxter County Public Defender and Mr. Tom Garner, one of Brenk's two lawyers from his previous capital murder trial. The trial court also added in its order that Mr. Kissee, at his option, would be allowed to participate in the Brenk case, but he would do so, without payment by the state or county for his legal services. For all practical purposes, Kissee was disqualified from further participation, and Brenk should be permitted to bring this interlocutory appeal which is expressly provided for under Ark. R. App. P. 2(a)(8).

Even though I believe this court should accept jurisdiction and decide Brenk's appeal, I believe the trial court's removal of Kissee was proper and should be affirmed. Brenk was represented by Mr. Kissee and Mr. Garner at Brenk's first trial and his appeal from a guilty verdict. We reversed and remanded the first trial, Brenk v. State, 311 Ark. 579, 847 S.W.2d 1 (1993), and on remand, Brenk brings this interlocutory appeal seeking to retain Kissee as appointed counsel for his second trial. Brenk is indisputably indigent and entitled to have counsel appointed, but he has no right to have any particular lawyer appointed to represent him at the taxpayers' expense. *Malone* v. *State*, 291 Ark. 315, 724 S.W.2d 180 (1987); *Mann* v. *Britt*, 266 Ark. 100, 583 S.W.2d 21 (1979).

Brenk cites *Clements* v. *State*, 306 Ark. 596, 817 S.W.2d 194 (1991), in support of his position that the trial court here had no right to remove Kissee as counsel. This court pointed out in *Clements* that each case must be examined on its own facts

when determining whether a lawyer's removal is justified. Without rehashing the facts already set out in *Clements*, it is enough said that this court concluded the action taken there by the trial court was arbitrary and unacceptable. Here, the trial court acted promptly and within the discretion given it by case law to provide Brenk with appointed counsel. Accordingly, this court should affirm.

U.S. TERM LIMITS, INC., et al. *v.* Bobbie E. HILL, et al.

93-1240 872 S.W.2d 349

Supreme Court of Arkansas
Opinion delivered March 7, 1994
[Rehearing denied March 14, 1994.*]

*Petition of State of Arkansas: Special Chief Justice George K. Cracraft and Special Justices Ernie Wright and Gerald Brown join. Special Justice Carl McSpadden would grant rehearing. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.

Petition of U.S. Term Limits, Inc., et al.: Cracraft, Sp. C.J., and Wright, Brown, and McSpadden, Sp. JJ., join. Hays, J., would grant. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.

Petition of Senatorial Unified Members: Cracraft, Sp. C.J., and Wright and Brown, Sp. JJ., join. McSpadden, Sp. J., would grant rehearing. Holt, C.J., and Newbern, Glaze, and Corbin, JJ., not participating.

[redacted]

Richard F. Hatfield, P.A., by: *Richard F. Hatfield*, for appellant State of Arkansas ex. rel. Attorney General Winston Bryant.

James F. Lane; Cleta Deatherage Mitchell, of Term Limits Legal Institute; and *Mackey & Wills, P.A.*, by: *Frank J. Wills III*, for appellant Arkansans for Governmental Reform.

The McMath Law Firm, by: *Sandy S. McMath*; and *John T. Harmon & Associates, P.A.*, by: *John T. Harmon*, for appellants Americans for Term Limits and Steve Goss.

Webb, Doerpinghaus & Brown, by: *Doyle L. Webb II*; and *Karr, Hutchinson & Stubblefield*, by: *W. Asa Hutchison*, for appellants.

Williams & Connolly, by: *John G. Kester, Terrence O'Donnell*, and *Timothy D. Zick*; and *Allen Law Firm*, by: *H. William Allen*, for appellant U.S. Term Limits, Inc. et al.

Wilson, Engstrom, Corum, Dudley & Coulter, by: *Stephen Engstrom*, for appellant Unified Members of Legislature.

Wright, Lindsey & Jennings, by: *Nancy Bellhouse May, Karen J. Garnett*, and *Judy M. Robinson*, for appellant George O. Jernigan, Jr., and the Democratic Party of Arkansas.

Friday, Eldredge & Clark, by: *Elizabeth J. Robben, Robert S. Shafer*, and *Jeffrey H. Moore*, for appellees Bobbie E. Hill and

Dick Herget.

Mitchell, Williams, Selig, Gates & Woodyard, A Professional Limited Co., by: *Sherry P. Bartley*, for appellee Ray Thornton.

ROBERT L. BROWN, Justice. This case concerns the validity of Amendment 73 to the Arkansas Constitution, which establishes limitations on the number of terms that can be served by state constitutional officers, and state legislators, and limitations on the eligibility of candidates for the U.S. Senate and U.S. House of Representatives to have their names placed on the election ballot. Amendment 73 was proposed as an initiated petition by the people of the State under Amendment 7 of the Arkansas Constitution and approved in the General Election on November 3, 1992, by a vote of 494,326 to 330,836.

The proposal, as it appeared on the ballot and was voted on at the General Election, read as follows:

PROPOSED CONSTITUTIONAL AMENDMENT NO. 4

(Proposed by Petition of the People)

(Popular Name)

ARKANSAS TERM LIMITATION AMENDMENT

(Ballot Title)

> An Amendment to the Constitution of the State of Arkansas limiting the number of terms that may be served by the elected officials of the Executive Department of this state to two (2) four-year terms, this department to consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, Commissioner of State Lands; limiting the number of terms that may be served by members of the Arkansas House of Representatives to three (3) two-year terms, these members to be chosen every second year; limiting the number of terms that may be served by members of the Arkansas Senate to two (2) four-year terms, these members to be chosen every four years; providing that any person having been elected to three (3) or more terms as a member of the United States House of Representatives from Arkansas

shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas; providing that any person having been elected to two (2) or more terms as a member for the United States Senate from Arkansas shall not be eligible to appear on the ballot for election to the United States Senate from Arkansas; providing for an effective date of January 1, 1993; and making the provisions applicable to all persons thereafter seeking election to the specified offices.

FOR Proposed Constitutional Amendment No. 4 ☐

AGAINST Proposed Constitutional Amendment No. 4 ☐

The text and description of the full Amendment which were published and included in the initiative petition but not on the ballot read:

SUMMARY:

This amendment provides a limit of two (2) terms for the Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General and Commissioner of State Lands. It provides a limit of three (3) terms for State Representatives, and a limit of two (2) terms for State Senators. It also provides that persons having been elected three (3) or more terms as a member of the United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas. Lastly, it provides that any person having been elected to two (2) or more terms as a member of the United States Senate from Arkansas shall not be eligible to appear on the ballot for election to the United States Senate from Arkansas.

PREAMBLE:

The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the sys-

tem established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials.

SECTION 1 — Executive Branch

(a) The Executive Department of the State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, all of whom shall keep their offices at the seat of government, and hold their offices for the term of four years, and until their successors are elected and qualified.

(b) No elected officials of the Executive Department of this State may serve in the same office more than two such four-year terms.

SECTION 2 — Legislative Branch

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two year terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member of the Arkansas Senate may serve more than two such four-year terms.

SECTION 3 — Congressional Delegation

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

SECTION 4 — Severability

The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand.

SECTION 5 — Provisions Self-Executing

Provisions of the Amendment shall be self-executing.

SECTION 6 — Application

(a) This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all persons thereafter seeking election to the offices specified in this Amendment.

(b) All laws and constitutional provisions which conflict with this Amendment are hereby repealed to the extent that they conflict with this amendment.

The text of the entire Amendment was published prior to the election as required by law. Ark. Const. amend. 7. "Initiative;" Ark. Code Ann. § 7-9-113 (1987).

On November 13, 1992, appellees Bobbie Hill on behalf of herself and the League of Women Voters of Arkansas filed a complaint for declaratory judgment in Pulaski County Circuit Court seeking to invalidate Amendment 73 on several grounds: (1) the Amendment violates Article 1 of the U.S. Constitution by adding an additional qualification for election to the U.S. House of Representatives and the U.S. Senate; (2) the sections of the Amendment are inherently nonseverable and the unconstitutionality of section 3 voids the entire Amendment; (3) the Amendment did not contain an Enacting Clause in violation of Amendment 7 of the Arkansas Constitution.

The original defendants named in the complaint were incumbent State constitutional officers and legislators, U.S. senators and representatives currently in office, the State Democratic Party, the State Republican Party, and the State Board of Election Commissioners. Many of the incumbent State legislators combined their efforts in this matter under the title of Unified Members. Thereafter, other parties intervened. The State of Arkansas through the State Attorney General's office intervened as a party defen-

dant and was joined by various organizations that were proponents of the Amendment: U.S. Term Limits, Inc., Arkansans for Governmental Reform, and Americans for Term Limits, as well as their representatives. An Amended Complaint was subsequently filed adding Dick Herget, a political supporter of U.S. Congressman Ray Thornton, who has previously served three terms in the U.S. House of Representatives, as a party plaintiff. Plaintiff/appellee Bobbie Hill was described as a political supporter of State Representative John Dawson, who has previously served seven terms in the State House of Representatives.

Appellees Hill and Herget joined by U.S. Congressman Ray Thornton and the State Democratic Party moved for summary judgment to void Amendment 73 in accordance with the Amended Complaint. The Unified Members filed a similar motion. The State of Arkansas and Arkansans for Governmental Reform moved to Dismiss the complaint for lack of justiciability. Intervenor U.S. Term Limits moved for summary judgment on grounds that Amendment 73 was valid in all respects.

A hearing ensued on July 29, 1993, and the circuit court handed down its Conclusions of Law that same date which are summarized:

1. The matter is justiciable based on the adverse impact of Amendment 73 on incumbent officeholders and on appellees Hill's and Herget's right to participate in the political process.

2. The omission of an Enacting Clause in the Amendment was a fundamental error and fatal defect in the Amendment.

3. Amendment 73 is a restriction on the qualifications of persons seeking federal congressional offices and violates the U.S. Constitution.

4. The power to limit the terms of State legislative and executive officers vests with the people through a properly drafted initiative.

5. The provisions applying term limits to State officeholders were severable and not inextricably linked to term limits on the federal delegation.

A document entitled Findings of Fact, Conclusions of Law,

and a Final Order which embraced the Conclusions of Law of July 29, 1993, was entered on September 8, 1993. The principal finding of fact on September 8, 1993, was that Amendment 73 contained no Enacting Clause. For that reason the court reiterated its conclusion that the Amendment failed to pass muster under the Arkansas Constitution and declared it void. In the Final Order, the court also ruled that Section 3 pertaining to U.S. senators and representatives violated the Qualifications clauses of the U.S. Constitution, but that Section 3 was severable from Sections 1 and 2 which deal with state elected officeholders.

I. JUSTICIABILITY

Several appellants including U.S. Term Limits, Inc., Arkansans for Governmental Reform, the State of Arkansas, and Americans for Term Limits contend on appeal that this matter is not justiciable because appellees Hill and Herget and the affected state and federal officeholders have not been adversely impacted by Amendment 73 and, hence, the case is not ripe for decision. Appellants' justiciability argument hinges on the fact that no elections have yet been held where state or federal candidates have been excluded, and no rights to association and speech in appellees Hill and Herget at this juncture have been impaired. They urge that Amendment 73 is prospective and, accordingly, only terms of service after January 1, 1993, will be counted for eligibility purposes. They maintain, in short, that if past terms of service are counted, this would be giving retroactive effect to Amendment 73.

Our law is clear that declaratory relief will lie where (1) there is a justiciable controversy; (2) it exists between parties with adverse interests; (3) those seeking relief have a legal interest in the controversy; and (4) the issues involved are ripe for decision. *UHS of Ark., Inc.* v. *City of Sherwood*, 296 Ark. 97, 752 S.W.2d 36 (1988); *Cummings* v. *City of Fayetteville*, 294 Ark. 151, 741 S.W.2d 638 (1987); *Andres* v. *First Ark. Development Finance Corp.*, 230 Ark. 594, 324 S.W.2d 97 (1959).

We have no problem concluding that appellees Hill and Herget have standing to mount this action for declaratory relief and that the case is ripe for determination. Surely, the ability of Hill and Herget to participate in the political process on behalf of

certain candidates and as voters for those same candidates is in jeopardy which brings into play impairment of speech and association rights under the First and Fourteenth Amendments. *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983); *Thorsted* v. *Gregoire*, C93-770WD (W.D.D.C. Wash. Feb. 10, 1994). The same holds true for the League of Women Voters of Arkansas, which has standing to participate on behalf of its voter-members. *Thorsted* v. *Gregoire, supra.* For the officeholders themselves, both state and federal, the uncertainty over what the future holds is even more daunting. Some officeholders do not know whether they will be foreclosed from seeking election as early as this election year.

A case and controversy rages among the various parties to this action, including numerous elected officials, over the effectiveness of Amendment 73 and its application. It is a matter of significant public interest, involving issues of constitutional law. *See Bryant* v. *English*, 311 Ark. 187, 842 S.W.2d 21 (1992). Because of the far-reaching impact of the issue and the potential for an imminent impairment of the legitimate interests of elected officeholders and their supporters occasioned by the Amendment, the matter is ripe for adjudication and justiciable.

II. ENACTING CLAUSE

We turn next to the facet of this case on which the circuit court predicated its decision — the absence of an Enacting Clause in Amendment 73. Amendment 7 to the Arkansas Constitution sets the following requirement:

> Enacting Clause — The style of all the bills initiated and submitted under the provisions of this section shall be, "Be It Enacted by the People of the State of Arkansas" (municipality, or county as the case may be). In submitting measures to the people, the Secretary of State and all other officials shall be guided by the general election laws or municipal laws, as the case may be, until additional legislation is provided therefor.

The circuit court found that the omission of the Enacting Clause was fatal to Amendment 73 and voided it on that basis.

The appellants vehemently attack this ruling on several grounds: (1) appellees Hill and Herget waged, in essence, a con-

test over the sufficiency of the initiated petition with their Enacting Clause argument, and the circuit court had no jurisdiction over sufficiency matters; (2) Amendment 7 speaks of the style of all "bills" needing Enacting Clauses, and "bills" is a legislative term which does not include constitutional amendments; (3) the requirements of Amendment 7 are directory post-election and not mandatory; and (4) there was substantial compliance with the requirements of Amendment 7.

We believe that the declaratory judgment action which raised the Enacting Clause issue and the validity of Amendment 73, post-election, was appropriately before the circuit court and that that court had jurisdiction to hear the matter. We, therefore, turn to the language of Amendment 7 itself.

Under the title "Initiative," Amendment 7 reads:

> The first power reserved by the people is the initiative. Eight percent of the legal voters may propose *any law* and ten percent may propose a *Constitutional Amendment* by initiative petition, and every such petition shall include the full text of the measure so proposed. (Emphasis ours.)

The people of this State may propose either laws or constitutional amendments by initiative petition. The lawmaking power given to the people to propose and adopt laws by initiative petition was intended to supplement existing legislative authority in the General Assembly. *See Ferrell* v. *Keel*, 105 Ark. 380, 151 S.W. 269 (1912). That power, though, is not what is involved in the case before us. Here, we are concerned with an initiative petition to amend the Arkansas Constitution, which is a separate matter altogether.

In common legal parlance, a "bill" is a draft of an act of the legislature before it becomes law. *Black's Law Dictionary* 167 (6th ed. 1991). Under Amendment 7, the people of this State have the power to enact "bills" into laws by direct vote. The term "bills" as used in the Enacting Clause section of Amendment 7 does not refer to statewide constitutional amendments but only to initiated proposals where the people are seeking to enact their own laws. Our case law recognizes that Amendment 7 requires an Enacting Clause for initiated *bills* by the people. *Hailey* v. *Carter*, 221 Ark. 20, 251 S.W.2d 826 (1952). That is

because the people, as opposed to the General Assembly, are enacting the laws under their initiative power. But, again, the same does not hold true for constitutional amendments. We are aware of no case in Arkansas holding that an Enacting Clause is required for a proposed statewide constitutional amendment.

The circuit court failed to make this distinction, but the Enacting Clause provision makes it clear by referring to bills. In the case before us, Amendment 73 was published as required by law and adopted by a wide majority of those voting on the issue. The ballot title stated that it was "Proposed by Petition of the People." It was abundantly clear that this was a proposed amendment to the Arkansas Constitution to put term limits into effect.

In sum, Amendment 7 makes no requirement for an enacting clause for statewide initiated petitions to amend the Arkansas Constitution, and we so hold. We reverse the circuit court on this point.

III. QUALIFICATIONS CLAUSE

We next address the issue of whether the State of Arkansas can render certain incumbent U.S. senators and representatives ineligible to appear on the ballot for their respective positions. We conclude that such a restriction on eligibility to stand for election to the U.S. Congress is violative of the respective Qualification clauses of Article 1 of the U.S. Constitution. Those clauses read:

> § 2. House of representatives.
>
> . . . .
>
> No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.
>
> . . . .
>
> § 3. Senate.
>
> . . . .
>
> No person shall be a senator who shall not have

> attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state for which he shall be chosen.

U.S. Const. art 1, § 2, cl. 2 and § 3, cl. 3.

The parties in this case have taken considerable pains to educate this court on the history of the respective Qualification clauses and the original intent of the framers of the U.S. Constitution. We find the history to be helpful but inconclusive regarding the issue at hand. We can glean from the history that a provision to require the rotation, as it was called, of senators and representatives was discussed and debated and ultimately discarded at the Constitutional Convention as a formal provision of the U.S. Constitution. C. Warren, *The Making of the Constitution* (1928). No doubt that evinces a decision on the part of the framers not to mandate rotation, or term limits. At the same time, whether the states are foreclosed from adding a restriction to candidacy in the form of service limitations is not specifically addressed. Under the previous Articles of Confederation, individual states had this authority, and delegates to Congress were limited to a term of three years. Art. Conf. V (1777). The framers of the U.S. Constitution did not expressly endow the states with this same authority. Indeed, the Constitutional Convention of 1787 defeated a proposal for the states to set property qualifications for service in Congress. C. Warren, *The Making of the Constitution* 418 (1928).

The ultimate document proposed by the framers and ratified by the states as the U.S. Constitution enumerated three benchmarks for congressional service — age, citizenship, and residency. No other qualifications were included. When the House of Representatives attempted to add one more by refusing to seat one of its own members in 1967, Rep. Adam Clayton Powell, for wrongfully diverting federal funds to himself, his wife, and staff, the United States Supreme Court scuttled the effort. *Powell* v. *McCormack*, 395 U.S. 486 (1969). In doing so, the Court quoted Alexander Hamilton, who was answering an antifederalist charge during the ratification process that the proposed U.S. Constitution favored the wealthy and propertied interests:

> The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications

> of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, the *manner* of elections. *The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.* The Federalist Papers 371 (Mentor ed 1961). Emphasis in last sentence added.)

395 U.S. at 539.

The Legislature referenced by Hamilton was the Congress, but it is his allusion to the fixed and immutable character of the enumerated qualifications that is illuminating today. In that same decision, *Powell* v. *McCormack*, the Court made mention of a Report by the House Committee on Elections regarding the eligibility of William McCreery to sit in Congress. The issue concerned an additional residency requirement imposed by the State of Maryland that disqualified him. That Report clearly and specifically determined that the U.S. Constitution reserved no authority in the State legislatures to change, add to, or diminish the qualifications set forth in Article 1. 395 U.S. at 542-543, *citing* 17 *Annals of Cong.* 871-872 (1807).

Qualifications set out in the U.S. Constitution, unalterable except by amendment to that document, is a conclusion that makes eminently good sense. If there is one watchword for representation of the various states in Congress, it is uniformity. Federal legislators speak to national issues that affect the citizens of every state. Additional age restrictions, residency requirements, or sundry experience criteria established by the states would cause variances in this uniformity and lead to an imbalance among the states with respect to who can sit in Congress. This is precisely what we believe the drafters of the U.S. Constitution intended to avoid. The uniformity in qualifications mandated in Article 1 provides the tenor and the fabric for representation in the Congress. Piecemeal restrictions by state would fly in the face of that order.

The appellants raise a corollary argument. They urge that Amendment 73 is merely a ballot access amendment and not a mandate establishing an additional qualification. No doubt some

effort was made by the drafters of Amendment 73 to couch it in terms of eligibility "to appear on the ballot" rather than as a disqualification. And organizing and overseeing the time, place, and manner of elections clearly falls within the province of the states under the U.S. Constitution. U.S. Const. art 1, § 4. Provisions, for example, requiring state officials to resign before running for federal office have been upheld as merely falling within the general power of the states to regulate federal elections. *See, e.g., Joyner* v. *Mofford*, 706 F.2d 1523 (9th Cir.), *cert. denied,* 464 U.S. 1002 (1983).

This effort to dress eligibility to stand for Congress in ballot access clothing, that is, as a regulatory measure falling within the State's ambit under Article 1, § 4, is not without some rational appeal. We do not agree, however, that excluding a broad category of persons from seeking election to Congress is a mere exercise of regulatory power. The intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service. We do recognize that an ineligible congressman under Amendment 73 is not totally disqualified and might run as a write-in candidate for Congress or receive a gubernatorial appointment to fill a vacancy in the same body. Following this thread, the appellants posit that term limitations do not mean disqualification — only ineligibility to be placed on the ballot as a candidate for certain offices. These glimmers of opportunity for those disqualified, though, are faint indeed — so faint in our judgment that they cannot salvage Amendment 73 from constitutional attack. *See Thorsted* v. *Gregoire*, C93-770WD (W.D.D.C. Wash. Feb. 10, 1994).

An additional qualification has been added to congressional eligibility. The list now reads age, nationality, residency, and prior service. Term limitations for congressional representation may well have come of age. But to institute such a change, an amendment to the U.S. Constitution is required, ratified by three-fourths of the states. U.S. Const. art 5. In sum, the Qualification clauses fix the sole requirements for congressional service. This is not a power left to the states under the Tenth Amendment. The attempt to add an additional criterion based on length of service is in direct conflict with the Qualification clauses, and the Supremacy Clause pertains. Section 3 is stricken from Amendment 73.

IV. SEVERABILITY

Because we strike down Section 3 of Amendment 73, we must now address the issue of whether this jeopardizes the entire Amendment. The argument is made by the Unified Members that it does because the provisions relating to federal legislators and to state officeholders and legislators are inextricably linked irrespective of the presence of a severability clause in the Amendment. The Unified Members further stress that Amendment 73 was packaged as one plan.

Section 4 of the Amendment reads: "The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand." The circuit court ruled on this issue twice. In its first opinion dated July 29, 1993, this conclusion was reached:

> Section 3, of the term limit amendment which is the constitutionally invalid provision is linked to state term limits on (sic) only in theme, a theme that the voters overwhelmingly approved by initiative. To hold that the provisions are "inextricably linked" per the analysis in *Hasha*[1] this Court would have to conclude that the voters dislike for the federal delegation was overwhelming to the extent that they forced term limits upon state officials, an analysis that this Court cannot make.

Later, in its Final Order of September 8, 1993, the court ruled:

> 5. Sections 1 and 2 of Amendment 73 are not invalid because they were combined with unconstitutional limits on United States Senators and Representatives.
>
> 6. The court cannot conclude that the voter's dislike for incumbent United States Senators and Representatives was overwhelming to the extent that it caused voters to impose state limits on officers, senators and representatives.
>
> 7. Sections 1 and 2 of Amendment 73 are severable from Section 3 pursuant to the severability clause in Section 6 thereof.

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[1]*Hasha* v. *City of Fayetteville*, 311 Ark. 460, 845 S.W.2d 500 (1993).

[redacted] Our cases over the years have been consistent in examining the severability issue. In determining whether the invalidity of part of the act is fatal to the entire legislation, we have looked to 1) whether a single purpose is meant to be accomplished by the act; and 2) whether the sections of the act are interrelated and dependent upon each other. *Borchert* v. *Scott*, 248 Ark. 1050-H, 460 S.W.2d 28 (1970) (supplemental opinion on rehearing); *Faubus* v. *Kinney*, 239 Ark. 443, 389 S.W.2d 887 (1965); *Nixon* v. *Allen*, 150 Ark. 244, 234 S.W. 45 (1921); *Cotham* v. *Coffman*, 111 Ark. 108, 163 S.W. 1183 (1914). In *Faubus* v. *Kinney*, we noted that it is important whether the portion of the act remaining is complete in itself and capable of being executed wholly independent of that which was rejected. Clearly, when portions of an act are mutually connected and interwoven, severance is not appropriate. *Wenderoth* v. *City of Ft. Smith*, 251 Ark. 342, 472 S.W.2d 74 (1971).

The presence of a severability clause is a factor to be considered but, by itself, it may not be determinative. In *Combs* v. *Glen Falls Insur. Co.*, 237 Ark. 745, 375 S.W.2d 809 (1964), we stated that a severability clause may be an aid to the courts in construction of a statute but in the words of Justice Brandeis, it is not "an inexorable command." 237 Ark. at 748, 375 S.W.2d at 810, *citing Dorchy* v. *Kansas*, 264 U.S. 286 (1924). In *Combs*, we concluded that the clause could not salvage the act of the General Assembly in question, and we voided the entire act.

Recent authority indicates that other jurisdictions subscribe to the same basic principles for determining severability as we in Arkansas. *See Board of Natural Resources* v. *Brown*, 992 F.2d 937 (9th Cir. 1993); *Gerken* v. *Fair Political Practices Comm'n*, 863 P.2d 694 (Cal. 1993); *Legislature of the State of California* v. *Eu*, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 112 S.Ct. 1292 (1992). In *Brown*, the Ninth Circuit focused on whether the unconstitutional portion of the act was functionally independent and, secondly, on whether the Congress would have enacted the law without the unconstitutional provision. In *Legislature of the State of California* v. *Eu*, the California Supreme Court proposed a test with three facets for severability — whether the invalid portion of the measure was grammatically, functionally, and volitionally separable from the remainder. By volitionally separable, the court meant whether the people would have voted for it inde-

pendent of the invalid provisions. The court in *Eu* considered the severability of a void provision in a constitutional amendment establishing term limits. It declared the clause in the amendment relating to restrictions on pensions for incumbent legislators to be unconstitutional but held it to be severable and upheld the balance of the amendment fixing term limits.

A reading of Sections 1, 2, and 3 of Amendment 73 shows that they are grammatically independent and functionally independent. The question then remains whether the Arkansas voters would have adopted Sections 1 and 2 relating to State officeholders and legislators in the absence of Section 3 which applies to U.S. senators and representatives. We believe that the circuit court was correct in concluding that what the people voted for in adopting Amendment 73 was a theme or concept — the limitation of service terms for persons in public office. The fact that one category of persons is eliminated from that adopted Amendment does not mean that the voters did not intend it to apply to the remaining two categories. Nor do we consider term limits on federal legislators to be the bait which enticed voters to vote aye on the amendment as a whole. There is nothing to suggest that this was the case. In short, we are confident that Amendment 73 would have passed even without the inclusion of Section 3 in that the majority was voting for a concept — the limitation of public service terms.

We further disagree that *Hasha* v. *City of Fayetteville, supra*, controls this case. In *Hasha*, the issue was the placement of an invalid proposal for $10 million in public school bonds on the same ballot with a proposal for a 20-year one percent sales and use tax to secure capital improvement bonds, including the school bonds. We held that the two proposals were inextricably linked, and we stated:

> 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.

311 Ark. at 469, 845 S.W.2d at 505.

That is not the situation with Amendment 73. The common theme of term limitations applies equally to all three categories of elected officeholders. In *Hasha*, the public school bonds were categorically different from the sales and use tax and from the other capital improvement bonds. The school bonds provided an obvious lure to assure a favorable vote on the tax proposal. Here, there is nothing before us to indicate that the voting public sought to limit one category of elected official moreso than another.

The remaining sections of Amendment 73 can stand independently without the presence of Section 3. There is nothing to suggest that the voters intended Sections 1, 2, and 3 to be dependent on one another so that if one section failed, the other sections failed also. The balance of Amendment 73 is valid.

V. STATE OFFICEHOLDERS

We next examine the constitutionality of Sections 1 and 2 of Amendment 73 relating to term limits on State executive and legislative officeholders. The circuit court, though it invalidated the entire amendment for lack of an Enacting Clause, ruled that Sections 1 and 2 do not violate the First and Fourteenth Amendments to the U.S. Constitution.

We concur with this ruling. Individual states have limited the terms of their officeholders for decades, albeit more in the context of their governors than their legislators. *See Miyazawa* v. *City of Cincinnati*, 825 F.Supp. 816, 821 (S.D. Ohio 1993). In the case before us, the policy and interest of the State of Arkansas was expressed in the Preamble to Amendment 73:

> The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

In counterpoint to the State's interest, as expressed by the adoption

of Amendment 73, are the interests of current State officeholders and their supporters such as appellee Hill. We have already referred in this opinion to those legitimate interests in the political process which are protected under the First and Fourteenth Amendments.

The United States Supreme Court has made it clear that the right to candidacy is not a fundamental right requiring close scrutiny. *Bullock* v. *Carter*, 405 U.S. 134 (1972); *see also Clements* v. *Fashing*, 457 U.S. 957 (1982) (plurality decision). A second question, though, is whether the right of a person such as appellee Hill to participate in a person's political campaign or to vote for a candidate is fundamental in nature so as to warrant a *compelling* state interest to offset it. Separating the rights of the candidate from those of the supporter may be difficult. The Court observed in 1992 that "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Burdick* v. *Takushi*, 112 S.Ct. 2059, 2065-2066 (1992), *quoting Bullock* v. *Carter*, 405 U.S. 134, 143 (1972).

In *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), the Court weighed the speech and association interests of voters for and supporters of John Anderson, an independent candidate for president of the United States, against the State of Ohio's asserted interest in protecting political stability by setting an early filing deadline. The Court held that the supporters' interests unquestionably outweighed the State's regulatory interests. The proper standard for resolving the assessment of the State's interest and the burden on supporters has since been described "as a more flexible standard" dependent on the severity of the burden. *Burdick* v. *Takushi*, 112 S.Ct. 2059, 2063 (1992). However, not every burden on the right to vote is subject to strict scrutiny or requires a compelling state interest to justify it. *Id.*

The California Supreme Court, in the wake of the *Anderson* case, considered the effect of a constitutional amendment fixing term limits on elected state officials. *Legislature of the State of California* v. *Eu*, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 112 S.Ct. 1292 (1992). That Court weighed the interests of the voters and supporters of certain candidates against the will of the electorate limiting incumbent terms and held that the amendment would prevail irrespective of whether a rational basis standard or a compelling state interest standard was employed. The Court stated:

> In sum, it would be anomalous to hold that a statewide initiative measure aimed at "restor[ing] a free and democratic system of fair elections," and "encourag[ing] qualified candidates to seek public office" (Cal. Const., art. IV, § 1.5), is invalid as an unwarranted infringement of the rights to vote and to seek public office. We conclude the legitimate and compelling interests set forth in the measure outweigh the narrower interests of petitioner legislators and the constituents who wish to perpetuate their incumbency.

816 P.2d at 1329.

It is not the function of this court to agree or disagree with the purpose and rationale behind Amendment 73. It is our function to determine whether the Amendment expresses such a legitimate and sufficient state interest that the rights of the supporters and the incumbents must yield. We hold that the state interest, as expressed in the Preamble to Amendment 73, is sufficiently rational and even compelling when weighed against the residual burden placed on the rights and privileges of elected officeholders and those desiring to support them.

VI. TERMS OF SERVICE COUNTED

Because we hold that Sections 1 and 2 of Amendment 73 are severable and valid, we must determine when the terms of service by State officeholders are counted for purposes of disqualification. Appellant Americans for Term Limits as well as appellees Hill and Herget contend as part of their justiciability arguments that Amendment 73 is retroactive in its effect and that terms of service prior to the Amendment's effective date of January 1, 1993, should be counted for disqualification purposes. Other appellants, including the State of Arkansas and U.S. Term Limits, Inc., argue that only terms of service after the effective date of the Amendment are to be counted. The effect of counting terms of service after January 1, 1993, would be that State executive officers and senators would not be ineligible for another eight years (two four-year terms) and that State representatives would not be ineligible for another six years (three two-year terms). Conversely, by counting prior terms of service, any State executive officer or senator having previously served two terms and any State representative having previously served three terms is disqualified.

In reviewing several of the term limitations amendments adopted in other states, we note where the amendments either provide a date certain from which terms will be counted or, alternatively, provide for ineligibility based on a fixed number of years served:

- State of Washington. Wash. Rev. Code § 29.15.240 (Supp. 1993) (no terms served before November 3, 1992, may be used to determine eligibility to appear on the ballot) (approved Nov. 3, 1992).
- State of California. Cal. Const. art. XX, § 7 (applies to terms of state constitutional officers and legislators where the official was elected or appointed to the office after November 6, 1990) (adopted Nov. 6, 1990).
- State of California. Cal. Elections Code § 25003 (Deering Supp. 1993) (terms of office in Congress prior to January 1, 1993, shall not be counted) (approved Nov. 3, 1992).
- State of Colorado. Colo. Const. art. XVIII, § 9a (applies to terms of office in Congress beginning on or after January 1, 1991) (approved Nov. 6, 1992).
- State of Wyoming. Wyo. Stat. §§ 22-5-103, 22-5-104 (1992) (terms of service in state offices and in Congress prior to January 1, 1993, shall not be counted) (approved Nov. 3, 1992).
- State of Florida. Fla. Const. art. 6, § 4 (no person may appear on ballot for state or federal office if by end of current term in office, the person will have served in that same office for eight consecutive years) (approved Nov. 3, 1992).
- State of North Dakota. N.D. Cent. Code § 16.1-01-13.1 (Supp. 1993) (person ineligible for Congress if by the start of the term for which election is being held that person has served at least twelve years) (approved Nov. 3, 1992).
- State of Oklahoma. Okla. Const. art 5, § 17A (member of Legislature elected after effective date of amendment eligible to serve 12 additional years) (approved Sept. 18, 1990).

- State of Ohio. Ohio Const. art. V, § 8 (terms beginning on or after January 1, 1993, shall be considered for eligibility to the U.S. Senate and House of Representatives) (approved Nov. 3, 1992).

Amendment 73 does not expressly provide a separate benchmark date after which terms of service will be counted.

[redacted] To resolve the question of when to count terms, we turn to the measure itself. In doing so, we construe constitutional amendments liberally to accomplish their purposes. *Porter* v. *McCuen*, 310 Ark. 674, 839 S.W.2d 521 (1992). We will not give a strained construction contrary to the spirit and purpose of the amendment as expressed by the people. *Thompson* v. *Younts*, 282 Ark. 524, 669 S.W.2d 471 (1984). Amendment 73 contains an effective date and states that none of the State elected officials, whether executive or legislative, may serve more than the specified number of terms. It further proclaims that it is "applicable to all persons thereafter seeking election." However, it is simply not clear on when counting the terms must commence.

[redacted] Constitutional amendments operate prospectively unless the language used or the purpose of the provision indicates otherwise. *Drennan* v. *Bennett*, 230 Ark. 330, 322 S.W.2d 585 (1959). We have also held that with respect to an amendatory act the legislation will not be construed as retroactive when it may be reasonably construed otherwise. *Lucas* v. *Handcock*, 266 Ark. 142, 583 S.W.2d 491 (1979); *see also Gannett River States Publishing Co.* v. *Arkansas Indus. Dev. Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990). The same rule of construction is equally applicable to a constitutional amendment. The Amendment in this case is vague and ambiguous on the point of when to begin counting terms. As already stated, two proponents of the Amendment, U.S. Term Limits, Inc. and the State of Arkansas represented by the Attorney General's office, interpret it to apply prospectively. Arkansans for Governmental Reform took the same position before the circuit court. Because of the vagueness in the Amendment on this point, we agree. Only periods of service commencing on or after January 1, 1993, will be counted as a term for limitation purposes under Amendment 73.

A mandate will issue in this case on March 14, 1994. Any petition for rehearing shall be filed no later than March 9, 1994.

Any response shall be filed no later than March 11, 1994.

Special Justices ERNIE WRIGHT and CARL MCSPADDEN join in this opinion.

DUDLEY and HAYS, JJ., and Special Chief Justice GEORGE K. CRACRAFT and Special Justice GERALD P. BROWN concur in part and dissent in part.

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

ROBERT H. DUDLEY, Justice, concurring in part, dissenting in part. I concur in three of the holdings of the majority opinion, dissent from one, and do not reach the other two.

I.

I concur with the holding that this case presents a justiciable issue. The petitioners below sought a judgment declaring that Amendment 73 is invalid. We have said that a declaratory judgment is especially appropriate in disputes between private citizens and public officials about the meaning of the constitution or statutes. *Culp* v. *Scurlock*, 225 Ark. 749, 284 S.W.2d 851 (1955). If, as argued by intervenors, some state officeholders are illegally holding office, their salaries would constitute illegal exactions, and a declaratory judgment action is appropriate to determine that issue. *McDonald* v. *Bowen*, 250 Ark. 1049, 468 S.W.2d 765 (1971). Thus, there is a justiciable issue, and a suit for declaratory judgment is the proper action to determine the issue.

II.

I concur with the holding that Amendment 73, in part, violates the Constitution of the United States. It does so for three reasons. First, the framers rejected the idea of term limits in drafting the Constitution. Second, allowing a several state to create qualifications for national officeholders is antithetical to republican values. Third, the imposition of term limitations upon members of the Congress of the United States would violate the Qualifications Clause of the Constitution because it would add a qualification — lack of incumbency — to the requirements that are fixed by the Constitution, and the several states do not have this power. *See Plugge* v. *McCuen*,

310 Ark. 654, 661, 841 S.W.2d 139, 143 (1992) (Dudley, J., dissenting).

The third reason stated above is a close question and difficult issue. The articulate dissenting opinions of Justices Hays and Cracraft cause one to pause. The argument that a candidate is only barred from appearing on the ballot, but is not barred as a write-in candidate, is appealing at first blush, but when one thinks about it the issue becomes clear because, as a practical matter, the amendment would place term limits on service in the Congress. I am reassured by the style of this case, U.S. Term Limits, Inc. That name implies just what this amendment is: A practical limit on the terms of the members of the Congress. The fact that a person can conceivably be elected as a write-in candidate does not vitiate the fact that, as a practical matter, write-in candidates are at a distinct disadvantage. The result would be that the Qualifications Clause would be violated by the amendment.

III.

I concur in the holding that the voters of this State can, by amendment of the state constitution, limit the terms of state officeholders. There is no violation of the First and Fourteenth Amendments to the Constitution of the United States because the state interest of limiting the terms of officeholders clearly outweighs the burden on the officeholders and those supporting them. *See Anderson* v. *Celebrezze*, 460 U.S. 780 (1983).

IV.

I dissent from the holding in the plurality opinion that the provision in the amendment for limiting the terms of federal officeholders can be severed from the provision limiting the terms of state officeholders. This is a state issue and is governed by state law.

Amendment 73 contains a severability clause, but that clause alone does not necessarily determine severability. In *Combs* v. *Glen Falls Insurance Co.*, 237 Ark. 745, 375 S.W.2d 809 (1964), we wrote:

> A severability clause is frequently an aid to the Courts in the construction of a statute, but, in the oft-quoted words

> of Justice Brandeis, it is not "an inexorable command." *Dorchy* v. *Kansas*, 264 U.S. 286, 68 L. Ed. 686, 44 S. Ct. 323. *While such a clause deserves reasonable consideration it should not be paid undue homage.* Sutherland, Statutory Construction (3d Ed.) §2408. For example, if an act should levy a new tax and create a new agency for its collection, no one could doubt that the invalidation of the tax would also do away with the collection agency, despite the presence of a severability clause. In *Nixon* v. *Allen*, 150 Ark. 244, 234 S.W. 45, we declared an entire act to be invalid, in the face of such a clause, *because we concluded that if the legislature had known in advance that part of the act was unconstitutional it would not have enacted the rest. That is really the test.*

Id. at 747-48, 375 S.W.2d at 810-11 (emphasis added).

After writing the above, we declared the entire act void even though the act at issue contained a severability clause and only part of the act was invalid. We did so because the "alternatives are complementary and interdependent." *Id.* at 748, 375 S.W.2d at 811.

Somewhat like the case at bar, in *Allen* v. *Langston*, 216 Ark. 77, 224 S.W.2d 377 (1949), the citizens of Lee County passed an initiated motor vehicle tax act pursuant to Amendment 7, the initiative amendment. The initiated act authorized a tax on motor vehicles as well as wagons and buggies. A part of the tax was for the privilege of driving motor vehicles on the highways, and we held that the county's attempt to tax the use of the highways for motor vehicles was contrary to the general law of the state and therefore unconstitutional. However, that part of the act which taxed wagons and buggies was valid since state law had not pre-empted that field. In sum, part of the initiated act was valid and part of it was invalid. We held the entire initiated act void "for the reason that *it seemed apparent that the people of Lee County had no intention of separating and enforcing the provision as to wagons and buggies in the event the remaining tax on motor vehicles was declared void and of no effect.*" *Id.* at 85, 224 S.W.2d at 381 (emphasis added).

Likewise, in *Wenderoth* v. *City of Fort Smith*, 251 Ark. 342,

472 S.W.2d 74 (1971), we said that when parts of a law are connected and interwoven, and the legislature intended to enact the law as a whole and not in parts, severance is not appropriate.

In *Hasha* v. *City of Fayetteville*, 311 Ark. 460, 845 S.W.2d 500 (1993), the city placed a sales and use tax proposal on the same ballot as an invalid proposal to construct school facilities. The invalid proposal to construct school facilities was a lure to obtain a favorable vote on the tax. We held severance was not appropriate because the two proposals were "inextricably linked" and "tied together." We wrote: "There was a natural relationship between them. The two proposals were part of the same plan. They were united." *Id.* at 470, 845 S.W.2d at 505. Also, the bonds were "a primary purpose of the tax." *Id.*, 845 S.W.2d at 506. Both the dissenting opinion and the dissenting opinion on rehearing make clear the fact that no evidence was submitted to support the holding that the voters were lured into voting for the tax. *See* 311 Ark. 460, 471, 845 S.W.2d 500, 506 (Glaze, J., dissenting); *Hasha* v. *City of Fayetteville*, 311 Ark. 476-A, 476-C, 847 S.W.2d 41, 42 (1993) (supplemental opinion denying rehearing) (Glaze, J., dissenting). The pertinent questions are whether there the two proposals were inextricably linked in the minds of the voters, whether they were tied together in the minds of the voters, whether the voters perceived a natural relationship between them, whether they were presented as being united, whether the voters had any intention of separating the proposals and enforcing them separately, and whether both were a primary purpose of the amendment. To state the questions is to answer them. The two proposals were clearly tied together. They were linked. There was a natural relationship between them. Limiting the terms of members of Congress was a primary purpose of the amendment. *Both proposals were sold together as one political package.*

Each ballot cast at the election contained a ballot title, or summary, of the amendment. The great majority of voters derived their information about the amendment from the ballot title. *Dust* v. *Riviere*, 277 Ark. 1, 638 S.W.2d 663 (1982). The ballot title that the voters read in voting on this amendment was as follows:

> An Amendment to the Constitution of the State of Arkansas limiting the number of terms that may be served by the elected officials of the Executive Department of this

> state to two (2) four year terms, this department to consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, Commissioner of State Lands; limiting the number of terms that may be served by members of the Arkansas Senate to two (2) four-year terms, these members to be chosen every four years; providing that any person having been elected to three (3) or more terms as a member of the United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas; providing that any person having been elected to two (2) or more terms as a member for the United States Senate from Arkansas shall not be eligible to appear on the ballot for election to the United States Senate from Arkansas; providing for an effective date of January 1, 1993; and making the provisions applicable to all persons thereafter seeking election to the specified offices.

Before the vote on the amendment was held, the proponents of the measure were aware of the problems involved in linking the two measures. In declining to remove the proposal from the ballot before the election this court wrote:

> Undoubtedly, a strong case can be made concerning the Term Limitation Amendment's invalidity both under Arkansas's and the United States' Constitutions, and *voters should be aware that their votes for or against this measure may ultimately have value only as an expression of public sentiment on the subject. In short, a future judicial proceeding will be required to decide the Amendment's validity if it is adopted by the people.* If that occurs, the constitutional arguments posited here will then be placed squarely before us and can be decided after due and proper consideration.

Plugge v. *McCuen*, 310 Ark. 654, 661, 841 S.W.2d 139, 143 (1992) (emphasis added).

Undisputedly, the two proposals were packaged and sold together. One of the proposals is valid, while the other is unconstitutional. The proponents of the amendment were aware of the

pending constitutional issue, but they objected to it being decided before the election. Still, they continued to sell the proposals together. The majority opinion severs the two proposals *after the election* and declares one of them valid.

The precedent set by the majority opinion runs counter to the efforts of this court to require fairness and honesty in the presentation of initiated proposals to the voters. We have required that ballot titles be honest and impartial. *Dust* v. *Riviere*, 277 Ark. 1, 638 S.W.2d 846 (1984); *Shepherd* v. *McDonald*, 189 Ark. 29, 70 S.W.2d 566 (1934). We have mandated that ballot titles fairly assess the general purpose of the act. *Coleman* v. *Sherrill*, 189 Ark. 843, 75 S.W.2d 248 (1934). We have held they must not be misleading. *Westbrook* v. *McDonald*, 184 Ark. 740, 43 S.W.2d 356 (1931).

The troubling aspect of the precedent set by the case at bar is illustrated by the case of *Hoban* v. *Hall*, 229 Ark. 416, 316 S.W.2d 185 (1958). It that case we ordered a proposal removed from the ballot before the people voted on it, and, to that extent it is not applicable, but it is applicable to demonstrate how some people will attempt to bait a proposed amendment. The proponents of the initiated amendment named their proposal "The States' Rights Amendment" since that was a popular concept in the South at the time. However, the ballot title failed to disclose that the amendment would create a commission with overreaching authority. It could conduct investigations and conduct public or secret hearings and "interrogate any citizen in the state about his business affairs, his private life, his political beliefs, or any other subject that can be imagined." *Id.* at 420, 316 S.W.2d at 187. If a public official failed to carry out "the clear mandates" of the amendment, he was subject to a fine, imprisonment, and automatic forfeiture of office. *Id.* In removing the proposal from the ballot because the proponents only disclosed the bait of states' rights, we wrote:

> The cause of states' rights, like that of the aged and the blind, is deservedly a popular one and undeniably appeals to the great body of the electorate. But are there provisions in the amendment which, if made known, would give the voter serious ground for reflection?

Id. at 418, 316 S.W.2d at 187. We did not allow the misleading political packaging.

The majority opinion does not fully address political packaging and the questionable precedent. Rather, it misses the mark and concentrates on whether the two proposals can be said to literally stand independently.

In summary, I concur in holding that the part of Amendment 73 which is in violation of the Constitution of the United States is void, and that part which limits the terms of state officeholders is valid. I would hold that in the minds of the voters the invalid part of the amendment was inextricably linked with the valid part, and, as a result, I would not allow the two proposals to be severed after the election. Consequently, I would hold that Amendment 73 is void.

V.

Since I would hold that Amendment 73 is void for the reasons set out above, I do not reach the issues regarding the enacting clause and terms of service counted.

STEELE HAYS, Justice, concurring in part and dissenting in part. Although I agree with today's decision upholding term limits upon state officeholders and severing that part of Amendment 73, I disagree with the holding of the majority that the eligibility restriction upon United States senators and representatives is unconstitutional. I start from the premise that all political authority resides in the people, limited only by those provisions of the federal or state constitutions specifically to the contrary. In this instance the people of Arkansas have spoken, prudently or otherwise, in the most direct means available to them — an initiated amendment to their state constitution. That expression should not be denied them except on clear and compelling grounds. Such grounds have not been demonstrated to my satisfaction.

The people of each state possess all powers which are not expressly or impliedly delegated to the federal government or which they are not prohibited from exercising by the United States Constitution. U.S. Const. amend. 10. *See State* v. *Nichols*, 26 Ark. 74 (1870). Further, we must presume the amendment is constitutional, and all doubts must be resolved in favor of its

constitutionality if it is possible to do so. *Fayetteville School Dist.* v. *Arkansas State Bd. of Education*, 313 Ark. 1, 825 S.W.2d 122 (1993); *Gazaway* v. *Greene County Equalization Board*, 314 Ark. 569, 864 S.W.2d 233 (1993). Accordingly, if a provision of the amendment is not clearly prohibited, we are obliged to construe it as constitutional.

I find the United States Constitution does not prohibit additional qualifications for senators and representatives. The Qualification Clauses of Article 1 of the Constitution simply provide: "No person shall be a representative [senator] *who shall not have . . .*" (Emphasis supplied.) This language indicates the qualifications are to be the *minimum* requirements rather than the *exclusive* requirements. I see it as significant that the Constitution provides: "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." Art. 1, § 2, cl. 1. This provision contemplates allowing a state to require an elector to have attained the age of thirty years.[1] It seems clear the framers intended to prevent a person under the age of twenty-five years from being elected to the House of Representatives, but, if a state required electors to be at least thirty years of age, it is implausible to conclude the state would be required to allow a person to run for office who could not vote. Since the framers determined that the people of each state could establish requirements for their electors, it stands to reason that the qualifications in Article 1 are minimum requirements. In sum, the framers intended merely to insure that no state lowered the standards for being elected to the House of Representatives or Senate.

The majority states that the history surrounding the drafting of the Constitution is inconclusive, yet they rely upon that history as discussed in *Powell* v. *McCormack*, 395 U.S. 486 (1969). In *Powell*, the Court held the House of Representatives could not exclude Congressman Powell, a duly elected member of Congress, for any reason other than the qualifications set forth in the Constitution. In so holding, the Court examined the debates

[1]I recognize that Amendment 26 of the United States Constitution prohibits such an action; however, the actions of the framers must be examined within the proper context. At the time the Constitution was ratified, a state could abridge the right to vote by establishing a property requirement or an age restriction beyond 18 years of age.

surrounding the drafting and ratification of the Constitution itself. While it is clear that the framers discussed term limits, I am not convinced that the failure to include term limits in the Constitution prohibits the people of the states from enacting term limits.

The only "intent" that can be ascertained from the framers' exclusion of term limits is that the delegates considered it undesirable to impose a uniform tenure limitation upon the representatives of every state. However, this does not confirm that the people of each state are prohibited from enacting term limits. Even the majority recognizes that whether the States are foreclosed from adding a restriction to candidacy is not specifically addressed in the Constitution or the historical debates. Nevertheless, the majority places emphasis upon the historical debates and Alexander Hamilton's "allusion to the fixed and immutable character of the enumerated qualifications."

Justice Holmes observed that government is an experiment. The people are the conductors of that endless experiment and have the right to tinker with it as they choose, free of unwarranted interference. Although it may make "eminently good sense" to have uniform qualifications for federal legislators in order to prevent an "imbalance among the states," I submit the drafters of the Constitution intended merely to establish uniform minimum qualifications.

Nor can I agree that the effective date of the amendment for purposes of compliance is other than January 1, 1993, the date specified in the provision. The avowed purpose of Amendment 73 is to revitalize government, inhibit voter apathy and stimulate voter participation and involvement. I can find no basis for concluding that the electorate intended to defer those objectives for an additional six years.

Amendment 73 contains an effective date and states that none of the State elected officials, whether executive or legislative, may serve more than the specified number of terms. It further proclaims that it is "applicable to all persons thereafter seeking election." The Ballot Title contained the same quoted language. The purpose of the amendment, as stated in its Preamble, is to limit the terms of elected officials who are described as an entrenched incumbency who ignore their duties and are preoc-

cupied with reelection. The language of the amendment itself read as a whole runs counter to an interpretation that it is not to take effect, practically speaking, until 2000 or thereafter.

I do not believe that Amendment 73 is a retroactive law because the amendment does not take away a vested right or impose a new obligation, duty, or disability regarding matters that already have occurred. *F.D.I.C.* v. *Faulkner*, 991 F.2d 262 (5th Cir. 1993), citing *Bowen* v. *Georgetown Univ. Hospital*, 488 U.S. 204 (1988); *Miyazawa* v. *City of Cincinnati*, 825 F.Supp. 816 (S.D. Ohio 1993); *Ficaria* v. *Dept. of Reg. Agencies*, 849 P.2d 6 (Colo. 1993). A statute does not operate retroactively merely because its application requires some reference to prior facts. *F.D.I.C.* v. *Faulkner, supra, citing McAndrews* v. *Fleet Bank of Massachusetts*, 989 F.2d 13 (1st Dir. 1993) [*citing Cox* v. *Hart*, 260 U.S. 427 1922)]. Furthermore, it is clear that holding public office is a privilege, not a vested right. *Miyazawa* v. *City of Cincinnati, supra.*

For the reasons stated, I concur in the majority opinion as to Section I (JUSTICIABILITY), Section II (ENACTING CLAUSE), Section IV (SEVERABILITY), and Section V (STATE OFFICEHOLDERS), but not as to Sections III (QUALIFICATIONS CLAUSE) and Section VI (TERMS OF SERVICE COUNTED), to which I respectfully dissent.

GEORGE K. CRACRAFT, Special Chief Justice, concurring in part, dissenting in part. I concur with the results reached in the majority opinion on the issues of justiciability, the enacting clause, the constitutionality of limitations on state elected officials, severability, and terms of service to be counted. I cannot, however, agree that the restrictions on members of the United States Congress violate the Qualifications Clauses of Article I, Sections 2 and 3 of the United States Constitution. I do not view the provisions of Amendment 73 to the Arkansas Constitution as raising a "qualifications" issue, but rather a ballot access issue to be measured by the First and Fourteenth Amendments to the United States Constitution.

Unlike Sections 1 and 2 of Amendment 73 (which apply to state elected officials), Section 3 (which applies to members of Congress) does not impose an absolute bar on incumbent suc-

cession. Instead, Section 3 merely makes it more difficult for an incumbent to be elected. Under our liberal write-in laws, an incumbent can be elected to congressional office and, if elected, serve the term for which elected. An incumbent United States Representative or Senator can also serve in the Congress under appointment to fulfill an unexpired term. In neither case would his or her qualifications to serve be in anywise affected by Amendment 73. In my view, a person is qualified within the meaning of Article I of the United States Constitution if permitted to serve if elected. While an incumbent congressional candidate's ballot access is limited, his or her qualifications to serve if elected to Congress are not affected.

The United States Supreme Court has never squarely faced this issue. However, two United States Courts of Appeals have recognized the distinction I would make between ballot access restrictions and those qualifications mentioned in Article I, and I find their decisions persuasive. *See Hopfmann* v. *Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated in part on other grounds*, 471 U.S. 459 (1985), and *Joyner* v. *Mofford*, 706 F.2d 1523 (9th Cir. 1983). In *Hopfmann*, the court stated:

> Plaintiffs next argue that the application of the 15 per cent rule [restricting which candidates' names would appear on the Democratic primary ballot to those who received at least 15 percent of the vote at the party's convention] transgresses Article I, Section 3, Clause 3 of the Constitution in that it unlawfully adds a qualification for the office of United States Senator beyond the age, citizenship and residency requirements of the Constitution.
>
> As the defendants have correctly pointed out, the 15 percent rule does not add a qualification that precludes Hopfmann from obtaining the office of United States Senator. The rule merely adds a restriction on who may run in the Democratic party primary for statewide political office and potentially become the party nominee. The cases cited by plaintiffs to the effect that neither Congress nor the states can add to the constitutional qualifications for office are inapposite. *Cf. Powell* v. *McCormack*, 395 U.S. 486, 547, 551, 89 S.Ct. 1944, 1977, 1979, 23 L.Ed.2d 491 (1969).

> Unlike the additional requirements involved in the cases cited by plaintiffs, failure to comply with the 15 percent rule does not render a candidate ineligible for the office of United States Senator. An individual is free to run as the candidate of another party, as an independent, or as a write-in candidate. If he is elected and meets the requirements of Article I, Section 3, he will be qualified to take office. As the Wyoming Supreme Court stated in *State* v. *Crane*, 197 P.2d 864, 871 (Wyo. 1948), *the test to determine whether or not the "restriction" amounts to a "qualification" within the meaning of Article I, Section 3, is whether the candidate "could be elected if his name were written in by a sufficient number of electors."*

746 F.2d at 102-03 (emphasis added).

In my view, the Qualifications Clauses protect only the right of a person who meets the qualifications of age, citizenship, and residency to be seated in the Congress if elected. They do not address the right of any person to seek election or that of his constituents to vote for the person of their choice. Indeed, the Qualifications Clauses themselves begin with the phrase "[n]o person shall *be*" a representative or senator, a choice of words that, to my mind, clearly demonstrates that the Qualifications Clauses are addressed to service in the Congress. The rights to seek election and to vote for the candidate of one's choice are afforded the protection of the First and Fourteenth Amendments against ballot access restrictions that are too severe when measured by the balancing test set out in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), and *Burdick* v. *Takushi*, ___ U.S. ___, 112 S.Ct. 2059 (1992). Nor should the odds for or against the successful waging of a write-in campaign lead to the conclusion that Section 3 of Amendment 73 is a "qualification" in "ballot access clothes." Rather, such odds should be merely one factor considered along with all others in the balancing process which pits candidates' and voters' rights against the state's interest in fair and open elections, free of perceived evils of entrenched incumbency.

In our deliberations, we have applied that balancing test to Sections 1 and 2 of Amendment 73 and found that the state's interest in preventing the perceived evils outweighs the First and Fourteenth Amendment rights of state level candidates and vot-

ers therefor. In my opinion, since we have decided that Amendment 73's lifetime bar on state level incumbents passes Fourteenth Amendment muster, it must necessarily follow that the less stringent restrictions placed on members of Congress easily pass this same test.

I would hold that Amendment 73 to the Arkansas Constitution was proposed and adopted in the manner provided by law, is not constitutionally infirm in any respect, and is valid and enforceable in its entirety.

GERALD P. BROWN, Special Justice, concurring in part, dissenting in part. The enactment clause issue, which has assumed a curious prominence in this drama, is in reality a petition-sufficiency issue over which this court has original and exclusive jurisdiction. Ark. Const. amend. 7. Since the trial court based its ruling on that issue, we would ordinarily dispose of it on procedural grounds. Under the circumstances of this case, I do not believe that such a disposition would be in the public interest in as much as the enactment clause issue (along with several others) was raised in this court in a pre-election challenge. We declined to decide this issue at that time for the reasons set forth in *Plugge* v. *McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992). I agree with the majority's decision to address the enactment clause issue at this time and dispose of it on its merits.

I also agree with the majority opinion that Amendment 73 is not vulnerable to attack on the enactment clause ground. In the first place, I do not believe that Amendment 7 requires a constitutional amendment to contain an enactment clause. Even if it does, Amendment 73 substantially complies.

The initiative petition, which placed Amendment 73 on the ballot, begins, "We, the undersigned legal voters of the State of Arkansas, respectfully propose the following Amendment to the Constitution of the State of Arkansas . . ." and ends, "and by this, our petition order that the same be submitted to the people of said state, to the end that the same may be adopted, *enacted*, or rejected by the vote of legal voters of said state. . . ." (Emphasis supplied.) That does not leave much room for doubt that the voters knew that they were enacting a new law. No one has suggested that the absence of the words "Be it Enacted" misled any-

one or had any effect on the outcome of the election. To strike down Amendment 73 for want of a formal enactment clause, after it has been approved by sixty percent of the voters, would be unduly technical and would elevate form over substance.

I agree with the majority opinion which holds that section 3 of Amendment 73 is fatally flawed because it conflicts with Supremacy Clause and the Qualification Clauses of the United States Constitution.

Although the issue is not entirely free from doubt, I believe the founding fathers considered and rejected term limits for members of Congress at the time of the adoption of the United States Constitution by the Constitutional Convention in Philadelphia over two hundred years ago. [*See* authorities discussed in majority opinion and the dissenting opinion in *Plugge* v. *McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992).]

As the majority opinion recognizes, and Justice Hays forcefully argues in his dissenting opinion, whether the founding fathers intended to foreclose the states from imposing additional qualifications for Congressmen was not definitively and categorically settled. In fact, Justice Hays makes a strong case for "minimum" rather than "exclusive" qualifications. But the action finally taken by the framers of the constitution, following exhaustive debates, is strong evidence that term limits for senators and representatives was rejected. Certainly that is the most plausible interpretation; and the specter of the hodge-podge of qualifications which a contrary holding might engender is daunting enough to swing the balance.

Congressional officeholders partake of the same national character as the President of the United States. Members of Congress pass laws which affect not only their own state, but all the states. They are part of the national team which was created by the Continental Congress. The rules which govern their qualifications are contained in the Constitution of the United States. Uniformity of qualifications is paramount, and individual states are not free to engraft variations. The terms for members of Congress can be limited only by amending the United States Constitution.

Does the constitutional infirmity of section 3 vitiate the

entire amendment, or is the serum provided by the severability clause strong enough to prevent the spread of the infection?

In *Combs* v. *Glenn Falls Ins. Co.*, 237 Ark. 745, 375 S.W.2d 809 (1964), this court held that the test of the efficacy of a severability clause is whether the measure would have passed without the unconstitutional portion.

There is no way for this court to determine whether the voters would have approved term limits for state officeholders if section 3 had not been in the picture. The sponsors of Amendment 73 created this uncertainty and, therefore, had the onus to furnish this court something to go on besides speculation. There is nothing in the record to show that this dichotomous issue was explained to the voters in a meaningful way. In short, there was not a straightforward, up-or-down vote on term limits for state officeholders.

There can be no serious doubt that a state has plenary power to impose term limits on state officials, provided it is accomplished in a constitutionally permissible manner. The sponsors of Amendment 73 obviously knew that section 3 was of questionable constitutionality because of the different approach they used: ballot access. They knew that most of the public discussion of term limits had been in the context of congressional officeholders. When they chose to blanket the two groups (state and federal officeholders) into one unified package, the voters had no choice to approve one without the other. The two groups were not only inextricably linked — they were systemically fused in such a manner that each ceased to have a separate existence for voting purposes. Although section 3 is couched in ballot-access terminology, the distinction between outright bar and ballot-access is too fine a point for the average voter to grasp.

The practice of coupling a legitimate objective with one of doubtful legality, papered over with a severability clause, is not fair to voters. It is misleading at the very least, if not downright deceptive, and should be discouraged. We should make it clear to sponsors of constitutional amendments and initiated acts that they are skating on thin ice when they rely on the redemptive power of a severability clause to bail out a shaky joinder. Such a posture will promote truth-in-packaging and thus be voter-friendly.

While "The States' Rights Amendment" involved in *Hoban* v. *Hall*, 229 Ark. 416, 316 S.W.2d 185 (1958), discussed at length in Justice Dudley's dissent herein, is admittedly an extreme example, it is illustrative of an effort to couple a legitimate public concern with a less laudable objective, with potential far-reaching consequences. The court simply ignored the severability clause in *Hoban* and treated it as a ballot title issue rather than a severability clause issue. Of course, those are separate issues, but they have in common the potential for unfairness to voters.

Sections 1, 2, and 3 of Amendment 73 were presented to the voters as an "all or nothing" package. State and federal officials were lumped together and referred to in the Preamble as "elected officials." Section 6 stated that the provisions of Amendment 73 shall be applicable to "the offices specified in this Amendment." The offices specified are state and federal officeholders.

Since section 3 cannot pass constitutional muster, sections 1 and 2 must also fall.

I respectfully dissent from the majority holding that the severability clause saved sections 1 and 2.

The WEST MEMPHIS SCHOOL DISTRICT NO. 4
of Crittenden County, Arkansas; et al. *v.*
The CIRCUIT COURT of Crittenden County, Arkansas

93-902 871 S.W.2d 368

Supreme Court of Arkansas
Opinion delivered March 7, 1994

Sloan, Rubens & Peeples, by: *Kent J. Rubens*, for appellants.

Heiskell, Donelson, Bearman, Adams, Williams & Caldwell, by: *David Rees* and *George R. Wadley, Jr.*, for appellee.

ROBERT L. BROWN, Justice. This is an original action for a writ of prohibition to prevent the Crittenden County Circuit Court from asserting jurisdiction over tort litigation against the West Memphis School District No. 4, its board of directors, and its superintendent, all of whom are the petitioners. The petitioners assert absolute immunity under various state statutes (Ark. Code Ann. §§ 6-19-103 (Repl. 1993), 16-120-102 (Supp. 1993), and 21-9-301 (Supp. 1993)) as a bar to the underlying tort claim. We deny the writ.

The following facts precipitated this action. Roger Patterson was hired as a school bus driver by the School District in 1986. A young girl, who was age 9 at the time of the complaint, lived along Patterson's bus route and was a daily passenger in 1988 and 1989. Due to the location of her home, she was the first student onto the bus in the morning and the last student to depart the bus in the afternoon. The Smiths are the parents of the girl. The Smiths filed a complaint against the school district, the school board, and the school superintendent, alleging that from November 1988 to December 1989, Patterson molested and sexually abused the girl on the school bus. The Smiths claimed that the school district, its board of directors, and the school superintendent were liable for Patterson's actions, and they sought damages. Specifically, they alleged that the defendants failed or refused to follow the guidelines for hiring school bus drivers or assuring safe pupil transportation as required by Ark. Code Ann. § 6-19-101 *et seq.* (Repl. 1993), and breached their common duty as well. In addition, they asserted:

> 1. Patterson was convicted for a crime that involved sexual activity with a minor in 1963 in Indiana. He served time in prison for seven years for this crime.
>
> 2. Patterson was arrested for driving while intoxicated on more than one occasion while employed as a bus driver in West Memphis.
>
> 3. The board and superintendent "failed or refused" to discipline or supervise Patterson for the alcohol-related arrests.
>
> 4. The acts of the defendants were intentional, malicious, outrageous, and grossly negligent acts and/ or omissions.
>
> 5. The acts of the defendants resulted in physical and mental injury to the young girl and her parents.
>
> 6. The board, school district, and superintendent are liable under a theory of respondeat superior for the intentional acts of Patterson done in the scope of his employment.
>
> 7. Liability insurance was in effect at the time of the

> defendants' tortious conduct which provides coverage for the injuries and damages sustained by the Smiths.

The defendants who are the petitioners herein filed a motion to dismiss and asserted that the Smiths had failed to state a claim upon which relief could be granted under Ark. R. Civ. P. 12(b)(6). The motion raised as one ground the bar of statutory immunity.

The circuit court denied the motion but found that the board members could only be sued in their official capacities and not as individuals. The court further found that the defendants were not absolutely immuned from liability, that the Smiths had plead sufficient facts to establish an intentional tort, and that the claims of negligence could be asserted if the defendants had liability coverage.

The petitioners next brought this original action seeking a writ of prohibition. They assert in their petition that prohibition is proper under *Fore* v. *Circuit Court of Izard County*, 292 Ark. 13, 727 S.W.2d 840 (1987); *overruled in part by The Wise Company, Inc.* v. *Clay Circuit*, 315 Ark. 336-A, 869 S.W.2d 6 (1994) (supplemental opinion) and *Lupo* v. *Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993).

A writ of prohibition is an extraordinary writ. *McGlothlin* v. *Kemp*, 314 Ark. 495, 863 S.W.2d 313 (1993). We have stated that it is only appropriate when the lower court is wholly without jurisdiction. *Id.* Jurisdiction is the power or authority of the court to act. *Mark Twain Life Ins. Corp.* v. *Cory*, 283 Ark. 55, 670 S.W.2d 809 (1984). The jurisdiction of the circuit court to hear civil cases absent a provision for exclusive jurisdiction of a particular matter in another venue is well settled. *Commission of Judicial Discipline and Disability* v. *Digby*, 303 Ark. 24, 792 S.W.2d 594 (1990). We have consistently denied writs of prohibition where the lower court acted within its jurisdiction. *See, e.g., Arkansas Highway Comm'n* v. *Munson*, 295 Ark. 447, 749 S.W.2d 317 (1988) (chancery court has power to enjoin the enforcement of a void order); *Commission of Judicial Discipline and Disability* v. *Digby, supra* (circuit court has authority to entertain a declaratory judgment action but not action for costs and expenses).

Additionally, we have denied writs where the relief

requested was based on an affirmative defense and not a question of jurisdiction. *Ark. State Highway Comm'n* v. *Munson, supra*, (res judicata is an affirmative defense); *Forrest City Machine Works, Inc.* v. *Erwin*, 304 Ark. 321, 802 S.W.2d 140 (1991) (statute of limitation is an affirmative defense and not jurisdictional). Likewise, we have stated that the claim of immunity of a state employee is a defense to be adjudicated. *Jaggers* v. *Zolliecoffer*, 291 Ark. 250, 718 S.W.2d 441 (1986).

In *Fore* v. *Circuit Court of Izard County, supra*, a writ of prohibition was granted following the denial of a motion for summary judgment. We have recently retreated from the overreaching language in *Fore*, however, and overruled the case in part. *See The Wise Company, Inc.* v. *Clay Circuit, supra; Lupo* v. *Lineberger, supra*. Indeed, we made it clear that a writ of prohibition was appropriate in *Fore* only because the Workers' Compensation Commission had exclusive jurisdiction of the matter. *Lupo* v. *Lineberger, supra*. Any further rationale for granting the writ in *Fore* has been repudiated by this court.

The following summarizes the inappropriateness of a writ of prohibition in cases such as the one before us:

> [A] petition for a writ of prohibition is not the proper remedy for the failure of a trial court to grant a motion to dismiss. A writ of prohibition is an extraordinary writ and is only granted 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.

National Sec. Fire & Casualty Co. v. *Poskey*, 309 Ark. 206, 207, 828 S.W.2d 836, 837 (1992) (citations omitted); *see also Lupo* v. *Lineberger, supra; Juvenile H.* v. *Crabtree, 310 Ark. 208, 833 S.W.2d 766 (1992).*

In this case, the petitioners seek to prevent the circuit court from proceeding with litigation when they have an immunity defense against such lawsuits. They focus on the language of two statutes in particular:

> (a) It is declared that the directors of all school districts and special school districts in this state in the discharge of their duties as such directors act in a necessary governmental function.

> (b) Therefore, no action for personal injuries or damage to property arising out of the acts, conduct, or omissions of such directors in their official capacities shall be brought or maintained in this state against directors personally.

Ark. Code Ann. § 6-19-103 (Repl. 1993).

> It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the state shall be immune from liability and from suit for damages, except to the extent that they may be covered by liability insurance. No tort action shall lie against any such political subdivision because of the acts of its agents and employees.

Ark. Code Ann. § 21-9-301 (Supp. 1993). The petitioners argue especially that these statutes foreclose the ability of the Smiths to bring a lawsuit against them, and the circuit court lacked jurisdiction over the matter.

We do not read the statutes to say that. What § 21-9-301 establishes is an immunity defense. That does not mean that the circuit court is without jurisdiction to hear a motion to dismiss on statutory immunity grounds. The circuit court recognized that intentional actions by board members are not protected by statutory immunity. *Deitsch* v. *Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992). The court further authorized additional discovery into liability coverage maintained by the school district. Ark. Code Ann. § 21-9-301 (Supp. 1993). Section 6-19-103 disallows personal liability for board members, and the court followed that statute and ruled accordingly.

We hold that the circuit court acted within the bounds of its authority in ruling on the motion to dismiss. Jurisdiction within that court is not lacking.

Writ denied.

HAYS, J., concurs.

CORBIN, J., not participating.

STEELE HAYS, Justice, concurring. The gist of the complaint

filed by Kathy Smith and Tommy Smith against the petitioners is that by failing or refusing to follow proper guidelines in hiring Roger Patterson as a school bus driver, petitioners breached a statutory and common law duty owed to their daughter. The complaint asserts causes of action based on gross negligence, intentional tort and outrage. To the extent that the petitioners may have liability insurance coverage applicable to this case, I agree the trial court is not without jurisdiction. I write simply to express my view that the complaint fails to state a cause of action for an intentional tort or for the tort of outrage and was subject to dismissal under ARCP 12(b)(6).

We have held that for a complaint to assert an intentional tort it must be based on an allegation that the intentional or deliberate act was *performed with a desire to bring about the consequences of the act. Miller* v. *Ensco, Inc.*, 286 Ark. 458, 692 S.W.2d 615 (1988); *Finch* v. *Swingly*, 42 A.D.2d 1035, 348 N.Y.2d 266 (1973).

As to outrage, we addressed the identical issue in *Rabalaias* v. *Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985), and noted that no facts were alleged entitling the plaintiffs to relief by the tort of outrage:

> Rule 12(b)(6) provides for dismissal of a complaint for "failure to state facts upon which relief can be granted." The two rules [Rule 12(b)(6) and Rule 8] must be read together in testing the sufficiency of a complaint; facts, not mere conclusions must be alleged. *Harvey* v. *Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981). Since no facts were alleged regarding the tort, the trial court was right to dismiss the claim.

Reduced to its elements, this complaint charges the defendants (petitioners) with hiring an individual who should not have been hired, and, had the petitioners followed the proper procedures, the alleged abuses might not have occurred. But no facts are pled which render that conduct outrageous, or from which we can infer there was any desire to bring about such consequences.

FRASER BROS., Duane Fraser and Rudy Fraser
v. DARRAGH COMPANY

93-287 871 S.W.2d 367

Supreme Court of Arkansas
Opinion delivered March 7, 1994

Fletcher C. Lewis, for appellants.

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *James M. McHaney, Jr.*, for appellee.

JACK T. LASSITER, Special Chief Justice. The appellants, Fraser Bros., Duane Fraser, and Rudy Fraser appealed from the trial court's order dismissing their complaint filed in Woodruff County for improper venue. We affirm.

Appellants' complaint asserted that Fraser Bros. was a Woodruff County farming partnership and that Duane Fraser and Rudy Fraser were general partners and residents of Woodruff County. The complaint alleged that appellee Darragh Company was an Arkansas corporation with its registered agent for service in Little Rock, Arkansas. The complaint also alleged that Darragh Company did business in Woodruff County, Arkansas, in its own capacity and through its broker. The complaint alleged that Fraser Bros. had sold corn to Darragh Company in September, 1992, in two different loads delivered to Darragh's mills in Conway and Searcy. Fraser Bros. claimed sale prices of $11,475.68

and $11,227.89, respectively. Appellants alleged that Darragh Company refused to pay for the corn in bad faith and intentional violation of their contract. Appellants sought damages in the amount of the sale price of the corn.

Darragh Company answered and moved to dismiss pursuant to ARCP, Rule 12(b)(3), arguing Woodruff County, the residence of appellants, was improper venue. Appellants responded asserting that venue was proper relying upon Ark. Code Ann. §16-60-113(a)(1987), which provides —

> (a) Any action for damages to personal property by wrongful or negligent act, whether arising from contract, tort, or conversion of personal property, may be brought either in the county where the damage occurred, or in the county where the property was converted, or in the county of residence of the person who was the owner of the property at the time the cause of action arose.

The trial court properly dismissed the complaint for improper venue. When two actions are pled which would lie in different venues, venue is determined by the real character of the action, the principal right being asserted. *Atkins Pickle* v. *Burrough-Uerling-Brasuell*, 275 Ark. 135, 628 S.W.2d 9 (1982). Appellants' cause of action was based on nonpayment of a debt or breach of contract. Those causes of action must be brought in the county of the defendant's residence or where the defendant is summoned. Ark. Code Ann. §16-60-111 and 116(a)(1987).

The appellants' complaint did not allege facts sufficient to establish venue in Woodruff County against the defendant corporation. First, the allegation that Defendant Darragh Company did business in Woodruff County was insufficient alone to establish venue in that county. Appellants did not allege that Darragh Company had its principal office in Woodruff County, was situated there, or that its chief officer resided there as required by Ark. Code Ann. §16-60-104 (1987). Second, we need not consider whether the corn was damaged within the meaning of Ark. Code Ann. §16-60-113(a)(1987), which was relied upon by the appellants, because the appellants have failed to plead facts sufficient to establish an ownership interest in the corn by Fraser Bros., Duane Fraser or Rudy Fraser after its delivery to the

appellee. Appellants' complaint asserted that the corn was sold to Darragh company at the Searcy and Conway mills. Therefore, the appellants' complaint pled facts passing title of the corn to Darragh company. Pursuant to Ark. Code Ann. §4-2-401 (Repl. 1991), title passes upon delivery. Since the complaint does not contain additional facts asserting appellants' ownership of the corn subsequent to the delivery to Darragh Company, we need not consider the applicability of Ark. Code Ann. §16-60-113(a)(1987).

The trial court correctly granted the appellee's motion to dismiss pursuant to Rule 12(b)(3) for failure to state proper venue.

Affirmed.

All Associate Justices join, including Special Associate Justices Eddie Walker and Curtis Hogue.

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

John Allen McNAIR, Jr. *v.* Patricia Coulter McNAIR

93-97 870 S.W.2d 756

Supreme Court of Arkansas
Opinion delivered March 7, 1994
[Rehearing denied April 18, 1994.*]

*Hays and Newbern, JJ., not participating.

[redacted]

Mashburn & Taylor, by: *Lindlee Baker Norvell* and *Bill Putman, Jr.*, for appellant.

Pettus Law Firm, P.A., by: *E. Lamar Pettus*, for appellee.

DIANE STOAKES MACKEY, Special Justice. Appellant/cross-appellee John Allen McNair, Jr. filed a complaint in the Circuit Court on January 9, 1990, seeking to replevy a 1987 Chevy Blazer. On January 8, a Bill of Sale had been executed by his daughter whereby she transferred her interest in the Blazer to John McNair. In reality, she had none and did not supply a title. On January 9, an Affidavit for Delivery and an Order of Delivery were filed seeking immediate possession of the vehicle. Summons was issued and served on the appellee/cross appellant Patricia Coulter McNair by the Sheriff, who began to take possession of the Blazer on January 11, 1990. The court upon oral motion revoked the Order of Delivery and stayed delivery before the Blazer was removed from Mrs. McNair's driveway.

The Answer denied that the daughter had any interest in the Blazer to convey and alleged that replevin was improper. Mrs. McNair counterclaimed for abuse of process and outrage based

on a series of prior court actions relating to the same vehicle, on her own ownership of the Blazer, and on John McNair's improper intention to abuse, coerce and harass her. The counterclaim also alleged the intentional infliction of emotional distress, forfeiture of bond, and conversion. No bond was actually issued.

At trial the court directed a verdict against John McNair on his replevin claim and against Patricia McNair on the tort of outrage. The jury found for Patricia McNair on her counterclaim and awarded her damages of $22,500 on the abuse of process claim, $8,227 on the conversion claim[1], and $70,000 in punitive damages.

John McNair's motion for new trial was denied although the court reduced the amount of punitive damages to $20,000 and denied the Rule 11 sanctions requested by Mrs. McNair. On appeal, three points are raised.

I. The trial court erred in denying the appellant's motion for a new trial as the verdict is clearly contrary to the preponderance of the evidence and is contrary to law.

II. The trial court maintained no jurisdiction to determine issues of marital property and therefore the jury's verdict finding the appellant liable for conversion is void.

III. The trial court erred in denying the appellant a new trial as the jury's award of both compensatory and punitive damages was excessive and influenced by passion or prejudice.

On cross appeal the issue is:

I. The trial court erred in ordering remittitur of the punitive damage awards.

[redacted] The results of the decision of the trial court on issues I, II and III are correct, and the decision is affirmed. We will sustain the trial court's decision if it is right, even though we may do so on a different basis. *Morrison* v. *Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981). We hold that the remittitur of the punitive

[1]The trial court modified the jury's calculation with agreement of the parties.

award constituted error. Accordingly we reverse the trial court on this issue.

I.

John McNair challenges the jury's verdict as being contrary to the preponderance of the evidence and does so by appealing from the trial court's denial of a new trial. Review of the evidence convinces this Court that there is indeed substantial evidence in the record to support the jury verdicts relating to abuse of process, conversion and punitive damages.

The jury verdict in favor of Mrs. McNair's counterclaim based on abuse of process is challenged as being contrary to the preponderance of the evidence and contrary to law. There is no challenge to the Court's directed verdict on the replevin action, although Mr. McNair belatedly mentions a possible constitutional defect in the replevin statutes. This issue was not developed at trial nor was the Attorney General notified in advance, as is required, and the Court does not find that he raises a serious constitutional challenge. To do so would be anomalous, at any rate, since he proceeded under that statute. See *Olmstead* v. *Logan*, 298 Ark. 421, 768 S.W.2d (1989).

The elements of an abuse of process claim are: (1) a legal procedure set in motion in proper form even with probable cause and even with ultimate success, (2) but, perverted to accomplish an ulterior purpose for which it is not designed, and (3) a wilful act in the use of process not proper in the regular conduct of the proceeding. *Union Nat'l Bank* v. *Kutait,* 312 Ark. 14, 846 S.W.2d 652 (1993).

Evidence submitted at trial indicates that John McNair elected to use the "short" replevin statute, rather than to comply with the added provisions passed by the Legislature in 1973. The 1973 provisions were enacted to correct any constitutional problems in *Ark. Code Ann.* §18-60-809, *et. seq.* in light of *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). The Supreme Court held in *Fuentes* that the issuance of a writ of replevin without prior notice to the party in possession of property was a violation of due process. While the old statute was not repealed, the added notice provisions are constitutionally required. *See Ark. Code Ann.* §8-60-801—808. No prior notice was given to Patricia McNair; the deputy

sheriff simply appeared at her home to take away her vehicle. Furthermore, Mr. McNair had no real title to the Blazer, a basic requirement to begin replevin. Additionally, no bond was posted. Thus, the action was not begun in proper form either under the old or newer statute.

The jury could find that Mr. McNair acted with an ulterior purpose from the testimony relating to his prior attempts to obtain the Blazer through successive chancery actions. His own testimony showed confusion, and contradictions which the jury apparently believed called into question his good faith in beginning the replevin action based only on guesses and a derivative claim of ownership. We will not, of course, substitute our judgment on any question of credibility. The jury could find that the first and second elements were sufficiently supported by the evidence.

In *Cordes* v. *Outdoor Living Ctr.. Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989) the Court discussed the nature of the third element, the wilful act requirement. For the third element to be present the procedure must have been perfected to accomplish an ulterior purpose for which it was not designed. Showing that a vexatious lawsuit was filed is not enough by itself. There must be a specific abusive use of "process," like serving an arrest warrant or, as here, obtaining an Order of Delivery and handing it to the Sheriff for execution. It is uncontradicted that Mr. McNair did exactly that.

Mrs. McNair did provide substantial evidence on each of the three required elements, and therefore is entitled to recover on her claim of abuse of process. The trial court is affirmed in denying a new trial on that claim.

II.

Appellant McNair raises a jurisdictional issue relating to Patricia McNair's counterclaim for damages for conversion of one-half of an IRS refund resulting from the filing of a joint return covering the last year of the marriage. This issue was not preserved, but since the appellant urges lack of jurisdiction, this issue may be raised for the first time on appeal. *See, Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1989); *Hilburn* v. *1st State Bank of Springdale*, 259 Ark. 569, 535 S.W.2d 810 (1976).

The trial court properly instructed the jury on the elements of conversion, which was one of the grounds for damages alleged in Mrs. McNair's Counterclaim. By doing so the jury was directed to make a determination on an action clearly cognizable in the circuit court.

[redacted] To the extent that John McNair attempted to raise an ambiguity or omission in the separate Stipulation Agreement as a defense to the charge of conversion, he raised a matter of contract interpretation relating to an asset which did not exist at the time of the Agreement but which, due to the Agreement's failure to address the issue, had arisen relating to a tax refund received after the divorce. (The Chancery Court did not retain jurisdiction concerning the Agreement.) Interpretation of an ambiguous contract term is within the jurisdiction of the circuit court for resolution by the trier of fact. *Shipley* v. *Shipley*, 305 Ark. 257, 807 S.W.2d 915 (1991).

[redacted] The trial court therefore did not lack subject matter jurisdiction since both conversion and contract interpretation are encompassed within its power.

[redacted] Mr. McNair further argues that submission to the jury of an instruction relating to division of marital property brought improper equity considerations to the jury in its deliberation. No party may assign as error on appeal the giving of an instruction unless he objects at trial and gives the grounds for his objection. *Delta School of Commerce, Inc.* v. *Wood*, 298 Ark. 195, 766 S.W.2d 424 (1989). This Mr. McNair failed to do; he may not now challenge the instruction.[2]

III.

[redacted] John McNair claims that both the compensatory and punitive damages were excessive and influenced by passion or prejudice. This court's review, as set out in *Morrison* v. *Lowe,* 274 Ark. 358, 625 S.W.2d 452 (1981), is de novo, to determine whether the amount of the judgment shocks the conscience of the Court.

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[2]The Court in no way condones the submission of an equitable instruction relating to the division of marital property to the jury in these circumstances. Nevertheless, appellant failed to object before the trial court and may not raise the issue before this Court for the first time.

The Court may either restore the jury verdict or even reduce it further.

Patricia McNair has also challenged on cross appeal the punitive damages award, as remitted by the trial court. Remittitur is within the inherent power of the court if an award is grossly excessive or appears to be the result of passion or prejudice. Newbern, Ark. Civil Prac. and Proc. §27-1; *Holmes* v. *Hollingsworth*, 234 Ark. 347, 352 S.W.2d 96 (1961). It may be ordered *sua sponte.* When a losing party files an appeal, the winning party has the right to challenge the court's revision of the jury verdict by means of cross appeal even if it agreed to the remittitur.

A review of our cases demonstrates that a number of standards have been applied to measure the propriety of punitive or exemplary damages. The extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party may be considered. *Holmes, supra* at 352. Appropriate compensation is not the test, but rather such damages are to be a penalty for conduct which is malicious or done with the deliberate intent to injure another. The penalty should be sufficient to deter others from such conduct. *Ray Dodge. Inc.* v. *Moore*, 251 Ark. 1036, 1044 479 S.W.2d 518 (1972). *See also, Interstate Freeway Services, Inc.* v. *Houser*, 310 Ark. 302, 310 835 S.W.2d 872, 876 (1992).

The jury had before it evidence of the affluence of Mr. McNair so that a large verdict could have been viewed as necessary for adequate punishment. The repetitive legal proceedings relating to the Blazer, the conversion of the IRS refund coupled with the forging of Mrs. McNair's name, and John McNair's failure to comply with the replevin statutes were before the jury, which could have deduced premeditated malice and the intent to harm his ex-wife from that evidence. The jury was instructed without objection that violation of the replevin statute was evidence to be considered, and the jury had heard that not only was the bond not posted, but more importantly, that no notice was given to Mrs. McNair. While the punitive award is large, this court has approved damages proportionally larger. *See, e.g., Viking Insurance Company of Wisconsin* v. *Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992).

Mr. McNair argues that testimony was elicited which inflamed the sympathy of the jury so as to increase the award because of passion and prejudice. A review of the record shows that the most damaging testimony was elicited by John McNair's attorney on cross examination. Such testimony, if error, cannot now be heard to be the basis for remittitur when evoked by Mr. McNair himself. Testimony supportive of Patricia McNair which was brought out by her own attorney was not objected to and thus cannot be cited as the improper basis for the jury's award either.

[redacted] The court may not substitute its judgment for the jury's when there is a basis in the evidence for its award and no objection to evidence tending to create passion or prejudice. *Clayton* v. *Wagnon*, 276 Ark. 123, 633 S.W.2d 19 (1982); *Morrison, supra.* While this Court may not have awarded the sum thought by the jury to be a proper punitive award, it, too, may not substitute its judgment for the jury's punitive damages award which meets the standards for such awards. Ample evidence exists that such standards were met. Accordingly, the jury's award of punitive damages should be upheld, the remittitur was improper, and the court's judgment ordering reduction of damages is reversed because on de novo review, the award does not shock the conscience of the Court. The jury's punitive damage award of $70,000 is therefore restored, and Mrs. McNair's cross appeal is granted.

John McNair also challenges the award of compensatory damages as being excessive and swayed by passion or prejudice. As to the latter, the record indicates that both sides submitted evidence derogatory to the other without objection. The evidence most damaging and most likely to raise passion or prejudice was evoked by Mr. McNair's own attorney, and he cannot now be heard to complain about that evidence.

To support his claim that the $22,500 awarded on Mrs. McNair's counterclaim based on abuse of process is excessive, Mr. McNair points out that the actual period of time during which the replevin action was being carried out was about one hour and that the Blazer never left the driveway. The attempted execution of delivery occurred at 10:00 a.m. in the morning and the deputy sheriff was respectful. He further claims that the proceeding did no damage to Mrs. McNair's reputation, and that she did not

prove that she had to see a doctor or stay awake at night as a result of the attempted replevin.

In response, Mrs. McNair showed that she was so emotionally upset by the continuation of John McNair's harassment that she collapsed on the sidewalk crying and shaking. Further, she had need of the support of friends. This episode took place when she was home alone caring for the youngest McNair children, and she has needed counseling. She was required to hire a lawyer to protect her interests. She testified that this was in effect, the last straw after two previous lawsuits brought against her by John McNair. The jury thus received evidence sufficient to support its award for damages based on a cause of action which is not usually susceptible of exact proof of loss. The jury chose to rely on Mrs. McNair's evidence in assessing the award, which we will not disturb.

The Court finds, based on the foregoing, that the compensatory award of $22,500 was based on sufficient evidence, was not merely the result of passion and prejudice, and does not shock the conscience of the Court. The denial of a new trial on the issue of compensatory damages is affirmed.

The damage award of $8,227 on the conversion claim was not directly challenged by either party and need not be addressed.

IV.

Patricia McNair argues entitlement to the sum of $1,347.00 for attorney fees and costs incurred in preparation of the Supplemental Abstract. Unquestionably, some material relevant to the issues on appeal was added in the Supplemental Abstract. Some of it was repetitious and some of it was needed to support her counterclaim. It is impossible to separate the time and costs for the Supplemental Abstract portions essential only to the appeal itself. The court will not speculate by allocating those costs, and so the motion is denied.

HOLT, C.J., and GLAZE, DUDLEY, CORBIN, and BROWN, JJ. join in this opinion.

Special Justice RAY BAXTER joins in this opinion.

HAYS and NEWBERN, JJ., not participating.

Evelyn A. RICHARDSON *v.* Thomas W. FLANERY
and Bonnie Flanery

93-1015 871 S.W.2d 589

Supreme Court of Arkansas
Opinion delivered March 14, 1994

Matthews, Sanders, Liles & Sayes, by: *Marci Talbot Liles* and *Mel Sayes*, for appellant.

Thomas & Smith, by: *Hoyt Thomas*, for appellees.

JACK HOLT, JR., Chief Justice. The jury returned a verdict in this case favoring Mrs. Richardson, who was involved in an automobile accident with the Flanerys, and the trial court granted the Flanerys' motion for new trial. Under the circumstances, we hold

that the court did not abuse its discretion in setting the jury verdict aside.

On Christmas Day, 1991, the appellees, Thomas and Bonnie Flanery, and their granddaughter, were travelling south on Highway 167 outside of Batesville, Arkansas. As Mr. Flanery was driving, he noticed another car "quite a ways" away — probably some one hundred feet or so — approaching on Barnett, the feed-on-lane to the highway. According to Mr. Flanery, he did not need to slow down because he knew that the other car had a yield sign. According to appellant, Mrs. Evelyn Richardson, she did look, but when she did not see anyone coming, she proceeded forward. Mr. Flanery saw her at the last moment and went over the yellow line into the northbound turn lane to avoid her but without success. As a result, a collision occurred, and the Flanery vehicle landed in a ditch west of the highway. Mrs. Richardson's car came to rest facing south out in the intersection in the southbound lane.

A deputy sheriff of Independence County, J. W. Wamack, who arrived at the scene of the accident soon after the wreck, stated that he thought Mrs. Richardson was heading down Barnett shortly before the accident. Deputy Wamack questioned the parties as to their injuries. Mr. Flanery was limping, and Mrs. Flanery complained of her shoulder. Deputy Wamack offered to call them an ambulance, but they said that they could drive themselves to the hospital, which they did.

The Flanerys filed suit against Mrs. Richardson, claiming that her negligence caused the automobile accident and their injuries. As a result of the accident, Mr. Flanery allegedly sustained multiple bruises, contusions and abrasions, severe strain and sprain to his neck, back, right shoulder and right elbow, a tear in his right knee, medical expenses, lost wages and disability all totalling $75,000. Mrs. Flanery claimed that Mrs. Richardson's negligence caused her, among other injuries, cervical and lumbar sprain and strain which extended to the hip muscles, medical expenses, lost wages, and disability, resulting in damages totalling $50,000. Thereafter, Mr. Flanery amended their complaint to increase his request for damages to $110,000.

The jury returned a general verdict in favor of Mrs. Richard-

son. Thereafter, the Flanerys filed a motion for new trial. Citing Ark. R. Civ. P. 59(a)(6), they argued that the verdict was contrary to the preponderance of the evidence that Mrs. Richardson was negligent. The trial judge agreed, explaining:

> [T]he jury verdict in favor of the defendant was contrary to the testimony given at the trial by the plaintiffs and investigating officer, and while the defendant denied liability, her testimony indicated that the accident resulted from her negligence.
>
> That while there could be differing opinions as to the amount and type of damages suffered by the plaintiffs, it was unquestioned that there was damage of a substantial amount to the plaintiffs' vehicle that could and did corroborate the damages testified to by the plaintiffs.

Arkansas Rule of Civil Procedure 59(a)(6) provides: "A new trial may be granted to all or any of the parties on all or part of the issues on the application of the party aggrieved, for . . . the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law." Under this subdivision, the trial court has some discretion in the matter, but that discretion is limited, and it may not substitute its view of the evidence for the jury's except when the verdict is clearly against the preponderance of the evidence. *People's Bank & Trust Co.* v. *Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986); Ark. R. Civ. P. 59(a)(6).

The test we apply in reviewing the trial court's granting of the motion is whether the judge abused his or her discretion. *Razorback Cab* v. *Martin*, 313 Ark. 445, 856 S.W.2d 2 (1993). A showing of abuse of discretion is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail. *Turrise* v. *Crane*, 303 Ark. 576, 798 S.W.2d 684 (1990). Also, we must not confuse this standard with that of our review of a trial court's granting of a judgment notwithstanding the verdict, which provides that a court may set aside the jury verdict if: (1) there is no substantial evidence to support the jury's verdict, and (2) the moving party is entitled to a judgment as a matter of law. *Dr. Pepper Bottling Co.* v. *Frantz*, 311 Ark. 136, 842 S.W.2d 37 (1992).

Applying Ark. R. Civ. P. 59(a)(6), we hold that the trial judge did not abuse his discretion in granting the Flanerys' motion for new trial and in finding that the verdict was clearly contrary to the preponderance of the evidence because the overwhelming weight of evidence was that Mrs. Richardson had negligently caused the auto accident. The only evidence tending to disprove the allegations of negligence against Mrs. Richardson is her own testimony regarding the cause of the accident. However, it is unrefuted that the Flanerys had the right-of-way when the accident occurred. Even Mrs. Richardson offered no explanation for how the accident occurred, other than to claim that the Flanerys struck her, rather than vice versa: "Yeah, I did not see. I slowed down. I looked. I did not see him. I mean, I didn't see their automobile, truck."

Although Mrs. Richardson claimed that the Flanerys struck her, the Flanerys and their granddaughter testified that Mrs. Richardson had struck them. Deputy Sheriff Wamack also explained that, "[T]he yield sign is there to protect vehicles from running into vehicles coming down as Flanery was doing. You have the right-of-way coming down through here, and any vehicle that runs up here and down does not observe the yield sign and goes out and hits a vehicle there in the line of traffic has violated the law."

As the trial judge recognized, there were also problems with the evidence which arose from the Flanerys attempt to prove their damages for personal injuries. For example, Mr. Flanery testified that he sustained injuries to his right knee, perhaps by hitting the gear shift during the collision. However, on the day of the accident, he did not tell the emergency room staff that his knee was bothering him. Further, when he visited his orthopedist, Dr. Thomas, in January 1992, he denied having back, hip or leg pain. It was not until March 1992, some three months after the car accident, that he complained about problems with his knee. Dr. Thomas' deposition was admitted into evidence, and in it, he explained that the problems with Mr. Flanery's knee are the "result of what I would perceive as a preexisting problem. It was more degenerative wear and tear as opposed to an acute rip in his knee or tear." He explained that other factors contributing to Mr. Flanery's condition are his age, weight, and occupation. However, Dr. Thomas explained that he had no reason to doubt Mr.

Flanery's veracity as to the onset of his knee problems.

Likewise, Mrs. Flanery's injuries were disputed. She complained after the accident that her shoulder blades and neck were hurting her, and the emergency room staff x-rayed her right shoulder blade. Although she claims that they did not look at her neck, the emergency room report reveals that her neck muscles were soft and supple at the time of examination, indicating that her neck was uninjured. Dr. Thomas stated that her neck sprain is associated with degenerative arthritis, but that, in his opinion, he believed her problems were related to the car accident.

Despite these disputed facts, still the preponderance of the evidence supports the conclusion that Mrs. Richardson had negligently hit the Flanerys' vehicle causing them damages, and the judge thought that the jury had ignored this fact. Under Ark. R. Civ. P. 59(a)(6), the trial court had discretion to set aside the jury verdict and grant a new trial when it believed the verdict was clearly contrary to the preponderance of the evidence, and it exercised this discretion appropriately.

Affirmed.

CORBIN, J., not participating.

The AMERICAN INSURANCE COMPANY, NAP Financial Corporation, and Mark J. Berman *v.* Lee CAZORT, Jr.

93-934 871 S.W.2d 575

Supreme Court of Arkansas
Opinion delivered March 14, 1994

[redacted]

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *Phil Campbell*; and *Robinson, Staler & Marshall, P.A.*, by: *Thomas B. Staler*, for appellants.

Nichols, Wolff & Ledbetter, by: *Mark W. Nichols*, for appellee.

ROBERT H. DUDLEY, Justice. Lee Cazort, Jr., appellee, a resident of Arkansas, opened a securities brokerage account with Marc Berman, a resident of Florida who was an employee of

MJB Associates, Inc., a Florida corporation. The account was opened through NAP Financial Corporation, a Texas corporation which has its principal place of business in California. Cazort signed an asset management agreement with Berman and MJB, a letter of transmittal with NAP, and an asset management agreement with First Southwest Company. Each of these documents contains clauses by which Cazort agreed to submit to arbitration all controversies between himself and NAP, Berman, and MJB. The American Insurance Company, appellant, filed a corporate bond with the Arkansas Securities Department in which it agreed to be "liable to any and all persons who may suffer loss by reason of [NAP or Berman's] failure to comply with the law of securities transactions."

Cazort filed this suit in the Circuit Court of Pulaski County and alleged that Berman and NAP engaged in excessive and inappropriate trading in his account. The counts of the complaint alleged that Berman and NAP (1) were not properly registered to sell securities; (2) violated Arkansas statutes by making false statements; (3) committed common law fraud; (4) breached a fiduciary duty; (5) committed common law negligence; and (6) violated the federal Securities Act of 1933. In the same complaint he alleged that appellant American issued a blanket bond "to cause no person to suffer loss" by Berman and NAP's wrongs.

Appellant American filed a cross-complaint against NAP and Berman for indemnity in the event American should be required to make payment on their behalf.

Berman and NAP filed a motion to compel arbitration in accordance with the agreements, and alleged that "the Federal Arbitration Act requires arbitration." Cazort moved for a voluntary nonsuit of the actions against NAP and Berman. The circuit court granted leave to Cazort to voluntarily dismiss the claims against NAP and Berman. This left appellant American as the only defendant remaining in Cazort's suit, although NAP and Berman remained in the case on American's cross-complaint for indemnity should it be required to make payment on their behalf.

Appellant American moved for an order to compel Cazort to submit his claim to arbitration, or in the alternative, to dismiss. Cazort pleaded that he had not signed an agreement with

American to arbitrate. After a hearing, the circuit court denied American's motion to compel arbitration and denied NAP and Berman's motions to dismiss American's cross-complaint. The trial court denied American's motion to compel arbitration because the complaint alleged tort causes of action which are not subject to the Arkansas Uniform Arbitration Act. *See* Ark. Code Ann. § 16-108-201(b) (Supp. 1993). American, NAP, and Berman appeal and argue that the trial court's ruling failed to address their argument that the Federal Arbitration Act is applicable and that the better policy is to compel arbitration. The argument has merit, and we reverse and remand.

The parties appeal from the order denying a motion to compel arbitration. American's jurisdictional statement provides that the order is appealable because Ark. Code Ann. § 16-108-219(a)(1) (1987) authorizes an appeal from an "order denying an application to compel arbitration . . ." and Rule 1-2(a)(12) of the Rules of the Supreme Court provides that the supreme court shall hear "interlocutory appeals permitted by statute. . . ." The statement is partially correct. The statute provides that an appeal may be taken, but the appealability of orders is governed by Rule 2 of the Arkansas Rules of Appellate Procedure and not by Rule 1-2 of the Rules of the Supreme Court. Rule 1-2 addresses the division of appellate jurisdiction between the supreme court and the court of appeals. Under Amendment 58 to the Constitution of Arkansas, which created the court of appeals, the supreme court, by rule, decides which court will have primary jurisdiction of appeals after an appeal has been validly lodged. Rule 1-2 addresses that division of appellate jurisdiction and does not address the appealability of orders. The appealability of orders is governed by Ark. R. App. P. 2. *See Chem-Ash, Inc.* v. *Arkansas Power & Light Co.,* 296 Ark. 83, 751 S.W.2d 353 (1988).

Rule 2 of the Arkansas Rules of Appellate Procedure provides, with certain exceptions, that an appeal may be taken from a judgment or decree that finally determines the outcome of an action. There is no final order in this case. Indeed, the order refusing to compel arbitration is more akin to an order refusing to transfer a case from circuit court to chancery court. *Chem-Ash Inc., supra.* However, Rule 2 preserved all statutory rights of appeal that were in existence at the effective date of the rules, July 1, 1979. Act 38 of 1973, which authorized the supreme court

to prescribe the rules, provides that rights of appeal shall continue as authorized by law. *See* Ark. R. App. P. 2 (court's notes). When we promulgated Rule 2, we did not intend to alter the statutory rights of appeal that were then in existence. *Sunbelt Courier* v. *McCartney*, 303 Ark. 522, 798 S.W.2d 92 (1990), and *Whitlock* v. *G.P.W. Nursing Home, Inc.*, 283 Ark. 158, 672 S.W.2d 48 (1984). The Uniform Arbitration Act and its section on appeals, §16-108-219, were enacted in 1969 and were in existence at the time we promulgated Rule 2. Thus, appellants have a right of appeal under Ark. R. App. P. 2.

We have refused to permit attempted appeals from orders compelling arbitration. *See England* v. *Dean Witter Reynolds, Inc.*, 306 Ark. 225, 811 S.W.2d 313 (1991); *Chem-Ash, Inc.*, 296 Ark. at 85, 751 S.W.2d at 354. Unlike those cases, this is an appeal from an order denying a motion to compel arbitration, and the Uniform Arbitration Act treats the two differently. *See* Ark. Code Ann. §16-108-219. In summary, appellant has a right of appeal and this court has appellate jurisdiction.

American's primary argument is that arbitration should be compelled pursuant to the Federal Arbitration Act. It contends that the federal act controls all agreements to arbitrate disputed transactions involving interstate commerce. The argument is well taken. The word "commerce" is first defined as commerce among the several states. 9 U.S.C. § 1. Section 2 then provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Cazort's transactions involved interstate commerce. *See Parry* v. *Bache Co.*, 125 F.2d 493 (5th Cir. 1942); *England* v. *Dean Witter Reynolds*, 306 Ark. 225, 811 S.W.2d 313 (1991); *McEntire* v. *Monarch Feed Mills, Inc.*, 276 Ark. 1, 631 S.W.2d 307 (1982). In addition, Cazort's complaint alleged violations of the federal Securities Act of 1933. By alleging a violation of the

Securities Act of 1933, Cazort made a claim that the Supreme Court has ruled arbitrable. *See Rodriquez DeQuijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (overruling its previous holding that such claims are not arbitrable).

In *England* v. *Dean Witter Reynolds*, we indicated that claims alleging fraudulent inducement, intentional misrepresentation, and outrage were arbitrable under the federal act. 306 Ark at 226-27, 811 S.W.2d at 314-15. Cases from lower federal courts and another state are in accord. *A.L. Williams & Assoc., Inc.* v. *McMahon*, 697 F. Supp. 488 (N.D. Ga. 1988); *U.M.C. Petroleum Corp.* v. *J & J. Enters., Inc.*, 758 F. Supp. 1069, 1073-74 (W.D. Pa. 1991); and *Paine Webber, Jackson & Curtis* v. *McNeal*, 239 S.E. 2d 401, 403 (Ga. 1977). Claims under state securities law are arbitrable under the federal act. *See Surman* v. *Merrill Lynch, Pierce, Fenner & Smith*, 773 F.2d 59 (8th Cir. 1988); *Krog* v. *Mait*, 712 F.2d 1148 (7th Cir. 1983) *cert. denied*, 465 U.S. 1007 (1984).

The Supreme Court has emphasized a strong preference for removing the parties from court and into arbitration as quickly and easily as possible, and has urged district courts to enforce these agreements as rigorously as possible. *Perry* v. *Thomas*, 482 U.S. 483, (1987); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds* v. *Byrd*, 470 U.S. 213 (1985); *Moses H. Cone Memorial Hosp.* v. *Mercury Const. Corp.*, 460 U.S. 1 (1983). Even though our state act is more restrictive, cases construing Arkansas law reflected this same policy. *See Dean Witter Reynolds, Inc.* v. *Deislinger*, 289 Ark. 248, 711 S.W.2d 711 (1986); *Bob Ladd, Inc.* v. *Adcock*, 633 F. Supp. 241 (E.D. Ark. 1986); *Wessell Bros. Found. Drilling Co.* v. *Crossett Public Sch. Dist. No. 25*, 287 Ark. 415, 701 S.W.2d 99 (1985); *Merrill Lynch, Pierce, Fenner & Smith* v. *Hovey*, 726 F.2d 1286 (8th Cir. 1984). In summary, the claims asserted by Cazort are arbitrable claims under the federal act.

[redacted] The next issue is whether American can compel Cazort to arbitration since Cazort did not sign an arbitration agreement with American. Generally the terms of an arbitration contract do not apply to those who are not parties to the contract. *Nolde Bros., Inc.* v. *Local 358, Bakery and Confectioners'*

Union, 430 U.S. 243 (1977). *See also Morrie and Shirlee Mages Found.* v. *Thrifty Corp.*, 916 F.2d 402 (7th Cir. 1990); *Lorder Indus.* v. *Los Angeles Printworks Corp.*, 803 F.2d 523 (9th Cir. 1986). However, it is also clear that nonsignatories to a contract may be deemed as parties, through ordinary contract and agency principles, for the purposes of the Federal Arbitration Act. *See Merrill Lynch Commodities* v. *Richal Shipping Corp.*, 581 F. Supp. 933 (S.D.N.Y. 1984); *Hartford Fin. Sys.* v. *Florida Software Serv., Inc.*, 550 F. Supp. 1079 (D. Me. 1982); *Interbras Cayman Co.* v. *Orient Victory Shipping Co.*, 663 F.2d 4 (2d Cir. 1981); *In re Oil Spill by the "Amoco Cadiz,"* 659 F.2d 789 (7th Cir. 1981). The fact that they are not literally covered by the arbitration clause is not dispositive. *See Wells Fargo Bank* v. *London S.S. Owners' Mut. Ins.*, 408 F. Supp. 626 (S.D.N.Y. 1976); *Lumbermens Mut. Casualty Co.* v. *Borden Co.*, 268 F. Supp. 303 (S.D.N.Y. 1967). Nonsignatories which have been deemed parties to such contracts include guarantors. *See Merrill Lynch Commodities*, 581 F. Supp. at 941; *Compania Espanola de Petroleos* v. *Neureus Shipping, S.A.*, 527 F.2d 973 (2d Cir. 1975).

[redacted] In determining whether nonsignatories should properly be deemed parties to an arbitration contract pursuant to the Federal Act, state law contract principles are invoked. *Hartford Fin. Sys.*, 550 F. Supp. at 1086-87.

[redacted] In our state law, we have recognized the distinction between a surety bond and an indemnity bond. A surety agrees to do the thing that the principal undertakes to do but fails to complete, while an indemnitor agrees to save another from a loss upon an obligation. *Fausett Builders, Inc.* v. *Globe Indem. Co.*, 220 Ark. 301, 305, 247 S.W.2d 469, 471 (1952). American agreed to be "liable to any and all persons who may suffer loss by reason [of NAP's or Berman's] failure to comply with the law of securities transactions." Thus, the bond at issue is an indemnity bond, and under our law Cazort has no right to pursue indemnity from American except for his losses caused by NAP and Berman. *Id.* at 305-06, 247 S.W.2d at 471.

[redacted] Cazort's allegation, in part, is that NAP and Berman breached their contract with him, and they are liable for that breach of contract. He relies on the contract for his breach of contract claim, but, at the same time, seeks to circumvent the

arbitration provision of the same contract by dismissing his claims against the principals NAP and Berman. The indemnitor, American, had filed a cross-complaint against NAP and Berman. If this procedure were to be allowed, NAP and Berman would be denied the benefit of their arbitration agreement. Other courts, when presented with similar factual situations, have compelled arbitration.

In *A.L. Williams & Associates* v. *McMahon*, 697 F. Supp. 488 (N.D. Ga. 1988), McMahon attempted to sue the A.L. Williams company in state court upon claims arising out of his employment with A.L. Williams. 697 F. Supp. at 493. He argued that his wife and other petitioners should not be compelled to arbitrate because they were nonsignatories. *Id.* The district court recognized that, generally, nonsignatories cannot be forced to arbitrate, but it ruled that since Mrs. McMahon alleged "no entitlement to damages distinct from those allegedly suffered by her husband and [based] her entitlement to allegations that she was her husband's business partner" it would not allow her to assert claims arising out of these agreements without requiring her to arbitrate them. *Id.* at 494. Similarly, in *Hughes Masonry Co.* v. *Greater Clarke County School Building Corp.*, 659 F.2d 836 (7th Cir. 1981), the federal court of appeals held that a signatory was estopped from arguing that it should not be compelled to arbitrate with a nonsignatory. *Id.* at 841. It found that, since the signatory was suing the nonsignatory for breach of the contract which contained the arbitration agreement, it should not be able to turn around and deny that the nonsignatory was a party to the agreement in order to avoid arbitration. *Id.* at 838-39. As another court put it, "In short, [plaintiff] cannot have it both ways. It cannot rely on the contract when it works to its advantage and ignore it when it works to its disadvantage." *Tepper Realty Co.* v. *Mosaic Tile Co.*, 259 F. Supp. 688, 692 (S.D.N.Y. 1966). Still other courts have commented that it would contravene the federal act to allow one to circumvent arbitration as Cazort proposes to do. *See Avila Group, Inc.* v. *Norma J. of California*, 426 F. Supp. 537, 540 (S.D.N.Y. 1977) (opining that "[t]o allow [defendant] to claim the benefit of the contract and simultaneously avoid its burdens would . . . contravene the purposes of the Arbitration Act") and *Sam Reisfield & Son Import Co.* v. *Eteco*, 530 F.2d 679, 681 (5th Cir. 1976) (holding that allowing circumvention would effectively

thwart the federal policy in favor of arbitration).

Thus, there is a strong public policy for compelling these claims to be together submitted to arbitration.

Cazort contends that we should not compel arbitration because statutory bonds are to be construed as if the terms of the statute were written into them, and section 23-42-305(a)(4) of the Arkansas Code Annotated of 1987 provides a direct cause of action on an indemnitor's bond. The securities act, of which the cited statute is a part, was written in contemplation of our established law with the indemnitor and its principal on the one side and the securities purchaser on the other, and it was written in contemplation of the indemnitor's liability being contingent on the liability of the principal to the securities purchaser. The statute does not give an investor a right of direct action against the indemnitor without regard to the principal's liability. An indemnitor is entitled to the rights and defenses available to the principal. *Troxler* v. *Wilson*, 133 Ark. 216, 219, 202 S.W. 819 (1918). For example, if a securities purchaser were to let the statute of limitations run so that he could no longer maintain a suit against a securities dealer, he could likewise no longer maintain a suit against the securities dealer's indemnitor. Similarly, in this case one of the principal's rights is the right to compel arbitration, and this right inures to the benefit of the indemnitor. The statute does not give a right of direct action against an indemnitor without a determination of the amount of the principal's liability.

Reversed and remanded for proceedings consistent with this opinion.

CORBIN, J., not participating.

Henry DUPREE *v.* STATE of Arkansas

CR 92-1364 871 S.W.2d 570

Supreme Court of Arkansas
Opinion delivered March 14, 1994

Robert P. Remet, for appellant.

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

ROBERT H. DUDLEY, Justice. This is a speedy trial case. Appellant was charged with delivery of cocaine, a felony, on March 4, 1991. The trial court had a duty to bring appellant to trial in twelve months unless there were delays that constituted excludable periods of time. A.R.Cr.P. Rule 28.1(b). The trial court set appellant's trial for March 3, 1992. On that day, March 3, 1992, appellant was granted a continuance to April 7, 1992. This continuance constituted an excludable period of thirty-

five days. No action was taken on April 7, the date set for trial. On April 10, the case was continued on appellant's motion until May 21, 1992. This continuance constituted an excludable period of forty-one days. The two continuance periods together amounted to seventy-six days of excludable time. On May 21, or one year and two days after he was charged, appellant moved to dismiss the case for lack of speedy trial. The trial court denied the motion. Appellant was tried and convicted. We reverse and dismiss.

Appellant was not tried within the time specified by the speedy trial rules. Upon motion by the Attorney General, this court remanded the case to the trial court to settle the record about what occurred to prevent the scheduled trial from taking place on April 7, 1992. The reason for the delay from April 7 to April 10 is critical. However, rather than settling the record upon the remand, the trial court dismissed the remand. Since the record reflects that appellant was not tried within the allowable time, and the trial court refused to settle the record, the Attorney General was left with no choice other than to confess error and recognize that appellant's conviction must be reversed and dismissed. The confession of error is well taken.

Reversed and dismissed.

CORBIN, J., not participating.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. The appellant, having four felony convictions, was tried on May 21, 1992, for violation of Ark. Code Ann. § 5-64-401 (1987), delivery of cocaine, a Class Y felony. A jury of his peers in Arkansas County convicted appellant and sentenced him to forty years in the Department of Correction. The majority reverses the conviction and dismisses the information on nothing more than a scrivener's error. I respectfully dissent.

This case is a classic example of a rule bound approach to the law. The appellant could have had a speedy trial. His case was set for trial within the time allowed under Ark. R. Crim. P. 28. However, that was not his wish. So he asked for, and was given, a continuance of thirty-five days. His trial was rescheduled for April 7. But again, a trial was not the goal, so again he asked for,

and was given, a continuance, this time for forty-one days.

Now, notwithstanding the fact that appellant had averted two speedy trials by continuances totalling seventy-six days, the majority dismisses because it charges a two day delay to the state, attributable to a gap between the April 7 trial date and the April 10 order rescheduling the trial to May 21 *at the request of the appellant.*

Ironically, this court has frequently defended a rigid application of the speedy trial rule by noting that its purpose in part, "perhaps above all," is to serve the interests of the public in obtaining a speedy trial. *See*, e.g., *Weaver* v. *State*, 313 Ark. 55, 852 S.W.2d 130 (1993), and *Chandler* v. *State*, 284 Ark. 560, 683 S.W.2d 928 (1985). If that is so, the appellant is the only winner and the public interest is twice thwarted: first, it is denied a speedy trial because the appellant successfully outmaneuvered two trials with back-to-back continuances and, second, it is denied the sober satisfaction of seeing criminal activity punished, all because of a docket error of minuscule proportions.

Arkansas is the only state to apply this simplistic, mechanical approach to the intricacies of case management for purposes of speedy trials. The other states and the District of Columbia *uniformly* adopt the four criteria approved in *Barker* v. *Wingo*, 407 U.S. 514 (1972): the length of delay, the reasons for the delay, whether the defendant asserted the right to a speedy trial and whether the defendant was prejudiced by the delay. *See* 78 Georgetown Law Journal 853, 984-988 (1990). If those criteria, or any one of them, were used in this instance, a different result, eminently more sensible, would clearly prevail.

Sandra MASTIN *v.* Harold MASTIN

93-1088 871 S.W.2d 585

Supreme Court of Arkansas
Opinion delivered March 14, 1994

Central Arkansas Legal Services by: *Griffin J. Stockley* and *Lynn Pence*, for appellant.

No response.

DAVID NEWBERN, Justice. This appeal was brought as the result of an *ex parte* order transferring custody of Sandra Mastin's daughter to Harold Mastin, who is Ms. Mastin's ex-husband and the child's father. Ms. Mastin sought a declaratory judgment that ex parte orders transferring custody violate the custodial parent's due process rights. Ms. Mastin failed to present a justiciable controversy, and the case is moot. We dismiss the appeal.

Harold and Sandra Mastin were divorced in 1986. Custody of the Mastins' daughter was awarded to Ms. Mastin. Mr. Mastin

was awarded the right of visitation and ordered to pay child support. In June of 1993 while the child was in Pulaski County for her summer visit with her father, Ms. Mastin was arrested and incarcerated. On June 16, 1993, Mr. Mastin filed a motion for emergency modification of custody.

The motion alleged that Ms. Mastin was incarcerated and subject to criminal charges pending in four counties. The order requested that custody temporarily be modified until Ms. Mastin was released and able to appear at a hearing addressing a permanent change in custody. On June 29, 1993, the Chancellor entered an *ex parte* order granting Mr. Mastin's request for temporary custody pending a hearing on July 6, 1993.

On June 30, 1993, Ms. Mastin's attorney moved to set aside the *ex parte* order. This motion further sought a declaratory judgment that *ex parte* orders in matters of child custody violate the custodial parent's due process rights by failure to require a hearing within seventy-two hours of the order, and failure to notify the parent of the right to present evidence, cross examine witnesses, and appear with counsel.

The Chancellor moved the hearing up from July 6 to July 2, 1993. Both parties appeared with counsel. Ms. Mastin testified she was no longer incarcerated and was capable of properly caring for her daughter. Mr. Mastin testified the child was in the middle of her six-week summer visitation with him. The Chancellor dissolved the *ex parte* order and restored Ms. Mastin's custody. He ordered that the child stay with Mr. Mastin until a July 23, 1993 hearing on the issue of permanent custody.

On July 23, 1993, a consent order was entered in which Ms. Mastin retained custody of her daughter. The Chancellor filed an additional order on August 3, 1993, denying Ms. Mastin's request for declaratory relief. The order noted that no specific statutory authority exists for *ex parte* orders changing custody but that chancery courts have broad inherent equitable powers as well as a duty to exercise these powers in emergency situations to protect the best interests of a child.

1. Mootness

Ms. Mastin concedes the case is moot. She received the

hearing she requested, and custody of her daughter was restored to her. She contends, however, that *ex parte* orders in custody disputes are capable of repetition, yet may evade review, and are a matter of public interest. She requests that we address the issue in her appeal despite the fact it is moot.

Mootness may not determine whether we review a case which involves the public interest, or tends to become moot before litigation can run its course, or in which a decision might avert future litigation. *Campbell* v. *State*, 300 Ark. 570, 781 S.W.2d 14 (1989). Most cases become moot due to events which transpire in the course of litigation. *See, e.g., Arkansas Intercollegiate Conference* v. *Parnham*, 309 Ark. 170, 828 S.W.2d 828 (1992). In such cases, the rationale of the *Campbell* case may apply, given the circumstances recited in the *Campbell* case. When, however, mootness is the result of the complaining litigant receiving from the Trial Court the relief requested, we are not inclined to review the matter. *Bynum* v. *Savage*, 312 Ark. 137, 847 S.W.2d 705 (1993).

In the *Bynum* case, Ms. Bynum asked that Arkansas's temporary guardianship law be declared unconstitutional. We noted that not only had she failed to obtain a ruling on her request for a declaratory judgment, she succeeded in having set aside an order of temporary guardianship thus retaining custody of her child.

The only difference between this case and the *Bynum* case is that Ms. Mastin obtained a ruling on her request for a declaratory judgment. That might have been a significant distinction if we were faced with any sort of justiciable controversy.

2. Justiciable controversy

Ms. Mastin's motion requested a declaratory judgment that due process requires a hearing within seventy-two hours of an *ex parte* order changing custody. That is precisely what Ms. Mastin received. The *ex parte* order was entered on June 29, 1993, and a hearing was held three days later, on July 2, 1993. At the hearing, Ms. Mastin appeared with counsel, presented evidence, and cross-examined Mr. Mastin's witnesses.

The Chancellor noted he has broad power to enter an order

in emergency situations to protect the best interests of a child. While he did not cite them, emergency is referred to in both the Uniform Child Custody Jurisdiction Act, specifically Ark. Code Ann. §§ 9-13-203(a)(3)(Repl. 1993); and the Parental Kidnapping Prevention Act. *See* 28 U.S.C. §§ 1738(A)(c)(2)(C)(ii). The Chancellor expedited the hearing and held it within seventy-two hours as Ms. Mastin requested.

While Ark. Code Ann. § 16-111-104 (1987) recognizes a party's right to a declaratory judgment, a justiciable controversy is required. *See Arkansas Intercollegiate Conference* v. *Parnham, supra.* There is no controversy whatever in this case. No brief has been filed in response to the one filed by Ms. Mastin. A review of the issue presented in this appeal would result in a purely advisory opinion, and we are especially disinclined to produce such an opinion in a one-brief case where the matter has not been fully argued or even contested.

Appeal dismissed.

CORBIN, J., not participating.

Bernard WHETSTONE *v.* William M. CHADDUCK, M.D.

93-1094 871 S.W.2d 583

Supreme Court of Arkansas
Opinion delivered March 14, 1994

Bernard Whetstone, for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., for appellee.

DAVID NEWBERN, Justice. Bernard Whetstone appeals from two orders of the Trial Court. The first order granted Dr. William Chadduck's motion for a voluntary nonsuit which resulted in the dismissal of his claim against Mr. Whetstone without prejudice. Mr. Whetstone's contention that the dismissal should have been with prejudice is without merit due to the plaintiff's absolute right to a voluntary nonsuit without prejudice pursuant to the express terms of Ark. R. Civ. P. 41(a). The Trial Court's second order imposed sanctions on Dr. Chadduck pursuant to Ark. R. Civ. P. 11. Mr. Whetstone appeals on the ground that the monetary sanction against Dr. Chadduck was inadequate. We remand this issue because we conclude the Trial Court should not have considered Dr. Chadduck's *pro se* status in determining the amount of the sanction.

Dr. Chadduck initially became involved in this litigation after he was made a defendant in a malpractice lawsuit brought, in part, by Mr. Whetstone on behalf of a client. This fact was reported in the *Arkansas Times* newspaper. Dr. Chadduck filed a complaint seeking damages for defamation against several individuals, including Mr. Whetstone. At the hearing on Mr. Whetstone's motion to dismiss, Dr. Chadduck moved to nonsuit his complaint pursuant to Rule 41(a). The Trial Court granted the motion and dismissed Dr. Chadduck's complaint without prejudice.

The Trial Court retained for consideration Mr. Whetstone's motion for Rule 11 sanctions. After argument from both sides, Dr. Chadduck was ordered to pay Mr. Whetstone and the other two defendants $1,000.

1. Dismissal without prejudice

The relevant portion of Rule 41(a) states that "an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court." The rule clearly allows a plaintiff to nonsuit a claim, and this Court has consistently upheld that provision. We have considered it as creating an absolute right to such a nonsuit. *See, e.g., Jenkins* v. *Goldsby*, 307 Ark. 558, 822 S.W.2d 843 (1992). The dismissal without prejudice was not in error.

2. Sanctions

Rule 11 states, in part, that "[i]f a pleading, motion or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay . . . the amount of the reasonable expenses incurred."

The Trial Court has discretion in determining whether a violation occurred. *See Bratton* v. *Gunn*, 300 Ark. 140, 777 S.W.2d 219 (1989). Only if this discretion is abused will we reverse. *Ward* v. *Dapper Dan Cleaners and Laundry, Inc.*, 309 Ark. 192, 828 S.W.2d 833 (1992).

If Rule 11 is violated the Trial Court "shall impose upon the person . . . a represented party, or both, an appropriate sanction." Obviously the rule contemplates some discretion on the

part of the Trial Court in determining what the sanction shall be, but neither the language of the rule nor our prior holdings supports the proposition that a *pro se* litigant shall be subject to a lesser sanction.

Our decisions interpreting the rule are sparse. The only case cited by the Trial Court on the point of sanctions against a *pro se* litigant is *Thomas* v. *Evans*, 880 F.2d 1235 (11th Cir. 1989), a case in which the question was whether such a litigant should be found in violation of the rule rather than the nature of the sanction to be imposed once a violation had been shown. We know of no precedent which allows a trial court to consider the fact that a party is proceeding *pro se* when determining the degree of the sanction.

Before the Trial Court was evidence that the amount of the fee and expenses to be paid by Mr. Whetstone to his attorney for defending Dr. Chadduck's claim was at least $3,733.89. Rule 11 provides that the Trial Court may award "the amount of the reasonable expenses incurred . . . including a reasonable attorney's fee." While the Trial Court's otherwise thorough order mentioned his awareness of the defendants' expenses in defending Dr. Chadduck's action against them, no explanation is provided as to why the consideration of those expenses should in any way be lessened because Dr. Chadduck was proceeding *pro se*. In these circumstances we deem it appropriate to remand the case to the Trial Court for reconsideration of the sanction imposed with respect to Mr. Whetstone's motion for relief pursuant to Rule 11.

Reversed and Remanded.

CORBIN, J., not participating.

Joe NEWTON & Randal Newton *v.* Danny CHAMBLISS

93-1054 871 S.W.2d 587

Supreme Court of Arkansas
Opinion delivered March 14, 1994

Crumpler, O'Connor & Wynne, by: *Williams J. Wynne*, for appellants.

Odell C. Carter, for appellee.

TOM GLAZE, Justice. The appellant Joe Newton purchased a used 1986 Nissan 200SX for his son, co-appellant Randal Newton, and Randal had a custom sound system installed in the vehi-

cle. After the vehicle developed transmission problems, it was taken to appellee Danny Chambliss who was in the business of performing such repairs. After the initial repair, subsequent problems arose which were still under warranty, and the vehicle was returned to Chambliss. While the vehicle was in the possession of Chambliss for the third repair, the vehicle was broken into, vandalized, and components of the sound system were stolen. The vehicle was in Chambliss's custody from November 3 or 10 until repairs were performed on January 4. The break-in occurred either on December 26 or 27. The Newtons filed suit against Chambliss, as a bailee for hire, alleging Chambliss was negligent and requesting he pay damages that resulted to the Newtons' vehicle.

At trial, the undisputed testimony showed that Chambliss's auto repair shop is located about four and three-fourths miles from Star City, Arkansas, and is a one-stall garage positioned between Chambliss's motor home and his mother's house. Chambliss testified that the garage was approximately 50 yards from both his motor home and his mother's house, and that there are two night watcher lights — one on the front of the shop and one on a pole near his mother's house. In addition, Chambliss has three yard dogs. Chambliss testified that the Newtons' vehicle was broken into either during the night of December 26 or the early morning of December 27, it was raining during this time, he did not hear anyone break into the vehicle, and the dogs did not bark. The jury returned a defendant's verdict in favor of Chambliss.

On appeal, the Newtons raise four points, three of which challenge certain jury instructions and one questions the trial court's rejection of a proffered instruction. However, we are unable to reach the merits of their appeal because the abstract of record is deficient.

The record as abstracted contains three instructions and one proffered instruction, but it fails to reflect the Newtons' objections to the instructions, much less the reasons for these objections. Nor does the abstract show any objection to the Newtons' proferred instruction or reason for its exclusion.

No party may assign as error the giving or failure to

give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection. ARCP Rule 51. In addition, Sup. Ct. R. 4-2(a)(6) requires an abstract to contain those material parts of the record which are necessary for an understanding of the questions put before this court. Here, no objections to the instructions in issue have been abstracted and, therefore, we are unable to reach the issues raised in this appeal. This court has stated numerous times that it will not go to the single record to determine whether reversible error has occurred. *First Nat'l Bank of Brinkley* v. *Frey*, 282 Ark. 339, 668 S.W.2d 533 (1984).

Finally, the abstract is bereft of any rulings made by the court on any objections to the instructions given or the one proffered. This alone is fatal to the Newtons' appeal since failure to obtain a ruling on an issue below results in waiver of that issue on appeal. *Morgan* v. *Neuse*, 314 Ark. 4, 857 S.W.2d 826 (1993). Therefore, we affirm.

CORBIN, J., not participating.

Juliet B. BROWN and Larry Brown, Husband and Wife *v.* SEECO, INC. an Arkansas Corporation

93-890 871 S.W.2d 580

Supreme Court of Arkansas
Opinion delivered March 14, 1994
[Rehearing denied April 18, 1994.]

Sexton Law Firm, P.A., by: *Sam Sexton, Jr.*, for appellants.

Everett, Mars & Stills, by: *Thomas A. Mars*, for appellee.

ROBERT L. BROWN, Justice. This case involves an oil and gas lease entered into in 1961 between Julius and Mary Flegel, the parents of appellant Juliet Brown, and Arkansas Western Gas Company, the parent company of appellee SEECO, Inc. The lease covered the NE 1/4 SE 1/4 and SE 1/4 NE 1/4 of Section 2, Township 9 North, Range 26 West in Franklin County and was for a primary term of two years and "as long thereafter as oil liquid hydrocarbons, gas or their respective constituent products, or any of them is produced from said land."

Arkansas Western Gas drilled and completed a well in Section 2 in 1961 on lands owned by Elizabeth Post and designated the well as #1 Elizabeth Post (Post well). The Oil and Gas Commission designated all of Section 2 as a single drilling and production unit.

The leased property was subsequently conveyed to Juliet B. Brown, the daughter of the Flegels, who later conveyed an interest in the property to her husband, Larry Brown. Arkansas Western Gas then assigned its lease to appellee SEECO, its sister company. SEECO agreed to sell any gas it produced to Arkansas Western Gas.

In October of 1985, SEECO began attempts to purchase the mineral interests underlying the leased property from Juliet Brown. SEECO also made an offer to purchase the Browns' royalty interest. The Browns refused.

On December 18, 1990, the Browns sued SEECO to cancel the SEECO lease agreement for failure to produce natural gas in allowable or paying quantities, for failure to commence further development, and for underpaying royalties. They prayed for damages and costs. On June 11, 1993, SEECO filed a Petition for Preliminary Injunction stating that the Browns had denied the company access to the land to allow it to drill a second well and praying that they be enjoined from interfering. SEECO alleged that the Browns would not be harmed by drilling a second well but that SEECO's inability to drill disrupted its program and adversely affected its royalty owners in the unit. On June 30, 1993, the Browns moved for summary judgment on their complaint. A hearing was then held before the chancellor on the petition for preliminary injunction and the motion for summary judgment.

The Chancellor issued his letter opinion on July 19, 1993, denied the motion for summary judgment, and granted the preliminary injunction. With respect to the preliminary injunction, the chancellor wrote: "As for the Petition for Preliminary Injunction, I find that it should be granted and that a bond of twenty thousand dollars ($20,000) should be posted prior to the defendant entering upon the property of the plaintiffs."

On July 28, 1993, the Chancellor filed an order granting the preliminary injunction. In the order, the chancellor stated:

> Both parties offered testimony at the hearing and made arguments in support of and in opposition to the petition for preliminary injunction. Upon the basis of the testimony introduced at the hearing, the briefs submitted by counsel, and the arguments of counsel made at the hearing, the Court concludes that the petition for preliminary injunction should be, and hereby is, granted conditioned upon SEECO, Inc. posting a bond with the Clerk of the Court in the amount of $20,000.

The Browns' counsel approved the order of injunction as to form.

On August 11, 1993, the Browns filed in this court a motion to stay or dissolve the temporary injunction pending appeal. They contended in this motion, as they now do on appeal, that the injunction was defective due to no finding of irrevocable harm and noncompliance with Ark. R. Civ. P. 65(e). We denied the motion without prejudice to raise the same issues on appeal.

The Browns first contend that there was no showing of irreparable harm or lack of an adequate remedy at law. Embraced in this argument is an alleged failure by SEECO to establish a likelihood of success on the merits. They point out, in addition, that the chancellor made no finding on these points. The record, however, does not reflect that the Browns requested additional findings of fact pursuant to Ark. R. Civ. P. 52(b), after the temporary injunction was granted.

We review chancery matters, including the grant of an injunction, *de novo* on appeal. *Southeast Ark. Landfill, Inc.* v. *State*, 313 Ark. 669, 858 S.W.2d 665 (1993); *Knowles* v. *Anderson*, 307 Ark. 393, 821 S.W.2d 466 (1991). The grant of an injunction rests within the sound discretion of the chancellor. *Southeast Ark. Landfill, Inc.* v. *State, supra; American Trucking Ass'n* v. *Gray*, 280 Ark. 258, 657 S.W.2d 207 (1983). Where the record supports a finding of irreparable harm or likelihood of success on the merits, we have been unable to say that the chancery court abused its discretion. *See, e.g., W.E. Long Co.* v. *Holsum Baking Co.*, 307 Ark. 345, 820 S.W.2d 440 (1991).

We begin by examining the evidence presented by SEECO in support of its claim of irreparable harm. In its petition for preliminary injunction, SEECO asserted that it would suffer harm if it was not allowed to drill the well because its developmental drilling program would be disrupted in Section 2. Bill Winkelmann, the Senior Exploration Geologist for Southwestern Energy, SEECO's parent company, testified that the development project had been "in full swing" for at least two years following a geological study spanning several years. He also stated that the company had planned to drill in the area of the Post well for "probably two years." Winkelmann stated that he believed that a new well would relieve the drainage caused by off-setting wells in adjoining units drilled by other companies; specifically, a Mueller well in Section 1 drilled in 1992. He stated that drilling an addi-

tional well on the Browns' property would minimize the drainage loss and that the well could be drilled within two weeks, were an injunction to be granted. Without a second well, he testified that SEECO and the unit royalty owners in Section 2 would continue to be harmed.

Harm normally is only considered irreparable when it cannot be adequately compensated by money damages or redressed in a court of law. *Compute-A-Call, Inc.* v. *Tolleson and Jones*, 285 Ark. 355, 687 S.W.2d 129 (1985); *Kreutzer* v. *Clark*, 271 Ark. 243, 607 S.W.2d 670 (1980). We are not prepared to say, based on what is before us, that the loss occasioned by the disruption of SEECO's development program and its detrimental impact on royalty owners could be recouped by an award of damages. Moreover, we are not persuaded that the Browns are likely to prevail on the merits. Certainly there is enough in the record to support these conclusions. Accordingly, the chancellor did not abuse his discretion in issuing the order of injunction.

We turn next to the form of the injunction order and the Browns' argument that it failed to conform with the requirements of Ark. R. Civ. P. 65(e). Prior to the submission of this appeal, the Browns filed before this court a motion to stay or dissolve the temporary injunction in which they asserted that the order of injunction, on its face, violated the requirements of Rule 65(e). This court denied the motion without prejudice to raise it for consideration as part of their appeal. In their brief, the Browns raise the identical argument challenging the form and substance of the order as deficient under Rule 65(e).

Though the order of injunction does appear to be deficient on its face under Rule 65(e) due to vagueness, the Browns failed to raise this issue to the chancellor. Indeed, counsel for the Browns approved the order of injunction as to form. Ordinarily, such an approval would have no bearing on an appeal concerning the substance of the order. *Spencer* v. *Spencer*, 275 Ark. 112, 627 S.W.2d 550 (1982). But that approval is distinctly at odds with the Browns' contention that the order is defective *in its form* due to lack of specificity. In any case, we refuse to consider this issue because we have made it clear that in order to preserve an issue for appeal, the issue must be presented to the trial court for resolution. *See, e.g., Stewart Title Guaranty Co.* v. *Treat*, 306 Ark.

289, 810 S.W.2d 953 (1991); *Crowder* v. *Crowder*, 303 Ark. 562, 798 S.W.2d 425 (1990). That was never done in this case.

We are aware that in its Statement of the Case SEECO states that it has already drilled a second well on the Browns' property. If in fact this has occurred and the order of injunction only applies to that well recently drilled, then the issue is moot. We do not consider moot issues on appeal with certain limited exceptions. *Enviroclean, Inc.* v. *Arkansas Pollution Control*, 314 Ark. 98, 858 S.W.2d 116 (1993). Because the issue of mootness is unclear and not a matter evidenced in the record or argued by counsel, we have proceeded to address the merits of this appeal.

The order of the chancellor is affirmed.

Carthel FULLER, Sr. *v.* STATE of Arkansas

CR 93-166 872 S.W.2d 54

Supreme Court of Arkansas
Opinion delivered March 14, 1994
[Rehearing denied April 18, 1994.*]

*Corbin, J., not participating.

Hubert W. Alexander, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Carthel Fuller, Sr., appeals his conviction for second-degree assault arising out of a confrontation with Charles Davidson in Kensett. On the morning of July 9, 1991, Fuller pulled out of a lumber yard in his truck and almost ran into the vehicle of Charles Davidson, who was traveling with a passenger, Marlene Holt. Davidson and Holt continued on towards Kensett, on Highway 36, at which time Fuller came up behind them in his truck and forced them off the road, according to their testimony. Davidson and Holt waited a few moments and then drove into Kensett. As they passed Fuller's truck, they alleged that they saw him standing by the tailgate and pointing a pistol at them. They immediately went to find the

Kensett Chief of Police, Ralph Jordan. They located Jordan in town and related what had happened, whereupon Fuller drove up, got out of his truck, walked over to the police car, and began beating on the top of it, cursing Davidson and saying that Davidson was going to die and that he was going to shoot him.

Fuller was charged with first degree assault and terroristic threatening in the second degree, both misdemeanors, in Searcy Municipal Court. He was found guilty of assault in the first degree, sentenced to six months in jail with five months suspended, and fined $1,000 with $600 suspended. He was found not guilty of terroristic threatening.

Fuller appealed his judgment of conviction for first degree assault to circuit court. The matter was tried *de novo*, after which the circuit judge concluded that Fuller was guilty of second degree assault. He sentenced Fuller to seven days in jail, all of which was suspended, and a fine of $500. He specifically stated in his letter opinion dated August 4, 1992, that he was foreclosed under the Double Jeopardy Clauses of the U.S. and State Constitutions from retrying Fuller for terroristic threatening, regardless of any evidence which might be presented to support that charge, because the municipal court had found him innocent of that charge.

On August 7, 1992, the circuit judge's judgment was entered. On August 27, 1992, Fuller filed a motion for reconsideration, praying that the circuit judge reconsider his decision and find him not guilty. His stated reason for the motion was that he had been convicted of assault in municipal court for pointing the gun but was found innocent of making threats. In circuit court, he contended, the judge used his threats against Davidson to find him guilty of second degree assault, placing him in double jeopardy because he had been acquitted of that charge.

On September 2, 1992, Fuller filed a notice of appeal. The circuit judge denied his motion for reconsideration on September 15, 1992. No subsequent notice of appeal was filed.

We are first confronted with the issue of jurisdiction. The State points out that this court may be without jurisdiction over this case because of Ark. R. App. P. 4(c). Fuller filed the notice of appeal before 30 days had passed from the date of his motion. If Rule 4(c) applies, the premature filing would render

the notice of appeal void and divest this court of any jurisdiction over the case. Rule 4(c), by its terms, is applicable to specific civil motions including a motion for judgment notwithstanding the verdict under Ark. R. Civ. P. 50(b), a motion to amend findings of fact or to make additional findings of fact under Ark. R. Civ. P. 52(b), and a motion for a new trial under Ark. R. Civ. P. 59(b). We have applied Rule 4(c) to criminal matters, however, where the motion made following the judgment of conviction was analogous to a civil motion made under Rule 50(b), Rule 52(b), or Rule 59(b). *See Enos* v. *State*, 313 Ark. 683, 858 S.W.2d 72 (1993); *Taylor* v. *State*, 296 Ark. 541, 757 S.W.2d 959 (1988); *Terrell* v. *State*, 294 Ark. 583, 745 S.W.2d 135 (1988).

We conclude that Fuller's post-judgment motion is not analogous to a motion under Rule 50(b), Rule 52(b), or Rule 59(b). We have said that we will look to see what a motion actually is in determining Rule 4 questions such as the one before us. *See Jackson* v. *Arkansas Power & Light Co.*, 309 Ark. 572, 832 S.W.2d 224 (1992) (per curiam). It is clear, however, that Fuller's motion is not a request for amended or additional findings or for a new trial. Nor does it qualify as a request for a judgment NOV, which contemplates a jury verdict. Moreover, all three motions under Rules 50(b), 52(b), and 59(b) must be filed within ten days of entry of judgment. Fuller's motion was filed 20 days after the judgment was entered. Accordingly, the motion is not controlled by Rule 4, and the fact that Fuller's notice of appeal was filed when it was does not divest this court of jurisdiction. *See Enos* v. *State, supra.*

We turn then to the sole issue raised by Fuller in this appeal, which is the Double Jeopardy argument. Fuller, however, did not argue this point before the circuit judge at trial. He did raise it by motion for reconsideration, but we hold that this was not timely.

An issue must be presented to the trial court at the earliest opportunity in order to preserve it for appeal. *Chism* v. *State*, 312 Ark. 559, 853 S.W.2d 255 (1993); *Henry* v. *Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992); *Lewis* v. *State*, 307 Ark. 260, 819 S.W.2d 689 (1991). Even a constitutional issue must be raised at trial in order to preserve the issue for appeal. *Smith* v. *City of Little Rock*, 305 Ark. 168, 806 S.W.2d 371 (1991); *Kittler* v. *State*, 304 Ark. 344, 802 S.W.2d 925 (1991).

The Double Jeopardy argument was not raised by Fuller until 20 days after judgment was entered. A defendant may not wait until the outcome of a case to bring an error to the trial court's attention. *Chism* v. *State, supra.* Furthermore, if Fuller was not aware that the circuit judge was going to decide the case the way he did until judgment, he could have filed a motion analogous to one of the Ark. R. App. P. 4(b) motions within ten days of judgment and followed the procedure outlined under Ark. R. App. P. 4(c). This he failed to do. Or, he could have obtained a ruling on his motion for reconsideration prior to filing his notice of appeal within 30 days of judgment. He also failed to do this. The Double Jeopardy issue is simply not preserved for our review.

Affirmed.

HAYS, J., concurs.

CORBIN, J., not participating.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY *v.* Steve THOMAS and Carol Thomas, as Parents and Natural Guardians of Lindsay Thomas

93-994 871 S.W.2d 571

Supreme Court of Arkansas
Opinion delivered March 14, 1994

Boswell, Tucker & Brewster, by: *Clark S. Brewster*, for appellant.

Lovell & Nalley, by: *John Doyle Nalley*, for appellees.

ROBERT L. BROWN, Justice. This is the second appeal taken in this case. *See State Farm Mut. Auto. Ins. Co.* v. *Thomas*, 312 Ark. 429, 850 S.W.2d 4 (1993). We dismissed the first appeal for failure to comply with Ark. R. Civ. P. 54(b). Appellant State Farm Mutual Automobile Insurance Company appeals once more and raises the issue of whether the trial court erred in applying the penalty statute (Ark. Code Ann. § 23-79-208 (Supp. 1991) for failure to pay underinsurance benefits upon demand in this case. We conclude that the trial court did err in assessing statutory penalties and attorney's fees, and we reverse and remand.

Steve and Carol Thomas, husband and wife, and their two daughters, Jennifer and Lindsay, were involved in a three-car accident with John Laughlin, deceased, and David Spears on March 29, 1991. Laughlin had carried liability coverage of $100,000 per person with Farmer's Insurance Company. Spears had liability coverage of $25,000 per person with Farm Bureau Insurance Company.

On April 9, 1991, the Thomases filed suit against Laughlin and Spears. On November 1, 1991, the Thomases made demand on State Farm, their carrier, to pay underinsured benefits and sent the carrier a description of partial medical expenses incurred by Lindsay Thomas. According to the demand, Lindsay Thomas, who was five years old at the time of the accident, had sustained head injuries, including skull fractures, and a broken leg. The payment of underinsured benefits was not forthcoming by State Farm. On February 3, 1992, the Thomases filed a second amended complaint naming State Farm as a party defendant and praying for the $25,000 in benefits, for attorney's fees, and for a 12 percent penalty for failure to pay benefits on demand. In the complaint the Thomases alleged that Lindsay Thomas's damages exceeded all liability coverage and that payment under the underinsured coverage was warranted.

On June 10, 1992, the day before trial, Farmer's Insurance Company paid the policy limits — $100,000 — to the Thomases on behalf of its insured, John Laughlin, deceased. Within an hour on that same day, State Farm tendered the $25,000 in underinsured benefits to the Thomases. Though this is somewhat unclear in the record, it appears that no payment of liability benefits had been made at that time by Farm Bureau Insurance Company, the liability carrier for David Spears.

On July 8, 1992, the trial court entered judgment against State Farm in the amount of $5,000 in attorney's fees and a 12 percent penalty to be applied against the $25,000 paid. All other parties to this action have now been dismissed.

[redacted] We begin by observing once again that our statute, Ark. Code Ann. § 23-79-208, being penal in nature, is strictly construed. *Shepherd* v. *State Auto Prop. & Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993); *Miller's Mutual Ins. Co.* v. *Keith*

Smith Co., 284 Ark. 124, 680 S.W.2d 102 (1984). The penalty nature of the statute is directed against unwarranted delaying tactics of insurers. *Simmons First National Bank* v. *Liberty Mutual Ins. Co.*, 282 Ark. 194, 667 S.W.2d 648 (1984).

State Farm contends that the language of its policy with the Thomases controls:

> THERE IS NO COVERAGE UNTIL THE LIMITS OF LIABILITY OF ALL BODILY INJURY LIABILITY INSURANCE POLICIES OR BONDS THAT APPLY TO THE *INSURED'S BODILY INJURY* HAVE BEEN USED UP BY PAYMENT OF JUDGMENT OR SETTLEMENTS.

This language is highlighted in the policy in capital letters. We agree with State Farm's position.

Clearly, all liability benefits had not been "used up by payment of judgment or settlements" prior to June 10, 1992. State Farm paid immediately after one liability carrier — Farmer's Insurance Company — paid its policy limits. Indeed, State Farm paid its maximum benefit even before it knew what the liability carrier for the other alleged tortfeasor, Farm Bureau Insurance Company, would pay. If anything, State Farm paid before all liability benefits had been amassed. Because the penalty statute, § 23-79-208, only requires payment "within the time specified in the policy," State Farm's payment of benefits was timely.

The fact that the bold exclusion in State Farm's policy is not repeated a second time in the policy under the general heading for other exclusions is not fatal and does not create an ambiguity, as the Thomases contend. The exclusion appears on the front page of the policy endorsement providing underinsured coverage and is clear and precise in its meaning.

Nor do we read a public policy into either our common law or the underinsured motorist statute (Ark. Code Ann. § 23-89-209 (Supp. 1991)) which militates against this decision. It is practical and pure common sense that underinsurance should not pertain until it is determined whether the insured is in fact underinsured. That means, under the policy language in this case, waiting until all liability benefits have been made available in order to trigger payment of this supplemental coverage.

The Thomases urge that the injuries to Lindsay clearly showed that underinsured coverage would come into play and that State Farm should have evaluated her claim in that light and made payment. The Thomases add that this is precisely what State Farm did with regard to its payment of underinsured benefits to Steve Thomas before all liability benefits had been paid on his behalf. We do not agree that the underinsured motorist coverage statute, § 23-89-209, places this obligation on the carrier.

The underinsured motorist statute contemplates payment by the tortfeasor's insurance company. It also contemplates a determination of the injured party's damages. There is no directive under the statute that the underinsured carrier must investigate and evaluate a claim prior to the payment of liability coverage by the tortfeasor's insurance company. Also, in this case the State Farm policy is clear and precise in stating that there is no underinsured coverage until liability insurance is "used up." Of course, should the liability carriers be dilatory in their payments or operate in bad faith, the insured party has remedies.

[redacted] The order of the trial court assessing a penalty and attorney's fees under § 23-79-208 against State Farm is reversed, and this cause is remanded for an appropriate order to be entered.

Reversed and remanded.

NEWBERN, J., dissents.

CORBIN, J., not participating.

DAVID NEWBERN, Justice, dissenting. State Farm Mutual Insurance Company, (State Farm), appeals from a judgment which awarded Lindsay Thomas, the insured, attorneys' fees and a 12% penalty pursuant to Ark. Code Ann. § 23-79-208(a)(Repl. 1992) for failure to pay Ms. Thomas's claim under a provision for underinsured motorist coverage within a reasonable time. State Farm argues the penalty and fees should not have been awarded as State Farm paid on the underinsured motorist policy immediately after a primary liability insurer tendered its limit to Ms. Thomas in settlement of her claim against one of two motorists allegedly responsible for her injuries. I would affirm the Trial Court's decision.

Ms. Thomas was injured in an automobile accident on March 29, 1991. In effect at the time of the accident was an underinsured motor vehicle policy issued by State Farm. Ms. Thomas made demand for payment of the benefits due under the policy on November 1, 1991, having determined that her medical expenses would exceed primary liability coverage of the persons she alleged to be at fault.

State Farm did not pay, and suit was filed against State Farm on February 3, 1992. State Farm participated in the discovery process, apparently contesting the claim that Ms. Thomas's injuries would require compensation in excess of amounts payable by other insurers which had written primary liability coverage for John Laughlin and David Spears who were the other motorists involved in the accident in which she was injured.

The day before the trial was to begin, Farmer's Insurance Co. tendered to the Thomases $100,000, which was its liability limit on behalf of its insured, John Laughlin. State Farm then paid the $25,000 underinsured motorist benefits despite the fact that Farm Bureau Insurance Co. which insured David Spears for $25,000 against liability had not yet tendered payment. The Trial Court ruled that Ms. Thomas was entitled to the statutory penalty and attorneys' fees under §23-79-208(a).

Section 23-79-208(a) imposes the penalty and fee requirement on an insurer which fails to pay a claim "within the time specified in the policy." The policy provides, "[t]here is no coverage until the limits of liability of all bodily injury liability insurance policies or bonds that apply to the insured's bodily injury have been used up by payment of judgments or settlements." According to State Farm, the "time specified in the policy" was the time after primary liability coverage was exhausted. No explanation is given for the payment by State Farm while the additional $25,000 liability coverage of David Spears had not been tendered and was thus not exhausted.

The underinsured motorist coverage law was enacted to supplement benefits recovered from a tortfeasor's liability carrier. *See Shepherd* v. *State Auto Property & Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993). The purpose of underinsured motorist coverage is to provide compensation to the extent of the injury,

subject to the policy limit. *See Clampit* v. *State Farm Mutual Auto. Ins. Co.*, 309 Ark. 107, 828 S.W.2d 593 (1992).

The penal nature of §23-79-208 is directed against the unwarranted delaying tactics of insurers. *Shepherd* v. *State Auto Property and Cas. Co., supra.* The penalty attaches to a claim against an insurance company if suit is filed even though judgment is confessed before trial. *See Federal Life and Casualty Company* v. *Weyer*, 239 Ark. 663, 391 S.W.2d 22 (1965). The nature of the goal to be achieved by this punitive law remains constant and is not dependent upon the type insurance to which the statute applies.

While § 23-79-208(a), as the majority opinion states, "only requires payment 'within the time specified in the policy,'" the question we must face is whether an insurance company should be allowed to provide a policy which permits it to delay and contest payment of a claim which it could have ascertained to be payable long before the insured was forced to file suit. The majority opinion cites no case law in support of its decision, but relies on the statute and the language of the policy. I question that reliance in view of the cases we have decided in other insurance contexts. We should not allow an insurer to circumvent the intent of the statute.

The majority also states, "that it is pure common sense that underinsurance should not pertain until it is determined whether the insured is in fact underinsured." I question that approach. It suggests that an insurer can write a policy which requires payment only upon final judgment which requires it. Indeed, if we followed State Farm's argument and allowed it to delay for the duration provided in its policy it would not have to pay until not only a judgment had been rendered against the person or persons liable for the injury but could delay until there has been "payment" by the liable parties, and that cannot be the law.

We rejected argument of that type in *Farm Bureau Mut. Ins. Co. Inc.* v. *Mitchell, supra.* There the insurance company denied coverage of an uninsured motorist. After the insured received a favorable jury verdict and judgment, the Trial Court awarded a penalty and attorneys' fee. On appeal the insurer argued the award was erroneous as its responsibility to the insured did not become fixed or definite until the jury returned its verdict.

We held that after the insured was injured and asserted a claim, the insurer was entitled to a reasonable time to investigate, but when the insurance company elected to defend the suit brought by its insured, its decision carried with it the risk of having to pay the penalty.

There is no reason an insurer writing an underinsured motorist policy should not be subject to the same requirement of investigation and payment as the issuer of an uninsured motorist policy to investigate the amount of its liability. In both instances, the insurer should be expected to exercise good faith while dealing with its insured and should be penalized for delaying tactics.

The statutory penalty attaches when a demand for payment is made and, with knowledge of the State's clear public policy, the insurer refuses. *Shepherd* v. *State Auto Property and Cas. Co., supra.* While the rule has not been applied to an underinsured motorist insurer, the public policy involved is the same as has been applied in other cases. An insurer should not be allowed to write a policy in violation of it and thus be permitted to avoid its duty to investigate its responsibility and delay payment on the basis of what other insurers may or may not do when its investigation would have revealed implication of the underinsured motorist coverage of its insured.

I respectfully dissent.

Irwin GIDRON *v.* STATE of Arkansas

CR 92-1388 872 S.W.2d 64

Supreme Court of Arkansas
Opinion delivered March 21, 1994

[redacted]

Davis H. Loftin, for appellant.

Winston Bryant, Att'y Gen., by: *Cathy Derden*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, Irwin Gidron, was sentenced to twenty-six years and fined $10,000 for the second-degree murder of Joseph Houston and the second-degree battery of Sonya Woodley. Although he raises five arguments for reversal of his conviction, none having merit, we must first address and resolve a jurisdictional consideration.

This case was certified to our court by the court of appeals pursuant to Ark. R. Sup. Ct. 1-2(a)(3) because it calls for an interpretation of our rules as to the timeliness of the filing of this appeal under a former rule, Ark. R. Crim. P. 36.4. Pertinent to this issue are the following filings:

March 26, 1990	Judgment of Gidron's conviction for second degree battery and murder in the second degree.
April 18, 1990	Gidron's motion for new trial arguing ineffective assistance of counsel pursuant to Ark. R. Crim. P. 36.4.

May 18, 1990 Gidron's notice of appeal from the court's March 26th judgment.

The jurisdictional problem arises because Gidron filed his notice of appeal after the trial court's judgment of conviction was entered but before his post-trial motion for new trial under Ark. R. Crim. P. 36.4 claiming ineffective assistance of counsel was acted upon by the trial court. In fact, the record is silent as to any disposition; thus, we are faced with the question of whether or not Ark. R. App. P. 4(c), which provides that certain motions are "deemed denied" after thirty days, applies when a motion for new trial was filed under Rule 36.4 which was abolished in part by our Per Curiam Order of October 29, 1990, effective January 1, 1991. *In Re: Post-Conviction Procedure*, 303 Ark. 745, 797 S.W.2d 458 (1990).[1]

Obviously, counsel for Gidron was caught in a "Catch-22" situation due to the apparent conflicts between that portion of Ark. R. App. P. 4(c) which provides that motions are deemed denied after thirty (30) days and Ark. R. Crim. P. 36.4 which stated, in part:

> The trial judge must address the defendant personally and advise the defendant that if the defendant wishes to assert that his or her counsel was ineffective a motion for a new trial stating ineffectiveness of counsel as a ground must be filed within thirty (30) days from the date of pronouncement of sentence and entry of judgment. The judge must further advise the defendant that, if a motion for a new trial is filed asserting facts sufficient to raise an issue whether his or her counsel was ineffective, a hearing will be held, and *the time for filing a notice (of) appeal will not expire until thirty (30) days after the disposition of the motion*, as provided in Rule 36.22. (Amended by Per Curiam May 30, 1989, effective July 1, 1989).

(Emphasis added.)

Rather than attempt to resolve this conflict concerning a rule which is now nonexistent, we take the same tack as we did in *Tucker* v. *State*, 311 Ark. 446, 844 S.W.2d 335 (1993),

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[1]Per our revised Ark. R. Crim. P. 36.9, Ark. R. App. P. 4(c) does not apply to Rule 37 petitions for post-conviction relief.

where we accepted an appeal as a belated appeal under Ark. R. Civ. P. 36.9 because there was some justifiable confusion as to application of Ark. R. App. P. 4(c) and because the problems in filing the appeal were not brought about by inadvertence on the part of counsel. Here, as in *Tucker, supra*, there was obvious conflict in our rules regarding the proper procedures in filing this appeal, which, obviously, created confusion to counsel. For this reason, we accept this case as a belated appeal and decide it on its merits. *See Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992) and *Mangiapane* v. *State*, 314 Ark. 350, 862 S.W.2d 258 (1993). In doing so, we affirm the trial court.

The facts giving rise to this appeal are as follows. John Barry and Barry's cousin were at a pool hall in West Memphis, Arkansas, in the middle of the night when Adolphus Graves got into an altercation with them. Mr. Graves left the pool hall only to run into Barry, his cousin, and the appellant, Gidron. Graves tried to run away from them, but they chased him with a gun, firing shots.

Escaping them, Mr. Graves hid in a ditch and heard them pass. He then ran down the street and went over a fence. Again, Barry and Gidron caught up with him, only to have him slip away. He ran past a girl, telling her that he had been shot (although this turned out to be a cut). She ran in the house and called the police.

This house was the residence of Doris Houston and her husband, the murder victim Joseph Houston. Mrs. Houston testified that on the night of the murder, she and her husband were in bed and their children were outside. Their daughter Jennifer told them that someone was shooting outside their door, and Mr. Houston walked into the living room. A voice outside announced, "You better tell him to come out because I know he came in there and if he don't come out, we're gonna start shooting." Gun shots poured through the door and window, and Mr. Houston was shot in the stomach. The front door, china cabinet, microwave, stereo, and dining-room wall were riddled with bullets. Mr. Houston died about nine days later as a result of his bullet wound.

Sonya Woodley testified that, prior to the shooting, she was sitting on the Houstons' front porch when a man ran by with Barry and Gidron chasing him. Barry and Gidron stopped and

asked her and the others if they had seen Graves. When they said "no," the men warned that they were going to shoot up the house if Graves was not sent out. Gidron pulled out a gun, and Sonya and her friends ran into the house. During the ensuing attack, Sonya was shot in the leg.

Jury Selection

We consolidate Gidron's first two arguments since they pertain to jury selection, and in particular, to the trial court's failure to exclude a juror as well as its failure to quash the jury panel. Gidron complains that he and his co-defendant had antagonistic defenses and that each should have been given separate peremptory challenges for a total of sixteen rather than eight, and that by so limiting the co-defendants' challenges, Gidron was forced to accept a juror that the trial court refused to excuse for cause. In addition, Gidron complains that after the initial jury panel was seated, he "noticed, in looking around the courtroom, [that there] didn't seem to [be] any other black males in the courtroom, the result being that no black males were present" for jury panel selection, and for this reason, the jury panel should have been quashed.

We do not reach these issues as no record was made regarding jury selection or voir dire of the prospective jurors. The first mention of these claimed errors appears in the transcript of trial at the middle of the State's case, after the first day of testimony, and consists of dialogue between Gidron's counsel, the prosecuting attorney, and the trial court concerning the trial court's permission to grant Gidron's counsel to make a belated record of his objection to the jury venire.

Granted, the trial courts and counsel, in efforts to expedite proceedings, have on occasion treated various matters in a rather cursory fashion and have deferred making appropriate motions and rulings to some later time during the course of trial. Consequently, a premium has too often been placed on procedural convenience at the expense of the observance of certain basic requirements, *see Cummings* v. *State*, 315 Ark. 541, 869 S.W.2d 17 (1994); however, we have repeatedly held that an issue must be presented to the trial court at the earliest opportunity in order to preserve it for appeal, *Walker* v. *State*, 313 Ark. 478, 855

S.W.2d 932 (1993). By going to trial without objection to the manner in which the jury was impaneled, the appellant must be deemed to have waived any irregularity in the order of selecting the jury. *Bowlin* v. *State*, 175 Ark. 1115, 1 S.W.2d 553 (1928). In order to preserve objections regarding any irregularities affecting the selection or summoning of the jury panel, a timely objection must be made. *See Edens* v. *State*, 235 Ark. 996, 363 S.W.2d 923 (1963); *Underdown* v. *State*, 220 Ark. 834, 250 S.W.2d 131 (1952). Here, there was nothing timely about Gidron's objections. Moreover, the burden of obtaining a ruling from the trial court is upon the movant, and unresolved questions and objections are therefore waived and may not be relied upon on appeal. *Patrick* v. *State*, 314 Ark. 285, 862 S.W.2d 239 (1993).

In short, the burden is on the appellant to provide a record sufficient to show that reversible error occurred. *Kittler* v. *State*, 304 Ark. 344, 802 S.W.2d 925 (1991). This was not done in this instance.

Admission of Photograph of Deceased

In his next argument, Gidron contends that the court erred in admitting exhibit three, a photo of the deceased, for the jury's consideration. This objection was preserved, but Gidron failed to give a basis for the objection. According to Arkansas Rule of Evidence 103(a)(1), an error may not be predicated upon a ruling admitting evidence unless there was a timely objection stating the specific ground for objection, if the specific ground was not apparent from the context. Here the photograph in issue was of the deceased's head and torso. However, Gidron had no objection to admission of photos of the bullets removed from Mr. Houston's body and a closeup shot of his abdomen to show his fatal wound. Therefore, the specific ground for his objection to exhibit three is not clear.

Regardless, Gidron has failed to demonstrate how this photograph was prejudicial. He contends that the photo was irrelevant and was used to portray the victim as old and frail. Since the jury had already been informed that Mr. Houston was 67 years old and in bad health, these characterizations of the victim were not unique. Besides, admission of evidence is within the discretion of the trial judge, and he will not be reversed absent a show-

ing of abuse of that discretion. *Moore* v. *State*, 315 Ark. 131, 864 S.W.2d 863 (1993); *Kellensworth* v. *State*, 278 Ark. 261, 644 S.W.2d 933 (1983). Gidron has failed to establish that the trial judge abused his discretion in admitting the photograph into evidence.

Failure to Direct a Verdict

Gidron also claims that the court erred in refusing to grant him a directed verdict as to the charge of first-degree murder. Even though he was only convicted of second-degree murder, he contends that if the court had granted his directed verdict motion, then the jury might have given him less than second-degree murder. Gidron has failed to show how he was prejudiced. Besides, we have held that where the defendant's request to reduce his charge from first- to second-degree murder was denied, error, if any, was cured by the jury finding him guilty of a lesser charge. *Montgomery* v. *State*, 277 Ark. 95, 640 S.W.2d 108 (1982).

Refusal to Instruct on Lesser Included Offense

Lastly, Gidron complains that the court erred in refusing to give his proffered jury instruction as to negligent homicide. However, this was not error, for we have stated that "where a lesser included offense has been the subject of an instruction and the jury convicts of the greater offense, error resulting from a failure to give instructions on the lesser included offense is cured." *Branscomb* v. *State*, 299 Ark. 482, 489, 774 S.W.2d 426, 429 (1989).

Applying *Branscomb* to the facts before us, we note that the jury was instructed as to murder in the first degree, second degree, as well as on manslaughter, and, the jury found Gidron guilty of murder in the second degree. Thus, there is no reason to believe that the jury would have found Gidron guilty of a negligent act, and we hold that the jury instruction was not supported by the facts.

Affirmed.

CORBIN, J., not participating.

Michael D. HUDSON *v.* STATE of Arkansas

CR 93-1132 872 S.W.2d 68

Supreme Court of Arkansas
Opinion delivered March 21, 1994

Callahan, Bachelor, Newell & Oliver, by: *Steven D. Oliver*, for appellant.

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

JACK HOLT, JR., Chief Justice. The appellant, Michael D. Hudson, was sentenced to a cumulative term of imprisonment of thirty-two years for the offenses, committed as a habitual offender, of possession of a controlled substance with intent to deliver and possession of drug paraphernalia. He raises a single point for reversal, arguing that the trial court erred in denying his motion to suppress evidence seized as a result of an unlawful traffic stop and arrest. Finding no merit in his claim, we accordingly affirm the judgment of the circuit court.

During the first week of February 1993, Officer Richard W. Wiggins of the South Central Drug Task Force received three reports from confidential informants on activities of the appellant, Michael D. Hudson. On February 1, 1993, an informant advised Officer Wiggins that Hudson had been seen with a quantity of Lysergic Acid Diethylamide (LSD) and a clear plastic bag of marijuana in his possession at the Arkadelphia house shared by Hudson and Kathleen Freeman. An informant notified Officer Wiggins on February 4, 1993, that Hudson had sold the informant a quantity of LSD, the identification of which was presumptively confirmed through a field test.

On February 6, 1993, Officer Wiggins received information from a confidential informant that the informant had just observed Hudson and another person at the Arkadelphia residence of David Pennington in possession of marijuana and in the act of pro-

cessing and packaging the controlled substance for sale in "quarter bags." The informant also advised the Task Force officer that Hudson was in possession of cocaine and that he would be traveling in a two-door 1977 Buick Electra. Approximately one hour later, Officer Wiggins and other law enforcement officers, acting upon the information received, stopped an orange 1977 Buick Electra in Arkadelphia and immediately arrested Hudson.

Four bags of marijuana were found stuffed inside the waistband of Hudson's pants, and a cigarette package in Hudson's jacket pocket, containing two hand-rolled cigarettes which proved to be marijuana, was also seized. In the vehicle, officers discovered a set of hand scales, a box of zip-lock plastic bags, a package of cigarette rolling papers, a box of .38-caliber ammunition, and a box of .25 caliber ammunition.

Hudson was charged by information with possession of a controlled substance (marijuana) with intent to deliver in violation of Ark. Code Ann. § 5-64-401 (Repl. 1993), possession of drug paraphernalia in violation of Ark. Code Ann. § 5-64-403 (Repl. 1993), and being a habitual offender with seven prior convictions in violation of Ark. Code Ann. § 5-4-501 (Repl. 1993). On May 12, 1993, Hudson filed a motion to suppress evidence taken from his person and from the car he was driving, a motion to suppress evidence seized at Freeman's residence, a motion to dismiss for lack of probable cause to arrest, and a motion to compel disclosure of confidential informant. The circuit court denied all the motions, and Hudson was tried by a jury and convicted on all charges on June 18, 1993.

On appeal, Hudson contends that the trial court erred in denying his motions to suppress evidence seized as a result of his arrest following an illegal "traffic stop." He asserts that the first motion to suppress was cast in the form of a motion to dismiss for lack of probable cause to arrest and that the second motion was predicated on the lack of probable cause for a warrantless search following the "traffic stop."

Hudson focuses upon the criteria for warrantless arrests and vehicular searches set forth in Ark. R. Crim. P. 4.1 and 14.1. Under Ark. R. Crim. P. 4.1:

(a) A law enforcement officer may arrest a person

> without a warrant if the officer has reasonable cause to believe that such person has committed
>
> (i) a felony. . . .

Rule 14.1 provides, in pertinent part:

> (a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course where the vehicle is:
>
> (i) on a public way or waters or other area open to the public. . . .

The same standards govern reasonable (that is to say, probable) cause determinations, whether the question is the validity of an arrest or the validity of a search and seizure. *Perez* v. *State*, 260 Ark. 438, 541 S.W.2d 915 (1976). Because the arrest and the search in the present case were based on the same information supplied to the South Central Drug Task Force, we consider the two occurrences together.

The principal law enforcement officer involved in the arrest was Richard Wiggins, who testified at the hearing held on the motion to suppress evidence that he had received information from two confidential informants that Hudson "had been dealing drugs in Arkadelphia." On February 6, 1993, the day of the arrest, one of the informants notified Officer Wiggins that Hudson had been processing and packaging marijuana at another person's house and that he had cocaine in his possession and was traveling in a 1977 Buick Electra in the Arkadelphia area. The informant identified the vehicle's tag number.

Officer Wiggins stated that the informant who had furnished the information on February 6 had previously provided him with information that resulted in at least a dozen cases and had worked with the Arkansas State Police on "hundreds" of cases. He described the informant as "[v]ery reliable and trustworthy." According to Officer Wiggins, he and the other officers acted immediately to effect the arrest of Hudson as they were "hoping to catch the drugs on him before they hit the streets." The offi-

cers performed what is known as a "felony stop," with lights and sirens on, guns drawn, and handcuffs ready. Subsequently, Officer Wiggins prepared an affidavit for a search warrant to be executed at Hudson's Arkadelphia residence based on information received prior to the arrest.

Despite the fact that no cocaine was found in the car or on Hudson's person or at Hudson's and Freeman's residence, Officer Wiggins maintained that he believed the information was reliable. "I just don't know what happened to the drugs [*i.e.*, the cocaine] in between the time I received the call and he was stopped," the Task Force officer explained. An hour had elapsed from the time Officer Wiggins received the information that Hudson was traveling with cocaine in an automobile until the felony stop was made. It is conceivable that, during that period, Hudson might have had the opportunity to dispose of the cocaine in some fashion. Both the suspect, who was arrested, and his vehicle, which was searched, were mobile in the critical hour following Officer Wiggins's receipt of the informant's report. And, more to the point, at the time his car was stopped, Hudson was found in possession of a controlled substance, namely marijuana.

As Ark. R. Crim. P. 4.1 states, and as we have often held, a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that person has committed a felony. *Chism* v. *State*, 312 Ark. 559, 853 S.W.2d 255 (1993). Reasonable, or probable, cause for a warrantless arrest exists when the facts and circumstances within an officer's knowledge are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person to be arrested. *Crail* v. *State*, 309 Ark. 120, 827 S.W.2d 157 (1992); *Burks* v. *State*, 293 Ark. 374, 738 S.W.2d 399 (1987); *Roderick* v. *State*, 288 Ark. 360, 705 S.W.2d 433 (1986). Probable cause to arrest without a warrant does not require the degree of proof sufficient to sustain a conviction. *Chism* v. *State, supra.*

On appeal from a trial court's ruling on a motion to suppress evidence, this Court makes an independent determination based on the totality of the circumstances and reverses only if the trial court's ruling was clearly against the preponderance of the evidence. *State* v. *Blevins*, 304 Ark. 388, 802 S.W.2d 465 (1991); *Edwards* v. *State*, 300 Ark. 4, 775 S.W.2d 900 (1989). All

presumptions are favorable to the trial court's ruling on the legality of the arrest, and the burden is on the appellant to demonstrate error. *Friend* v. *State*, 315 Ark. 143, 865 S.W.2d 275 (1993); *Munnerlyn* v. *State*, 292 Ark. 467, 730 S.W.2d 895 (1987). The determination of probable cause is to be based on the factual and practical considerations of everyday life upon which reasonable and prudent persons, as opposed to legal technicians, act. *Hines* v. *State*, 289 Ark. 50, 709 S.W.2d 65 (1986). In assessing the existence of probable cause, our review is liberal rather than strict. *Id.*

Taking a broad and practical view of the totality of the circumstances, we hold that Officer Wiggins had, under the terms of Ark. R. Crim. P. 4.1, reasonable cause to believe that Hudson, at the time of his arrest, had committed a felony. The confidential informant had reported that, a short time before, Hudson and another person had been processing and packaging marijuana and that Hudson had departed in his car with cocaine in his possession. Earlier information, provided on February 1 and 4, 1993, indicated that Hudson was engaged in drug trafficking. Officer Wiggins emphasized the consistent reliability of the informant whose report led directly to the arrest and contemporaneous search on February 6, 1993. Under Ark. R. Crim. P. 14.1, the law enforcement officers had reasonable cause to believe that the automobile which had been identified by the informant contained items subject to seizure without a warrant.

We hold that the trial court did not err in refusing to grant the motions to suppress the evidence taken from Hudson's person and his vehicle.

Affirmed.

CORBIN, J., not participating.

Calvin THOMAS and Lorraine Thomas *v.*
Paul CORNELL, M.D.

93-906 872 S.W.2d 370

Supreme Court of Arkansas
Opinion delivered March 21, 1994

The Cortinez Law Firm, P.A., by: *Robert S. Tschiener* and *Robert R. Cortinez*, for appellants.

Mitchell, Williams, Selig, Gates & Woodyard, by: *Richard L. Angel and Amelia Mosely Russell*, for appellee.

JACK HOLT, JR., Chief Justice. The trial court granted a motion to dismiss in favor of appellee, Paul Cornell, M.D., inasmuch as the applicable statute of limitation in medical malpractice actions limits claims to two years from date of wrongful act complained of, Ark. Code Ann. § 16-114-203 (Supp. 1993). Appellants, Lorraine and Calvin Thomas, urge us to reverse the trial court's findings in this regard inasmuch as Ark. Code Ann. § 16-114-204 authorizes a ninety-day extension of this limitations period under circumstances relating to their claim. We disagree and affirm.

In May 1990, the Thomases discovered they were going to have a baby and employed Dr. Cornell as their obstetrician. During the pregnancy, Mrs. Thomas, according to her complaint, suffered considerable abdominal cramping, and on October 22, 1990, she advised Dr. Cornell that the pain was becoming more severe and asked for treatment. Dr. Cornell allegedly refused to provide treatment, prescribed medication, and, ultimately, told her that her pains were false labor and recommended ultrasonography. On October 27, 1990, Mrs. Thomas again called the doctor and told him that she had suffered severe abdominal cramping, but he only prescribed bedrest. At about 10:30 a.m. that day, Mrs. Thomas went into labor in her bathroom, without the atten-

dance of a physician, and the baby fell on the floor, and, thereafter, died.

On October 20, 1992, nearly two years later, the Thomases sent Dr. Cornell a letter by certified mail notifying him that they were making a claim against him for medical negligence, and, on January 19, 1993, the Thomases filed their complaint against Dr. Cornell in circuit court.

In response, Dr. Cornell filed a motion to dismiss, explaining that pursuant to *Weidrick* v. *Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), the requirement of a sixty-day notice letter being forwarded to a medical care provider prior to commencement of a medical malpractice action had been eliminated, and therefore, the ninety-day extension of the limitations period when notice letters were issued to medical care providers had likewise been "abolished." Dr. Cornell further claimed that the applicable statute of limitations in medical malpractice actions, as provided in Ark. Code Ann. § 16-114-203 (Supp. 1993), remained as two years from date of the "wrongful act complained of." The trial court agreed and granted Dr. Cornell's motion. The Thomases appeal.

For their first argument for reversal, the Thomases contend that the trial court erred in dismissing their complaint because *Weidrick* merely negated the necessity of sending a right-to-sue letter when one is desiring to file suit against a physician for malpractice and did not provide for supersession of Ark. Code Ann. § 16-114-204 (b), which extended the two-year statute of limitations provided in Ark. Code Ann. § 16-114-203 by ninety days, thus making the filing of their claims timely.

Granted, we have encountered the notice requirement of this statute several times since its inception and have held it to be constitutional. *See Jackson* v. *Ozment*, 283 Ark. 100, 671 S.W.2d 736 (1984); *Simpson* v. *Fuller*, 281 Ark. 471, 665 S.W.2d 269 (1984); *Gay* v. *Rabon*, 280 Ark. 5, 652 S.W.2d 836 (1983). In *Jackson, supra*, we also held that the statute was not superseded by Ark. R. Civ. P. 3 but, instead, "adds an additional step to the proper commencement of a medical injury case provided under ARCP Rule 3." *Jackson*, 283 Ark. at 101-103, 671 S.W.2d at 738.

More recently, in *Weidrick* v. *Arnold*, 310 Ark. 138,

835 S.W.2d 843 (1992), noting the court's adoption of the Supersession Rule[1], we reevaluated our position on § 16-114-204 and overruled *Jackson* on that point, holding that Ark. R. Civ. P. 3 directly conflicts with and supersedes Ark. Code Ann. § 16-114-204 (1987, Supp. 1991) with respect to the commencement of civil actions.

In *Weidrick* we stated:

> We can think of few rules more basic to the civil process than a rule defining the means by which complaints are filed and actions commenced for a common law tort such as medical malpractice. The express intent of the Arkansas Constitution and Act 38 of 1973 is for the governance of the procedure of the courts of this state to fall within the power and authority of the Arkansas Supreme Court. How civil actions are commenced is a fundamental cog in that procedural wheel.
>
> We hold, therefore, that Rule 3 directly conflicts with and supersedes Ark. Code Ann. 16-114-204 (1987, Supp. 1991) with respect to the commencement of civil actions.

Weidrick, 310 Ark. at 146, 835 S.W.2d at 847-848.

The crux of the issue before us now is whether we intended in *Weidrick* to hold that Rule 3 supersedes all of Ark. Code Ann. § 16-114-204 or merely section (a), concerning the commencement of the civil action, thus leaving section (b), relating to the statute of limitation, intact. In answering this issue, we first focus on both subsections of Ark. Code Ann. § 16-114-204 (Supp. 1993), which provide:

> (a) No action for medical injury shall be commenced until at least sixty (60) days after service upon the person or persons alleged to be liable, by certified or registered mail to the last known address of the person or persons allegedly liable, of a written notice of the alleged injuries and the

[1]The Supersession Rule, which we adopted as part of the Arkansas Rules of Civil Procedure, provides, "All laws in conflict with the Arkansas Rules of Civil Procedure, Rules of Appellate Procedure and Rules for Inferior Courts shall be deemed superseded as of the effective dates of these rules." Supersession Rule, Arkansas Court Rules p. 689 (1993).

damages claimed. Provided, service of the written notice of the alleged injuries and damages claimed may also be made by hand delivery.

(b) If the notice is served within sixty (60) days of the expiration of the period for bringing suit described in § 16-114-203, the time for commencement of the action shall be extended ninety (90) days from the service of the notice. When service is by certified or registered mail, the date of service of the notice shall be the date of the mailing of the written notice.

[redacted] The primary rule in the construction of a statute is to ascertain and give effect to the intent of the legislature, and in determining legislative intent, we look to the language of the whole statute or act. *Shinn* v. *Heath*, 259 Ark. 577, 535 S.W.2d 57 (1976). In order to give effect to every part of a statute, it is the court's duty, as far as practicable, to reconcile the different provisions so as to make then consistent, harmonious, and sensible. *Id.*

[redacted] We have held that where the purpose of a statute is to accomplish a single object, and some of its provisions are invalid, the entirety must fail unless sufficient language remains to effect the object without the aid of the invalid portion. As we explained in *Allen* v. *Langston*, 216 Ark. 77, 224 S.W.2d 377 (1949):

> But if its (the statute's) purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature would not pass the residue independently, then if some parts are unconstitutional, all of the provisions which are thus dependent, conditional, or connected must fall with them.

Allen, 216 Ark. at 85, 224 S.W.2d at 381 (citing *Oliver* v. *Southern Trust Co.*, 138 Ark. 381, 212 S.W. 77 (1919)).

[redacted] Arkansas Code Annotated § 16-114-204 has a single object — to promote the settlement of actions against medical care

providers prior to the initiation of the lawsuit. *See Gay* v. *Rabon*, 280 Ark. 5, 652 S.W.2d 836 (1983). Applying the analysis of *Allen* to the facts before us, it is clear that the notice requirement of section (a) was a condition of section (b), which provided an extension to the two-year statute of limitations. Thus, these sections are dependent upon one another, and, accordingly, to have held in *Weidrick* that section (a) is superseded in its application is to render the entire statute superseded.

For their next argument for reversal, the Thomases contend that even if *Weidrick* affects the statute of limitations, it should be applied prospectively rather than retroactively. Although the Thomases questioned below when an appellate court decision becomes effective, they did not specifically question whether a decision should be applied retroactively or prospectively. Since the Thomases failed to raise this issue of prospective or retroactive application of a supreme court decision before the trial court, it is waived on appeal. *Green* v. *State*, 313 Ark. 87, 852 S.W.2d 110 (1993); *Daley* v. *Boroughs*, 310 Ark. 274, 835 S.W.2d 858 (1992).

Lastly, the Thomases argue that they, and other similarly situated parties, are entitled to a reasonable period of time before being held accountable for an "alteration" of a limitations period brought about by a supreme court decision. However, our decision in *Weidrick* did not alter the limitations period for medical malpractice lawsuits — as before, the limitations period is still two years. Ark. Code Ann. § 5-114-203 (Supp. 1993). The effect of *Weidrick* was only to eliminate a condition whose fulfillment provided an *extension* to the two-year limitations period for some ninety days. Therefore, the Thomases' contention that they should not be held accountable for the "shortening" of the limitations period until a reasonable time after the opinion had been released is without merit because *Weidrick* did not, strictly speaking, shorten the limitations period.

Granted, we have upheld actions subject to a shortened limitations period where the parties had 104 days notice of the shortened period, *Thomas* v. *Service Finance Corp.*, 293 Ark. 190, 736 S.W.2d 3 (1987); and ninety days. *Steele* v. *Gann*, 197 Ark. 480, 123 S.W.2d 520 (1939). Here, there was no shortening of the limitations period in which to bring a medical malpractice action. Thus, the matter of notice is a non-issue.

Affirmed.

NEWBERN and DUDLEY, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. The basis of our decision in *Weidrick* v. *Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), was that Ark. Code Ann. § 16-114-204 (1987) conflicted with Ark. R. Civ. P. 3 because it added a condition for commencing a civil action for medical injury. The condition added was the requirement that a plaintiff wait 60 days after notifying the defendant before commencing an action for medical injury. The question here is whether our invalidation of the 60-day requirement for commencement of an action for medical injury caused the entire statute, including the statute of limitations extension, to be invalid.

The majority opinion, correctly I believe, notes that "where the purpose of a statute is to accomplish a single object, and some of its provisions are invalid, the entirety must fail unless sufficient language remains to effect the object without the aid of the invalid portion."

Subtracting the 60-day delay requirement leaves a law that provides a 90-day extension of the statute of limitations when notice of the alleged injuries and damages claimed has been provided to a potential medical injury defendant. May the object of the statute be effected absent the invalid portion?

The object of the statute "is to encourage the resolution of claims without judicial proceedings, thereby reducing the cost of resolving claims and, consequently, the cost of malpractice insurance." *Cox* v. *Bard*, 302 Ark. 1, 786 S.W.2d 570 (1990); *Gay* v. *Rabon*, 280 Ark. 5, 652 S.W.2d 836 (1983).

While the statute may no longer require that the notice be given 60 days before suit is filed, if only that part of it is excised, the extension of the statute of limitations remains, and it gives an incentive to provide the notice. Providing the notice serves the object we have attributed to the statute, so the statute should not be held to have been altogether invalidated.

I respectfully dissent.

DUDLEY, J., joins in this dissent.

Earl BAUMGARNER *v.* STATE of Arkansas

CR 93-383 872 S.W.2d 380

Supreme Court of Arkansas
Opinion delivered March 21, 1994

[redacted]

Chet Dunlap, for appellant.

Winston Bryant, Att'y Gen., by: *Sherry Daves*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant, Earl Baumgarner, was arrested December 30, 1991, and charged with the kidnapping and first degree battery of Brenda Dixon. He abducted the victim at knifepoint from a convenience store in Fisher, cut her, and caused her to suffer a broken kneecap. Appellant was convicted of both charges and, as a habitual offender, received consecutive sentences of life imprisonment and forty years. We affirm the judgment of convictions.

Six of appellant's seven assignments of error involve the denial of various motions made at trial. He does not question the sufficiency of the evidence, so we recite only the facts related to the motions. On March 31, 1992, appellant filed a motion requesting a psychiatric examination. The trial court promptly ordered an examination. *See* Ark. Code Ann. § 5-2-305(a)(2) (Repl. 1993). Dr. Thomas Heissler, a forensic psychologist, went to the jail to conduct the examination, but appellant stated that he would not talk to him until he conferred with his attorney. Dr. Heissler could do nothing further and left without conducting the examination. Neither appellant nor his attorney made an effort to contact Dr. Heissler and let him know that appellant was ready to proceed with the examination. On August 27, Dr. Heissler wrote the

deputy prosecuting attorney that he had been unable to complete the examination.

The case was set for jury trial on November 23. A pre-trial hearing was held on November 16, 1992, and, at that time, appellant's attorney stated that appellant had never been examined. The next day, November 17, another pre-trial hearing was held. Appellant's sister testified that appellant was not competent to stand trial. The trial court ordered that a mental examination be conducted forthwith. Dr. Heissler returned to the jail and conducted a clinical interview, administered a Wechsler Adult Intelligence Scale-Revised test, reviewed statements of the victim, a deputy sheriff, and a friend of appellant's, and looked at appellant's "rap sheet." Shortly thereafter, Dr. Heissler told the deputy prosecutor that his preliminary evaluation was that appellant was competent to stand trial and knew the difference between right and wrong at the time he committed the crimes. The deputy prosecutor passed this information on to appellant's attorney. Meanwhile, on November 18, yet another pre-trial hearing was conducted, this time to determine whether appellant should be granted a change of venue. The trial court denied the motion. At this same hearing the State sought, and was granted, permission to amend the information to allege that the kidnapping was done to "terrorize another" and to allege that appellant was a habitual offender.

By November 20, appellant's attorney had not received a copy of Dr. Heissler's written report, and he moved for a continuance on the ground that he had not received a copy of the report. Dr. Heissler called the deputy prosecutor on November 22 and told him the written report was completed. The deputy prosecutor drove to Dr. Heissler's office in Wynne, got the report, drove back to Harrisburg, called appellant's lawyer, and gave him a copy of the report at 6:00 that evening. The report was filed the next morning, the first day of appellant's trial. Appellant again moved for a continuance, this time on the ground that he did not have adequate time to prepare his affirmative defense of lack of mental capacity. The trial court denied the motion.

Appellant's first assignment is that the trial court erred in refusing to grant a continuance because the written psychiatric report was given to the defense attorney only fourteen hours

before the trial began. The trial court's ruling was based, in part, on facts stated by counsel in their argument on the motion, and those facts, along with the others shown by the pleadings, are as follows. As soon as appellant's counsel mentioned the possibility of defense of mental disease the trial court ordered the examination. The forensic psychologist immediately attempted to conduct the examination, but was thwarted by the refusal of appellant to cooperate. This was on March 31. Appellant's attorney did not notify the trial court that the examination had not been conducted until November 20, or just three days before the trial was set. When the trial court learned there had not been an examination, it ordered one conducted forthwith. The psychologist completed the examination the next day, and, by phone, told the deputy prosecutor the preliminary result. The deputy prosecutor immediately told appellant's attorney of the preliminary report. The written report was received on November 22 and given to appellant's attorney at 6 p.m. The written report conformed with the earlier preliminary statements that appellant was competent to stand trial. From this it is clear that, while the appellant's attorney only received the written report fourteen hours before the trial commenced, he knew in advance what it would provide. In addition, the difficulties were caused by appellant's refusal to submit to the tests at an earlier time and his failure to notify the trial court that the examination had not been conducted.

[redacted] Appellant failed to exercise due diligence in obtaining the examination. Failure to exercise due diligence alone can be the basis to deny a motion for a continuance. *Walls* v. *State*, 280 Ark. 291, 658 S.W.2d 362 (1983). In addition, A.R.Cr.P. Rule 27.3 provides for the grant of a continuance "only upon a showing of good cause." The denial of a motion for continuance is within the sound discretion of the trial court and will not be reversed absent a showing of abuse. *Stone* v. *State*, 290 Ark. 204, 718 S.W.2d 102 (1986). Appellant bears the burden of showing abuse and of demonstrating prejudice. *Mann* v. *State*, 291 Ark. 4, 722 S.W.2d 266 (1987). Appellant has failed to show that the trial court abused its discretion under these facts. Appellant has also failed to show that he was prejudiced by the denial of the motion because he was able to secure an examination and the testimony of a neuropsychologist on the issue of his competence.

[redacted] Appellant's next two assignments are that the court

erred in allowing the State to amend the information to allege that he was a habitual offender and that the kidnapping was done to "terrorize another." The habitual offender act is based on the concept that one who is a persistent offender warrants an increased punishment for the protection of the community. *Finch* v. *State*, 262 Ark. 313, 556 S.W.2d 434 (1977). Whenever the State seeks to charge a defendant as a prior offender in order to seek additional punishment, it is essential that a habitual offender allegation be included in the information. *Id.* at 316, 556 S.W.2d at 436. The purpose of this requirement is to give the defendant notice of the essential elements the State relies upon to assess punishment. *Id; see also Baugh* v. *State*, 256 Ark. 64, 505 S.W.2d 519 (1974).

It is well settled that an information may be amended up to a point after a jury has been sworn if it does not change the nature of a crime, or create unfair surprise. *See Kilgore* v. *State*, 313 Ark. 198, 852 S.W.2d 810 (1993); *Wilson* v. *State*, 286 Ark. 430, 692 S.W.2d 620 (1985). We have held that an amendment which adds an allegation of habitual offender does not change the nature or degree of the crime. *Finch*, 262 Ark. at 317, 556 S.W.2d at 436; *Osborne* v. *State*, 237 Ark. 170, 371 S.W.2d 518 (1963). Such an amendment simply authorizes a more severe punishment, not by creating an additional offense or an independent crime, but by affording evidence to increase the final punishment in the event the defendant is convicted. *Finch*, 262 Ark. at 317, 556 S.W.2d at 436; *see also Higgins* v. *State*, 235 Ark. 153, 357 S.W.2d 499 (1962).

The sole question for the trial court to resolve is whether the defendant is unfairly surprised by such an amendment. We addressed an argument similar to the one at bar in *Kilgore*, in which the appellant urged reversal because the State was allowed to amend on the day of the trial, charging him as a habitual offender, and he did not "fully know the charges against him until the day of the trial." 313 Ark. at 201, 852 S.W.2d at 812. We refused because Kilgore did not show that either he was unaware of the charges against him or surprised by the nature of the amendment. *Id.* We wrote that "[t]he fact that an amendment authorizes a more severe penalty does not change the nature or degree of the offense." *Id.*

Similarly, in *Traylor* v. *State*, 304 Ark. 174, 177, 801 S.W.2d 267, 269 (1990), we refused to reverse for the addition of a habitual offender amendment when it was shown that the defendant had been given a "rap sheet" showing prior convictions, thus could not effectively argue surprise. *See also Mann* v. *State*, 291 Ark. 4, 722 S.W.2d 266 (1987).

A similar situation exists in this case. There was ample evidence that appellant's attorney knew he was a prior offender and that the attorney was not surprised by the amendment. At a pretrial hearing appellant's sister testified that he had been incarcerated in California on more than one occasion for various crimes, and appellant's attorney acknowledged that the deputy prosecutor had given him a copy of appellant's lengthy "rap sheet." The deputy prosecutor previously stated that he would seek to amend the information if the certified copies of the convictions were received from the State of California before the trial commenced. In sum, there was no showing of unfair surprise by the amendment.

[redacted] The trial court did not err in allowing the State to amend the charge of kidnapping to allege that it was done for the purpose of "terrorizing another." An amendment may be made, with permission of the trial court, so long as it does not change the nature of the crime charged or the degree of the crime charged. Ark. Code Ann. § 16-85-407 (1987); *Prokos* v. *State*, 266 Ark. 50, 282 S.W.2d 36 (1979). This amendment did not change the *nature* of the alleged kidnapping, rather it amended only the *manner* of the alleged commission of the crime of kidnapping. *See Jones* v. *State*, 275 Ark. 12, 627 S.W.2d 6 (1982). Appellant additionally argues that, even if allowing the amendment was not error, the refusal to grant a continuance after the amendment was error. Again, the burden is on appellant to show that the trial court abused its discretion and that he was prejudiced. *David* v. *State*, 295 Ark. 131, 748 S.W.2d 117 (1988). Appellant failed to make such a showing. In his argument to the trial court, appellant's attorney stated that he needed additional time to "investigate this 'terrorizing another' [so as to] be able to defend on it." However, the trial court was aware that the original information contained the allegation that appellant restrained the victim and interfered with her liberty. Thus, appellant had fair notice that the State was accusing him of using physical force on the victim and

should not have been surprised when he was charged with "terrorizing" her.

[redacted] Appellant additionally argues that the trial court erred in not granting a continuance after allowing the amendments, but since there was no surprise to appellant, there was no error in refusing to grant a continuance. Appellant contends that until the written report on competency was received, it was not necessary to prepare his defense of mental defect, and, by the time it was received, he needed more time to secure witnesses for that affirmative defense. The argument is without foundation for either of two reasons. First, appellant did not exercise due diligence because he did not disclose that he planned to offer an affirmative defense even though he had been ordered to disclose the names of his witnesses. Second, while the court did not grant a continuance, it did grant a recess from November 24 until November 30, and, during that time, appellant employed Dr. William Wilkins, a neuropsychologist, who testified that appellant was unable to conform his behavior to the law. Thus, appellant has not shown any possible prejudice.

Appellant next contends that trial court erred in refusing to grant a change of venue. He testified that he is a distant relative of an infamous convicted felon, and, because of the stigma attached to his name, it was impossible to assemble an impartial jury in Poinsett County. His motion was supported by affidavits of three disinterested residents of the county. However, the distant relative's conviction was ten years earlier, and the witnesses did not state that they had a general knowledge of the state of mind of the county's inhabitants, nor did they state that they were aware of prejudice throughout the county.

[redacted] The defendant carries the burden of proof in showing that a court has abused its discretion in denying a change of venue. *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988). A change of venue should be granted only when it is clearly shown that a fair trial is not likely to be had in that county. *Id.* at 53, 754 S.W.2d at 523. This court has held that witnesses who testify in support of a change of venue must be able to show that they have a general knowledge of the state of mind of the county's inhabitants, or that they are aware of prejudice throughout the county. *McArthur* v. *State*, 309 Ark. 196, 830 S.W.2d 842

(1992). Appellant's witnesses did state that they were aware of prejudice existing throughout the area, but they admitted that they had not discussed the matter with anyone lately. The trial court had the opportunity to observe these witnesses and to determine the weight of their testimony. We have repeatedly emphasized this opportunity in deciding whether the trial court abused its discretion. *McArthur*, 309 Ark. at 203, 830 S.W.2d at 846; *Gardner*, 296 Ark. at 52, 754 S.W.2d at 523; *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 284 (1982).

We have also said that there is no error in refusing a change of venue if voir dire shows that an impartial jury has been selected. *Perry* v. *State*, 277 Ark. 357, 642 S.W.2d 865 (1982). Voir dire is omitted from the record, and, accordingly, appellant cannot demonstrate error.

Appellant also contends the trial court erred in finding that he was mentally competent to stand trial. The trial court held a hearing on the matter, and Dr. Heissler testified that the Wechsler Adult Intelligence Scale-Revised test showed that appellant's verbal intelligence quotient was 85 and that he had a good vocabulary. Based on this data, the interview of appellant, and other records, he concluded that appellant was able to understand the proceedings against him and was able to assist in his defense. Appellant put on the testimony of five lay witnesses who testified that appellant was not communicative, was withdrawn, and seemed to lack all emotion. Four of the lay witnesses, who were jail inmates, testified that he was "not right in the head." The fifth witness, his sister, testified that he did not remember committing the crimes. The trial court concluded that appellant was competent to stand trial.

The test of competency to stand trial is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him. *Lipscomb* v. *State*, 271 Ark. 337, 609 S.W.2d 15 (1980). Dr. Heissler's testimony and the test results support the finding that appellant had a present ability to communicate with his lawyer and that he understood the proceedings. While there was testimony that appellant did not remember the crime, the psychologist's report expressed doubt about appellant's truthfulness.

In addition, lack of memory alone cannot serve as a basis for a finding an accused incompetent to stand trial. *See Rector* v. *State*, 277 Ark. 17, 638 S.W.2d 672 (1982). An accused is presumed competent to stand trial, and the burden of proving incompetence is on the accused. *Mask* v. *State*, 314 Ark. 25, 858 S.W.2d 108 (1993). Appellant failed to meet this burden, and the trial court's ruling was based upon substantial evidence.

Appellant next argues that the trial court erred in refusing to direct a verdict for him on his affirmative defense of lack of mental capacity. The State proved the elements of both crimes. After the State met its burden of proving the elements of an offense beyond a reasonable doubt, the burden shifted to the defendant to prove the affirmative defense by a preponderance of the evidence. *Mask*, 314 Ark. at 28, 858 S.W.2d at 110; *Walker* v. *State*, 308 Ark. 498, 825 S.W.2d 822 (1992). The question is one for the jury, and the judge may direct a verdict only if no factual issue exists. *Franks* v. *State*, 306 Ark. 75, 811 S.W.2d 301 (1991). The question for a reviewing court to resolve on a denial of a directed verdict is whether there is substantial evidence to support the verdict. Mask, 314 Ark. at 28, 858 S.W.2d at 110; *Davasher* v. *State*, 308 Ark. 154, 823 S.W.2d 863 (1992).

To succeed on his affirmative defense, appellant had to show by a preponderance of the evidence that, at the time of the kidnapping and battery, "he lacked capacity, as a result of mental disease or defect, to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct." Ark. Code Ann. § 5-2-312(a) (Repl. 1993). In his attempt to meet this burden, appellant presented testimony from three fellow inmates, his sister, and Dr. William E. Wilkins, a neuropsychologist. The inmates each testified that they had concluded, upon observing appellant's behavior while they were in jail with him, that he did not know right from wrong, and that something was "bad wrong" with him. His sister, Ms. Runyon, testified that, based on her observations of her brother's noncommunicative and depressed behavior around the time of the crime, she believed he lacked capacity to obey the law. Dr. Wilkins, who had examined appellant during the time of the trial, testified that, although appellant knew right from wrong, it was his opinion that he was unable to control his behavior. He had concluded that appellant had some brain damage and an organic personality disorder, which, when

coupled with the long-term effects of alcohol abuse, rendered appellant unable to conform his behavior to the law.

In rebuttal, the State presented testimony from Dr. Thomas Heissler, the forensic psychologist who had examined appellant in jail. Dr. Heissler disagreed with Dr. Wilkins that appellant had brain damage. He concluded that the actions, statements, and test results supported a finding of mental capacity to obey the law.

As is obvious, the above-recited testimony was disputed. Therefore, the trial court did not err in submitting it to the jury, and there was substantial evidence to support the jury's decision that appellant was not mentally incompetent at the time of the kidnapping and battery. *Traylor* v. *State*, 304 Ark. at 178, 801 S.W.2d at 270.

Appellant's final argument is that the convictions should be reversed because of cumulative error. We summarily dismiss the argument because there was no such motion made at the trial level. Even if such motion were made, we have said that we will entertain the argument of cumulative error only in rare and egregious cases. *Vick* v. *State*, 314 Ark. 618, 863 S.W.2d 820 (1993). Clearly, this case would not reach that level.

Because of the sentence in this case, an examination of the record has been made in conformity with Rule 4-3(h) of the Rules of the Supreme Court, and we find no reversible error on other rulings that were adverse to appellant.

CORBIN, J., not participating.

Thomas Randall COOK *v.* STATE of Arkansas

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Supreme Court of Arkansas
Opinion delivered March 21, 1994

William R. Simpson, Jr., Public Defender, by: *Phyllis A. Edwards*, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant was convicted of rape, kidnapping, and terroristic threatening. His sentence was enhanced because he is a habitual criminal. He appeals. We affirm the judgment of convictions.

Since appellant does not question the sufficiency of the evidence, we need not recite the details of the crimes. In appellant's first point of appeal, he contends that the trial court erred in refusing to declare a mistrial after a comment by the deputy pros-

ecutor. The comment, made in closing argument, related to the trustworthiness of an alibi witness who had testified that appellant was at her home, rather than at the scene of the crimes, when the crimes were committed. The alibi witness testified that she remembered the exact date because it was the date her boyfriend's family flew into Little Rock from Chicago. She testified that her boyfriend, Richard, confirmed the date by calling his relatives and having them check their airline tickets.

In closing argument, the deputy prosecutor argued that the witness did not know the exact date appellant was in her home. He questioned the source of the confirmation of the date and asked: "Where's Richard? Where's the boyfriend? Where is Richard? Richard is working in town today, presumably could have been subpoenaed." Defense counsel objected and stated that the argument implied that it was up to the accused to prove his innocence and moved for a mistrial. The trial court denied the motion for a mistrial and instructed the jury:

> Ladies and gentlemen of the jury, the defendant is not required to prove his innocence. He's not required to subpoena any particular individual for any reason. He does not have to do any of that. And I want to read for emphasis an instruction I've already given.
>
> There is a presumption of the defendant's innocence in a criminal prosecution. In this case Thomas Cook is presumed to be innocent. That presumption of innocence attends and protects him throughout the trial and should continue and prevail in your minds until you are convinced of his guilt beyond a reasonable doubt.

A mistrial is an extreme remedy that should only be granted when justice cannot be served by continuing the trial. *Taylor* v. *State*, 303 Ark. 586, 799 S.W.2d 519 (1990). A mistrial is only appropriate when the error is beyond repair and cannot be corrected by any curative relief. *Hall* v. *State*, 314 Ark. 402, 862 S.W.2d 268 (1993). A trial court has broad discretion in granting or denying a motion for a mistrial, and the trial court's decision will not be reversed absent abuse of that discretion. *Id.* In addition, we have said that a trial court has discretion to control closing argument and is in a better position to determine the

possibility of prejudice by observing the argument firsthand. Woodruff v. State, 313 Ark. 585, 592, 856 S.W.2d 299, 303 (1993). This court will not reverse the action of a trial court in matters pertaining to its control, supervision, and determination of the propriety of arguments of counsel in the absence of manifest gross abuse. *Id.*

The trial court did not abuse its considerable discretion in the ruling in this case. The comment was not about the accused's failure to testify in violation of his Fifth Amendment privilege against self-incrimination. *See Aaron* v. *State*, 312 Ark. 19, 846 S.W.2d 655 (1993). Rather, it was about the trustworthiness of a witness's recollection of a date and her confirmation of that date. At most, it was an attempt to shift the burden of proof, and we cannot say that the trial court erred in determining that the instruction remedied that wrong.

In his second point of appeal appellant contends that the trial court erred in limiting his cross-examination of the prosecutrix. Appellant's attorney attempted to question the victim about an attempted suicide that occurred three months before the crimes were committed. The State objected, and the trial court ruled that an attempted suicide three months earlier was not relevant to the crimes charged. Appellant made a proffer that if he were allowed to question the prosecutrix, he would show that the attempted suicide was really an attempt to get attention and that the prosecutrix's allegations in this case were made for the same reason. Appellant argued that the questions should be allowed to show motive of the victim to fabricate her story and cited A.R.E. Rule 404(b). On appeal appellant contends that honesty is a character trait and that he should have been allowed to question the prosecutrix's trait for honesty. In support of his argument he cites *Kellensworth* v. *State*, 275 Ark. 252, 631 S.W.2d 1 (1982). We summarily dismiss the point. The argument made at trial involved Rule 404(b), and that rule is not applicable. Further, a ruling on relevancy is discretionary and will not be reversed by an appellate court absent an abuse of discretion. *Owens* v. *State*, 313 Ark. 520, 856 S.W.2d 288 (1993).

Affirmed.

CORBIN, J., not participating.

FARM CREDIT BANK of St. Louis *v.*
Bob MILLER and Karon Miller

93-652 872 S.W.2d 376

Supreme Court of Arkansas
Opinion delivered March 21, 1994
[Rehearing denied April 25, 1994.*]

*Corbin, J., not participating.

Friday, Eldredge & Clark, by: *Richard D. Taylor*, for appellant.

David Hodges and *Bay Fitzhugh*, for appellees.

ROBERT H. DUDLEY, Justice. Appellees Bob and Karon Miller, a real estate agent and a real estate broker who own Miller Realty in Bald Knob, filed suit against the Farm Credit Bank of St. Louis. They pleaded that they had a real estate sales agreement with Farm Credit and were entitled to receive a commission for the sale of a tract of land owned by Farm Credit. They alleged that Farm Credit refused to pay the agreed commission and asked damages for tortious interference with contractual relations and breach of contract. The trial court directed a verdict against the Millers on the tort claim, but let the contract claim go to the jury. The jury found that the Millers were the procuring cause of the sale and returned a verdict for them in the amount of $88,000. Farm Credit files a direct appeal, and the Millers file an alternative cross-appeal. We affirm on direct appeal and do not reach the alternative cross-appeal.

Appellant Farm Credit first argues that there was no substantial evidence to support the verdict. The facts, viewed most favorably to appellee Millers, as we must do, are as follows. Farm Credit owned a 3,700 acre farm in Woodruff County that was known as the Little Dixie Farm. In late 1988, the Millers asked Farm Credit employee Jack Runsick about listing the farm for sale. As a result, they obtained a nonexclusive contract, under which they were to receive four percent of the sale price as their commission if the property was sold to a prospect the Millers had listed with Farm Credit. On December 12, 1988, the Millers confirmed the agreement by letter and registered twenty-three prospects, including the United States Fish and Wildlife Service. The Millers also testified that they later mailed to Farm Credit a photocopy of the December 12 letter with the handwritten notation that the Nature Conservancy was to be added as a registered prospect.

The Millers often corresponded with the federal agency in order to pique its interest. They sent brochures, made aerial photographs showing the suitability of the tract for wildlife, advised the agency of the flood plain, and kept the agency advised of potential buyers. The Millers made fifty to sixty telephone calls to the agency and Farm Credit. Their contact with the agency was through John Yount of its Atlanta, Georgia, office. Yount testified

that after receiving the informational packets and aerial photographs, the agency determined that it had a real interest in the tract because it was within the ten-year flood plain and was within the acquisitional boundary of the Cache River National Wildlife Refuge. The agency subsequently classified the tract as a priority purchase and obtained authority to acquire the property.

The agency did not have an appropriation for the purchase of the land that fiscal year. A plan was devised by which Nature Conservancy, a private organization that acquires land for wildlife refuges, would purchase the farm and hold it until the agency could purchase it. Yount and Nancy Delamar of Nature Conservancy both testified that the two organizations had an ongoing and cooperative relationship through which Nature Conservancy bought land and held it until the agency was able to purchase it.

Tom Norsworthy replaced Jack Runsick as Farm Credit's local employee, and on March 7, 1989, Yount contacted Norsworthy for permission to appraise the property. Norsworthy gave Yount approval for the appraisal on March 10, 1989.

Meanwhile, on February 7, 1989, Miller Realty had written E. M. Radcliffe about duck hunting properties and mentioned that the federal agency was in the process of acquiring the farm. Soon thereafter, in March 1989, Tim Streeter, an associate of Radcliffe, and Gordon Brent met with Jim Miller, an agent of Miller Realty, and discussed the agency's interest in acquiring the land. Gordon Brent corresponded with the federal agency about its desire to purchase the land. Streeter and Brent knew that the agency wanted the land and formed a corporation, Little Dixie Planting Company, for the purpose of purchasing the farm. A jury could fairly infer that Little Dixie Planting was formed for the purpose of reselling the land to the federal agency. In April 1989, Little Dixie Planting signed a contract with Farm Credit to purchase the farm for 2.2 million dollars. Little Dixie Planting had only one asset, a $100,000 certificate of deposit that had been in the name of Gordon Brent. Its officers cashed the certificate and paid $100,000 to Farm Credit upon signing the agreement. The remainder was to be paid at closing.

It was at about this same time that the federal agency asked Nature Conservancy to acquire the land. Nature Conservancy

contacted Tim Streeter and sought an assignment of Little Dixie Planting's contract. Streeter contacted Farm Credit to see if he could assign the contract to Nature Conservancy. Farm Credit advised Streeter that it would not authorize an assignment of the contract from Little Dixie Planting to Nature Conservancy.

The closing of the sale took place on August 15, 1989. At that time, Nature Conservancy advanced $2,346,000 to Streeter and Little Dixie Planting. Farm Credit deeded the land to Little Dixie Planting for $2,200,000, and Little Dixie Planting, in turn, deeded the land to Nature Conservancy for the $2,346,000. The federal agency was to buy the land from Farm Credit as "migratory bird money" became available. On October 10, 1991, Nature Conservancy conveyed 1,152.96 acres of the tract to the federal agency for $663,000 and on January 31, conveyed all but 300 of the remaining acres to the federal agency for $1,019,363.

[redacted] Arkansas, along with the majority of jurisdictions, has long adhered to the procuring cause doctrine to determine whether a real estate broker is entitled to a commission. *See Hodges* v. *Bayley*, 102 Ark. 200, 143 S.W. 92 (1912); see also Luther Zeigler, *Brokers and Their Commissions*, 14 Real Est. L. J. 122, 123 (1985). This doctrine can be used affirmatively to infer a contract between the broker and the principal by allowing the broker to show that his part of the contract was performed and the principal reaped a benefit, or defensively to prevent broker fraud. *See* D. Barlow Burke, Jr., *Law of Real Estate Brokers* § 3.4 at 3:50, 3:54 (2d ed. 1992). It functions as a parol or extrinsic evidence rule to allow courts to look past the four corners of the listing agreement, and recovery under the doctrine is not dependent upon the express terms of the contract. Burke, *supra*, § 3.4 at 3:63; *see also Hopper* v. *Denham*, 281 Ark. 84, 663 S.W.2d 379 (1983); *Hodges*, 102 Ark. at 203, 143 S.W. at 93.

[redacted] In determining whether a broker is entitled to a commission, this court has said that the determination is highly fact-dependent, and the court looks at the whole context of the relevant transactions. *Schnitt* v. *McKellar*, 244 Ark. 377, 427 S.W.2d 202 (1968). We have long recognized that a broker is not allowed to recover a commission when he merely performs one event in a chain of actions. He must be a proximate cause of the eventual sale rather than a mere incidental link, and the sale must be a

result of his continuous course of conduct. *Hatchett* v. *Story*, 221 Ark. 120, 252 S.W.2d 78 (1952). However, he need not perform the actual sale to be due his commission; if this continuous course of conduct is demonstrated, he may still receive his commission even if he is excluded from the final transaction. *Hopper*, 281 Ark. at 87, 661 S.W.2d at 381; see also Barrett v. Land Mart of America, 3 Ark. App. 70, 621 S.W.2d 889 (1981); Storey v. Johnson, 270 Ark. 392, 605 S.W.2d 480 (Ark. App. 1980). Arkansas courts have found that a broker is due a commission if it appears that a sale to a third party is a straw transaction designed to avoid paying it. *See McKay & Co.* v. *Garland*, 17 Ark. App. 1, 701 S.W.2d 392 (1986).

The test is whether the Millers were the procuring, or efficient, cause of the sale to the federal agency. The Louisiana Court of Appeals set out factors that are helpful in this regard. In *Farnsworth Samuel, Ltd.* v. *Grant*, it wrote:

> Some of the [factors which determine whether a broker procured a sale are]: whether the prospect who ultimately purchased the property knew about the property before being contacted by the broker; the relative success or failure of the negotiations conducted by the broker, including the continuity or discontinuity of the original and final negotiations, the length of time elapsing between the broker's negotiations and the final sales agreement, and the development of a new, independent motive for prospect to purchase; whether or not the broker abandoned efforts to negotiate the transaction with a particular prospect; and, finally, the good or bad faith of the principal and the broker.

470 So. 2d 253, 254 (La. App. 1985). *See also* Lora C. Sykora, *The Law of Real Estate Brokerage Contracts: The Broker's Commission*, 14 La. L. Rev. 847 (1981). In this case there was testimony that the federal agency was not interested in purchasing the land until contacted by the Millers, and once the agency became interested, the Millers continually worked toward the sale and never abandoned those efforts.

Farm Credit's argument for reversal rests upon the express language of the listing agreement and the fact that the

Millers did not register Little Dixie Planting, but such an argument ignores the procuring cause doctrine. The Millers do not claim that they registered Little Dixie Planting. Rather they claim that they were the procuring cause of the entire transaction that resulted in the sale to the federal agency. *See Schnitt*, 244 Ark. at 385, 427 S.W.2d at 207. Showing a continuous course of conduct leading to the sale can mean that a broker is due a commission. *Hatchett*, 221 Ark. at 123, 252 S.W.2d at 79-80. A broker can be due a commission even if the first sale is to a third party, if it can be shown that the first sale is a straw transaction. *McKay & Co.*, 17 Ark. App. at 4, 701 S.W.2d at 394. There was substantial evidence that the Millers were the procuring cause of the federal agency's purchase of the land.

In a related argument, Farm Credit contends that the Millers' attorney, in closing argument, admitted the Millers did not register Little Dixie Planting and consequently there was not substantial evidence to support the verdict. Again, the argument is without merit because it ignores the procuring cause doctrine.

Farm Credit's final argument is that the trial court erred in refusing to answer an inquiry from the jury. The facts surrounding the argument are as follows. The jury was instructed about the procuring cause doctrine as follows: "You are instructed that Arkansas adheres to the general rule that a broker is entitled to his or her commission if he or she is the procuring cause of an eventual sale between the owner and purchaser." During deliberations, the jury foreman handed the bailiff a handwritten note requesting clarification. The note asked: "In the legal Instruction No. 6, the last part says 'an eventual sale concluded between owner and purchaser.' Is the *owner* interpreted to be the original owner or the owner at the time of the sale on the contract?" After a bench conference in which both parties stated their positions, the Court answered the inquiry by a note which said, "The Court is not permitted to respond to your inquiry."

Farm Credit contends that the trial court abused its discretion in refusing to answer. Section 16-64-115 of the Arkansas Code Annotated of 1987 allows a jury to request further instruction during deliberations by requesting the bailiff to conduct them into court. *Id.* Whether to give the additional information is a matter for the trial court's discretion. *National Bank of Com-*

merce v. *HCA*, 304 Ark. 55, 800 S.W.2d 694 (1990).

The trial court refused to answer the question because it would have been required to resort to speculation and conjecture to understand the exact question, and the jury's inquiry may have involved a question of fact about who should be considered the owner for the purpose of the procuring cause doctrine. The instruction was given without objection. The trial court's subsequent refusal to elaborate on the instruction under these circumstances did not amount to an abuse of discretion. There are no reversible errors on direct appeal, and, accordingly, we affirm.

The Millers filed a notice of cross-appeal and submitted briefs and arguments on cross-appeal, but made their arguments conditional on reversal of the direct appeal. The Millers state that their cross-appeal becomes moot if the case is affirmed on direct appeal. Since we affirm on direct appeal, we do not reach the conditional cross-appeal.

CORBIN, J., not participating.

Steven GRIMES *v.* NORTH AMERICAN FOUNDRY

93-722 872 S.W.2d 59

Supreme Court of Arkansas
Opinion delivered March 21, 1994

Walker Law Firm, by: *Eddie H. Walker, Jr.,* for appellant.

Davis, Cox & Wright, by: *Paul H. Taylor*, for appellee.

STEELE HAYS, Justice. This is a Workers' Compensation case. Claimant/appellant is Steven Grimes. Respondents/appellees are North American Foundry and its carrier. Grimes sustained a compensable injury to his back on August 20, 1987. He received temporary total disability for three months and returned to his employment at the foundry on November 23. Fifteen months later he was laid off along with other employees.

An administrative law judge determined that Grimes had sustained a seventeen percent permanent partial disability, seven percent of which was attributable to an impairment rating and ten

percent due to wage loss. Both parties appealed to the Commission, which remanded the case to the administrative law judge to determine whether Grimes was laid off as a result of his injury or for economic reasons.

The administrative law judge reinstated his previous award, at the same time finding that Grimes was laid off for economic reasons. North American Foundry appealed and the Commission, with one dissenting member, agreed with the seven percent anatomical impairment rating but held that Grimes had not suffered a loss in wage earning capacity attributable to his injury.

On appeal to the Court of Appeals, Grimes assigned three errors to the Commission: it erred in remanding the case to the administrative law judge for additional evidence, erred in denying benefits in excess of seven percent and erred in the interpretation of Ark. Code Ann. § 11-9-522 (1987). By a vote of three to three the Court of Appeals affirmed the Commission and, because of the tie vote, we granted Grimes's petition to review the decision of the Court of Appeals. We now affirm the Commission.

I

Citing *Gencorp Polymer Products* v. *Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (1991) and Ark. Code Ann. § 11-9-705(c)(1)(1987), Grimes argues the Commission abused its discretion in initially remanding the case to the administrative law judge for additional evidence when no request for a hearing for the introduction of additional evidence had been filed by either party. Grimes maintains the remand gave the appellee/respondent a second chance to present sufficient evidence to carry its burden of proof. Appellee points out in response that it was Grimes who benefitted from the remand because the burden of proof at that hearing rested on the claimant, not on the appellee.

In its ensuing opinion the Commission explained why the remand was warranted:

> It appears that the significance of why we remanded this case may have been lost. The issue is whether the claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity. The question of whether claimant is laid off for economic reasons or as a result of his compensable injury

> is extremely relevant in determining whether the claimant has met his burden of proof.
>
> * * * *
>
> Further, this is a very important factor because if the claimant had not been laid off for economic reasons, he would still be earning the same wages or greater wages than those he was earning at the time of the accident. This indicates that the claimant's *earning capacity* has not been diminished, as a result of his injury, but that he was simply laid off along with other employees of the company for economic reasons. While the claimant is currently working for D & N Machine making $5.25 or $5.50 per hour as opposed to $6.15 per hour he was earning when he was laid off, the claimant has offered insufficient proof that he took a lesser paying job because of his compensable injury.

Section 11-9-705(c)(1) provides that each party shall present all oral or documentary evidence at the initial hearing. It also provides that further hearings for additional evidence "will be granted only at the discretion of the hearing officer or the Commission." The statute also provides that a request for a hearing must show the substance of the evidence to be presented.

Undoubtedly this section was intended to inhibit piece-meal proceedings in workers' compensation cases, but without foreclosing the Commission's discretion to order additional hearings when appropriate. As it is clear from the statute that the Commission has the authority to do what was done in this case, the only question is, was it an abuse of discretion? Since there were sound reasons for the remand and it inured no less to the benefit of the claimant than to the respondent, we cannot say the Commission's discretion was abused.

Nor do we read the *Gencorp* case as mandating a reversal of the Commission's order of remand. The administrative law judge in *Gencorp* had "reserved for future determination" claimant's entitlement to temporary total disability and the Commission affirmed and adopted that ruling. Reversing, the Court of Appeals observed that it is the duty of the Commission to translate the evidence on all issues into findings of fact [*Sanyo Manufacturing Corporation* v. *Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984)],

whereas, reserving a material issue for future determination was not a finding of fact, but a declination to find a fact. Granted, the opinion takes note of § 11-9-705(c)(1), requiring that all evidence be presented at the initial hearing and that the claimant had been allowed "a second bite at the apple." However, the greater emphasis, we believe, was placed on the failure to make the finding of fact, as opposed to the order of remand, as evidenced by the comment:

> "disregarding its duty to find the facts in order to give the appellee [claimant] the benefit of the doubt is not within the Commission's authority," citing *Allen Canning Co.* v. *McReynolds*, 5 Ark. App. 78, 632 S.W.2d 450 (1982).

Gencorp, supra, at 195.

The intimations of that opinion, as we read it, are that the reversible error lay in the failure of the administrative law judge and the Commission to make an essential finding of fact and the reference to § 11-9-705(c)(1) was merely surplusage. Whether that is an accurate reading of *Gencorp* we leave to the Court of Appeals. It is enough to note that § 11-9-705(c)(1) specifically contemplates that while all evidence is to be offered at the initial hearing, the Commission and the administrative law judge have the discretionary power to permit the introduction of additional evidence. We cannot say the Commission exceeded the authority given it under the statute by ordering additional evidence in this instance.

II

Second, Grimes submits the Commission erred in denying disability benefits in excess of seven percent to the body as a whole. Steven Grimes is a thirty-six year old high school graduate with a long and productive record of employment. Prior to his injury Grimes had obtained 140 hours of community college training in machine shop, carpentry and automotive repair. He had no problems before but can no longer do carpentry or automotive work because of his injuries. Before being hired by the foundry Grimes worked for ten years for Whirlpool. At the time of his termination by the foundry Grimes was earning $6.15 per hour. As a machine operator he pushed large sand molds weighing eighty pounds or so and was on his feet all day.

Grimes suffered a herniated disc when he slipped and fell climbing onto a conveyer. He underwent a CAT scan which revealed a moderate bulging of the disc in the lumbar spine. An MRI showed a herniated disc, L5-S1, which was treated conservatively. On May 18, 1988, Grimes's physician described his condition as "asymptomatic at the present time." Grimes continued his employment at the foundry until he and others were terminated on February 9, 1989.

At the behest of the administrative law judge, Grimes was examined by an independent physician who diagnosed a herniated disc at the L5-S1 vertebrae level with decreased motion of the lumbar spine, but "no hard neurological symptoms other than a very mild decrease in the ability to extend the great toe which is not a functional deficit. Additional treatments, if Mr. Grimes feels this problem is too painful to live with, would be excision of the disc, and I would rate him with approximately thirteen percent total body impairment as he stands at this time."

Three or four weeks after his termination at the foundry Grimes found employment at D & N Machinery earning $4.00 an hour operating a computerized milling machine. Grimes testified his employers were aware of his condition and required no heavy lifting on his part.

In sum, Grimes submits that when his age, education, experience, physical impairment and other factors affecting his earning capacity are weighed, there is no substantial evidence on which to base an award of seven percent permanent partial disability.

Appellee cites countervailing evidence: Dr. Raby's testimony, taken on March 1, 1990, was the most recent evidence as to Grimes's condition. Dr. Raby allocated a rating of ten to thirteen percent, but he also conceded that it should be seven percent under the guidelines of the AMA. Also, the neurological examination of Dr. Reul, on January 19, 1990, contained the following:

> COMMENTS: He has a completely normal neurological examination, and EMG-NCV of left lower extremities is normal. MRI scan shows no significant pathology at this point and I would feel there is no neurological basis for his complaints.

According to appellee, the "most compelling evidence" that Grimes suffered no wage loss disability is the fact that he returned to work in November 1987 at the same wage rate and continued to earn at that level until his discharge in February 1989. There was no evidence that Grimes missed any work at D & N Machining because of his back, or that standing on his feet all day posed any difficulties for him.

[redacted] In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we weigh the evidence in the light most favorable to the findings of the Commission and affirm if there is substantial evidence to support such findings. *Cummings* v. *United Motor Exchange*, 236 Ark. 735, 368 S.W.2d 82 (1963). In so doing, we recognize that it is the prerogative of the Commission to determine issues of weight and credibility. *Bankston* v. *Prime West Corporation*, 271 Ark. App. 727, 610 S.W.2d 586 (1981). Beginning with *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961), the wage loss factor is defined, in contradistinction to the functional or anatomical loss, as the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Rooney & Travelers Insurance Co.* v. *Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978). Attendant factors include medical evidence, age, education, experience and other circumstances reasonably related to a claimant's earning power. *Perry* v. *Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1985).

[redacted] While there was evidence of substance in this record to support a finding greater than the rating awarded, we cannot say the finding of the Commission of seven percent of the body as a whole is not supported by substantial evidence.

III

The final point involves a procedural discrepancy which we think is effectually resolved by our disposition of the first point. Grimes asks us to hold the Commission erred in its interpretation of Ark. Code Ann. § 11-9-522(b) (1987). A part of that provision purports to disentitle an employee to benefits in excess of the percentage of permanent physical impairment so long as he or she has returned to work, or had a bona fide offer of work, at the same wage level.

On remand the administrative law judge, though reinstating

his original award of seven percent and ten percent, made a finding that Grimes was laid off from North American Foundry for economic reasons. When that opinion was appealed by the employer there was no cross-appeal by Grimes, prompting the Commission to declare the finding to be *res judicata.*

Grimes relies on *White* v. *Air Systems, Inc.*, 33 Ark. App. 56, 800 S.W.2d 726 (1990), as support for the premise that *res judicata* applies only to final orders and a timely appeal to the Commission from an administrative law judge by either side prevents such order from becoming final. Assuming, without deciding, that to be a correct interpretation of *White*, we do not read the Commission's opinion as relying on § 11-9-622(b) in denying wage loss benefits. Rather, it is evident the Commission relied on a variety of factors, including those mentioned under Point I, in rendering its opinion.

For the reasons stated, the order appealed from is affirmed.

DUDLEY and GLAZE, JJ., dissent.

TOM GLAZE, Justice, dissenting. I must disagree with the majority opinion. The administrative law judge fully tried Steven Grimes' claim, and on July 11, 1990, the judge found Grimes' anatomical impairment was seven percent and his loss in wage earning capacity to be ten percent. That decision was appealed to the Commission. On February 5, 1991, the Commission affirmed the judge's anatomical finding, but vacated the loss in earning capacity determination and instructed the judge to take additional evidence, particularly as to whether Grimes had been laid off by North American for economic reasons. In my view, the Commission's ruling to remand was an abuse of discretion.

The Commission justified its remand based on the premise that Grimes had failed to meet his burden of showing that he suffered a loss of earning capacity. Such is not the case.

Grimes' proof showed he suffered a moderately large disc herniation at the L5 S1 level, and experienced intermittent pain in his lower back and left extremity.[1] An independent examination

[1]Apparently this herniated disc problem changed to a bulging disc which was further described as disc degeneration. Grimes was also diagnosed as having structural damage to his disc.

by Dr. Steven Heim caused him to opine that Grimes suffered a thirteen percent impairment to the body as a whole. Physicians cautioned that Grimes should avoid bending, stooping and excessive lifting. Based on these and other findings and the fact that Grimes' subsequent or new employment paid over two dollars less than he had received at North American, the judge appropriately awarded a ten percent loss in earning capacity.

Although the administrative law judge's findings appear to amply support the ratings and award given Grimes, the Commission on appeal raised the issue as to whether Grimes had been laid off for economic reasons or as a result of his compensable injury. In its written opinion, the Commission explained that North American's reason for laying off Grimes was extremely relevant when determining whether he met his burden of proof as to the wage-loss issue. In my view, the Commission apparently failed to review the evidence presented to the administrative law judge on this very issue when the judge made his initial decision.

In this respect, Grimes testified that one of his physicians had told him to ask North American's personnel manager if Grimes could stop climbing to the top of the sand silo. He was allowed to stop this job responsibility, and this seemed to help his back. However, two weeks later, Grimes was laid off work, as were others at the company. He said that employees with less seniority than he, but who had no injuries, were kept on the job. Grimes related that he was never recalled to work even though he knew North American hired other people through a temporary service. He testified that, after North American terminated him, he applied for other employment, but on each occasion, he was asked if he had back problems, and he revealed that he did. None of these potential employers expressed an interest in hiring Grimes. A small business employer did eventually hire Grimes (at lower wages), but he did so without asking Grimes whether he had any prior back injury.

Obviously, the foregoing evidence was circumstantial but sufficient to support the administrative law judge's ten percent wage-loss ruling. Of course, the judge (or the Commission) could have just as easily disbelieved Grimes' assertion that he was terminated because of his injury, but Grimes' credibility has never been the issue. Significantly, North American made no attempt

to rebut Grimes' proof on the earning capacity issue, but the Commission absolved North American of its failure in this respect by finding the layoff/wage-loss issue "had not been contemplated" by the parties. The Commission, however, offered no explanation for such a supposition, and the record clearly fails to support it.

As previously discussed, Grimes certainly addressed the lay off/loss of earning capacity issue at the initial hearing. And North American was well aware (or should have been) that this wage-loss issue would be considered by the law judge since it is a factor set out and required to be addressed under Ark. Code Ann. § 11-9-522(b) (Supp. 1993). That specific provision provides as follows:

> "[S]o long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence."

Here, Grimes met his burden under § 11-9-522(b), and while it had the opportunity to rebut Grimes' proof at the initial hearing, North American simply failed to do so. The Commission gave North American a second opportunity to rebut Grimes' evidence even though the court of appeals has forbidden such a "second bite at the apple" by its holding in *Gencorp Polymer Products* v. *Landers*, 36 Ark. App. 190, 830 S.W.2d 475 (1991). No one suggests the *Landers* decision should be overturned.

For the foregoing reasons, I would reverse the Commission's decision with directions to reinstate the loss in earning capacity benefit awarded Grimes by the administrative law judge.

DUDLEY, J., joins this opinion.

Reginald JACKSON *v.* STATE of Arkansas

CR 93-1235 871 S.W.2d 591

Supreme Court of Arkansas
Opinion delivered March 21, 1994

Bill Luppen, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. This is an appeal from a conviction for aggravated robbery. The only issue is the sufficiency of the evidence. We affirm the trial court.

Reginald Jackson, appellant, was arrested for an aggravated robbery that occurred on January 30, 1993, at the automatic teller machine (ATM) of First Commercial Bank at Fillmore and Cantrell in Little Rock. A jury convicted Jackson of aggravated robbery and theft of property, imposing consecutive sentences of thirty-four years and ten years in the Department of Correction.

The victim testified Jackson had approached her from behind and grabbed her around the waist, ordering her to give him money

from the machine. As she was trying to get the money out Jackson showed her a knife and told her, "Don't mess up." She testified he continued to hold her around the waist as she worked with the machine and although she could not see it, she felt what she thought was the knife at her back. She positively identified Jackson as the robber.

On appeal the only argument is the sufficiency of the evidence for aggravated robbery as opposed to simple robbery. Jackson testified in his own defense, admitting the robbery and being in possession of a knife at the time of the incident, but maintaining that he did not use the knife in the robbery.

A challenge to the sufficiency of the evidence must be made by a directed verdict motion. A.R.Cr.P. 36.21(b). Defense counsel moved for a directed verdict at the end of the state's case, which was denied, but failed to renew the motion at the end of all the evidence as required by Rule 36.21. *Easter* v. *State*, 306 Ark. 452, 815 S.W.2d 924 (1991). Because appellant did not renew his directed verdict motion the issue is not preserved for appeal. *Henry* v. *State*, 309 Ark. 1, 828 S.W.2d 346 (1992).

Jackson argues however that his directed verdict motion was not waived. He concedes he did not renew the motion at the close of all the evidence but points out that he requested a jury instruction for the lesser included offense of simple robbery, which was granted. Jackson argues that this request "resuscitated" his directed verdict motion.

We view the argument as a request for a directed verdict by implication, for his reasoning is that if he requested an instruction for a lesser offense, implied in that request is the contention there was not sufficient evidence for the charge of aggravated robbery. Jackson cites two cases: *Eskew* v. *State*, 273 Ark. 490, 621 S.W.2d 221 (1991) and *Lee* v. *State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989). Neither case is supportive. Rather, as to the issue of an implied motion for a directed verdict, our rules are settled. We have held that A.R.Cr.P. 36.21 is to be strictly construed. *Easter* v. *State, supra.* In accordance with such requirement we have indicated our unwillingness to consider challenges to the sufficiency of the evidence in a case in which the defense made, "the usual motions." *Middleton* v. *State*, 311 Ark. 307,

842 S.W. 2d 842 (1992). We stated in *Middleton* in declining to recognize that phrase as a proper directed verdict motion:

> 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" will not suffice. Rule 36.21(b) is strictly construed.

We decline to hold, as appellant would have us do, that a motion for a directed verdict may be made by implication. Only a specific motion that apprises the trial court of the particular action requested will be recognized. This is true of all motions and objections and we have consistently so held. *See* e.g. *Taylor* v. *State*, 299 Ark. 123, 771 S.W.2d 742 (1989).

Affirmed.

CORBIN, J., not participating.

W.L. SMITH *v.* STATE of Arkansas

CR 93-758 872 S.W.2d 843

Supreme Court of Arkansas
Opinion delivered March 21, 1994
[Supplemental Opinion on Denial of Rehearing
April 18, 1994.*]

*Corbin, J., not participating.

The Law Offices of Greenhaw & Greenhaw, by: *John F. Greenhaw*, for appellant.

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

STEELE HAYS, Justice. Appellant W.L. Smith was found guilty by a jury of four counts of rape. He was sentenced to forty years imprisonment on each count. Two of the counts are to be served consecutively and the two remaining counts concurrently, for a total of eighty years in the Department of Correction. On appeal he raises three points for reversal: (1) the trial court erred in

allowing evidence of prior offenses to be admitted, thus causing the defendant to suffer substantial prejudice; (2) the trial court erred when it deviated from established trial procedures by ordering counsel to make closing arguments prior to jury instructions being given; and (3) the trial court erred in allowing extrinsic evidence of prior misconduct, in the form of a police report, to be admitted into evidence. Finding no error, we affirm the judgment of conviction.

The appellant was charged by information with five counts of rape in violation of Ark. Code Ann. § 5-14-103 (Repl. 1993) for engaging in sexual intercourse or deviate sexual activity with his stepdaughter Amy Honey, who was less than fourteen years of age, on or about April 10, 11, 12, 13, and 14, 1990. At trial, the state's case was based principally upon the testimony of the thirteen-year-old victim.

Janet Smith, the victim's mother, was in the hospital for approximately one week beginning on April 9, 1990. Her daughter testified she had been sexually penetrated by the appellant on four occasions during that period of time. In addition, Dr. Hoy Spear, a licensed physician, testified that he examined the victim on September 11, 1990. In his opinion, she had been subjected to vaginal and rectal intercourse. Ms. Tammy Bracewell, the victim's aunt, and Dr. Spear both testified that the child had stated appellant had intercourse with her.

Since the child testified only to four incidents, the trial court directed a verdict in favor of the appellant on one count of rape. In his defense on the four remaining counts, the appellant denied the allegations, challenged the veracity of the victim and contended he was out of town at the time of one of the alleged incidents. The testimony indicated the appellant was a truck driver and he left for Moberly, Missouri on April 10, 1990. According to the testimony, the trip from the family home in Grubbs, Arkansas (Jackson County) to Moberly takes approximately 24 hours. The jury returned a verdict of guilty on four counts of rape.

I.

The appellant first contends the trial court erred in allowing evidence of prior offenses to be admitted. On direct examination of Leonard Pickel, a witness for the defense, the following

exchange took place between counsel for the defense and the witness:

> Q. Now, Mr. Pickel, you testified that you've known W.L. Smith for over ten years?
>
> A. Yes, sir.
>
> Q. Based on your knowledge of him, do you feel it is possible that he could've repeatedly raped his daughter, who you also know, the five nights that Janet was in the hospital in April of 1990.
>
> A. In my opinion, I would say no, I don't think he would have repeatedly raped her during that period of time based on knowing him.

Prior to cross-examining Mr. Pickel, the state submitted Mr. Pickel had testified regarding the character of the accused and requested they be allowed to cross-examine the witness accordingly. The appellant objected to questions concerning prior charges; however, the trial court overruled the objection. Consequently, during cross-examination, the state asked Mr. Pickel the following questions:

> Have you heard, Sir, that on August 29th, 1987, the defendant, W.L. Smith, did play with the breast and lower part of the body of a twelve year old girl named Jennifer Stinley and did continue playing with her until she was able to break away from him?
>
> Have you heard, Sir, that on the 26th day of May, 1989, W.L. Smith raped a lady named Deanna Stinley [Stilley] by forcible compulsion in a semi-truck that was being, that Mr. Smith was driving?

Mr. Pickel acknowledged that he had heard of both accusations.

A.R.E. Rule 404(a) provides in pertinent part:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait

> of his character offered by an accused, or *by the prosecution to rebut the same*; . . .

(Emphasis supplied.)

Once the admissibility of character evidence is established under Rule 404, Rule 405 establishes the methods of proof which may be utilized. A.R.E. Rule 405, Methods of proving character, provides in pertinent part:

> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. *On cross-examination, inquiry is allowable into relevant specific instances of conduct.*

(Emphasis supplied.)

Mr. Pickel was asked if, based upon his knowledge of the appellant, he thought he could have committed the crimes with which he was charged. The only purpose the questions could have had was to show the appellant was a person not disposed to commit the alleged crimes. Therefore, he was a character witness pursuant to Rule 404.

We have recognized that by producing a character witness the defendant opens the door to evidence which might otherwise have been inadmissible. *Wilburn* v. *State*, 289 Ark. 224, 711 S.W.2d 760 (1986). Rule 405 clearly provides that in cross-examining a defendant's character witness, it is permissible to inquire into the witness' knowledge of specific instances of conduct. *Morris* v. *State*, 300 Ark. 340, 779 S.W.2d 526 (1989); *Reel* v. *State*, 288 Ark. 189, 702 S.W.2d 809 (1986). Such cross-examination tests the witness's knowledge of the defendant's reputation and that, in turn, may go to the weight to be given his opinion. *Morris, supra.* Further, Rule 405 places no limit, other than relevancy, on the kind of instances of misconduct with respect to which cross-examination may occur. *Reel, supra; Spohn* v. *State*, 310 Ark. 500, 837 S.W.2d 873 (1992).

We find the trial court did not commit error by allowing inquiry into relevant specific instances of conduct during cross-examination of Mr. Pickel. Whether Mr. Pickel was aware

of the two prior incidents tested his knowledge of the defendant's character and the weight to be given to his opinion.

Also, we have recognized that an instruction limiting the use of this evidence would assist the jury in placing the testimony in its proper light. *Reel, supra.* We noted the instruction informed the jury that they should consider the reference to the conviction during cross-examination as evidence going only to the extent of the witness's knowledge of the appellant and the weight to be given to his opinion of the defendant's character. Thus, the appellant would have been entitled to an instruction limiting the jury's consideration of the testimony. However, he failed to request the instruction.

II.

Second, Smith contends the trial court erred when it deviated from established trial procedure by ordering counsel to make closing arguments prior to jury instructions being given. The appellant submits his defense counsel lost the opportunity to stress the options available to the jury concerning lesser included offenses because the closing arguments were presented prior to jury instructions being given. In fact, at the close of all of the evidence, the defense counsel had not prepared proposed instructions. Rather than taking additional time to allow for preparation of the lesser included offense instructions, the trial court suggested making closing arguments and then waiting until the following morning to instruct the jury. Both the state and the counsel for the defense immediately agreed with the trial court. Subsequently, the appellant was questioned and agreed to make the closing arguments prior to instructing the jury.

It is well established that an appellant cannot complain when he agreed with the trial court's ruling. *Scroggins* v. *State*, 312 Ark. 106, 848 S.W.2d 400 (1993). Further, we have repeatedly stated that we will not consider an issue raised for the first time on appeal. *Walker* v. *State*, 314 Ark. 628, 864 S.W.2d 230 (1993).

III.

Finally, the appellant submits the trial court erred in admitting extrinsic evidence of prior misconduct. During direct examination of Mr. Smith, the defense counsel inquired into an incident

involving the alleged fondling of a twelve year old girl. The following exchange took place between the appellant and defense counsel:

> Q. Did you ever have a trial?
>
> A. No, sir, we didn't.
>
> Q. Is that because you didn't do it?
>
> A. That's right.

During cross-examination of the appellant, the state introduced the incident report from the Craighead County Sheriff's Department. The report indicated that the parents did not want to prosecute because the child refused to testify.

The appellant submits the evidence was offered to prove the accused was a man of bad character, addicted to crime. In support of his argument, he relies upon A.R.E. Rule 405 which only allows inquiry into specific instances of conduct during cross-examination. We disagree.

The Arkansas Rules of Evidence do not provide a rule on impeachment by contradiction. *Garst* v. *Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987). We have held that a witness could not be impeached by extrinsic evidence on collateral matters brought out in *cross-examination*. Id. That limitation, however, does not apply to answers given on direct examination. When a witness testifies on direct examination that he has not committed collateral acts of misconduct, he opens the door for impeachment by contradiction and his testimony may be contradicted by extrinsic evidence. *See McFadden* v. *State*, 290 Ark. 177, 717 S.W.2d 812 (1986); *Hendrik* v. *State*, 40 Ark. App. 52, 842 S.W.2d 443 (1992).

In *McFadden*, we cited *Walder* v. *United States*, 347 U.S. 62 (1954), where the Supreme Court held it was not error to admit evidence that an accused had committed another crime to rebut testimony in which the accused said he had not done it. In *Walder*, the other crime was one with which the accused had been charged, but the charge had been dropped when it was ruled that the search and seizure leading to the charge was illegal. We noted it would be a perversion of Rules 403 and 404(b) to say the state could not rebut testimony of an accused, given on direct examination,

about his not having committed other crimes. *McFadden, supra.*

Once again, we note the appellant would have been entitled to an instruction limiting the jury's consideration of the testimony in question to the issue of appellant's veracity. *McFadden, supra.* However, he sought no such instruction.

Affirmed.

CORBIN, J., not participating.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
APRIL 18, 1994

Greenhaw & Greenhaw, by: *John Greenhaw*, for appellant.

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

STEELE HAYS, Justice. Appellant's petition for rehearing insists that our opinion of March 21, 1994, affirming the judgment entered on his conviction of four counts of rape failed to address his contention that A.R.E. Rule 405 is governed by Rule 403 and, hence, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

We discussed the point at some length in part I, though our opinion may not have been explicit. Settled law dating well back in the common law (and now incorporated in A.R.E. Rules 404 and 405) provides that when an accused offers character evi-

dence in his own behalf, the character witness is subject to cross-examination as to his or her knowledge of relevant specific instances of conduct by the accused. That is precisely what occurred in this trial, as our opinion recounts, and when that occurs, cross-examination as to specific instances of conduct is allowed irrespective of prejudice. *Clark* v. *State*, 292 Ark. 69, 727 S.W.2d 853 (1986); *Lowe* v. *State*, 264 Ark. 205, 570 S.W.2d 253 (1978); *Weaver* v. *State*, 83 Ark. 119, 102 S.W. 713 (1907). In *Michelson* v. *United States*, 335 U.S. 469 (1948), the Supreme Court addressed the right of the prosecution to cross-examine a defendant's character witness:

> . . .the price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.

In *United States* v. *Bright,* 588 F.2d 504 (1979), *cert denied*, 440 U.S. 972 (1979), the Court of Appeals, Fifth Circuit, specifically rejected the argument that Rule 403 is applicable to the cross-examination of character witnesses. *And see* 1A Wigmore, *Evidence* § 58 (Tillers rev. 1983).

Rehearing denied.

CORBIN, J., not participating.

Joseph Michael WYNN *v.* STATE of Arkansas

CR 93-1263 871 S.W.2d 593

Supreme Court of Arkansas
Opinion delivered March 21, 1994

Mary M. Rawlins, for appellant.

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

DAVID NEWBERN, Justice. Joseph Michael Wynn appeals from

his convictions of felony battery and aggravated assault. He states as his first point for reversal the failure of the Trial Court to grant his motion for severance of the offenses. Due to his failure to renew the motion at the close of the evidence the point is not reviewable on appeal. Mr. Wynn also argues the Trial Court erred by denying his motion to suppress videotaped expert testimony. We are unable to review this point in light of Mr. Wynn's failure to abstract the testimony. The conviction is affirmed.

On December 12, 1992, Mr. Wynn and his wife transported their infant son, Jonathan Wynn, to a hospital for treatment of a broken leg. Mr. Wynn was arrested and charged with one count of felony battery and one count of felony assault. After first saying he had fallen on the child while carrying him Mr. Wynn changed his story. In his written statement, Mr. Wynn said he broke Jonathan's leg when it caught in the crib rails as he jerked the child out of the crib. In a later statement, however, he admitted he struck Jonathan on the leg and caused the fracture. He also admitted he had struck the infant on the face, head, and ribs on previous occasions, had tossed him in his (Wynn's) bed from a distance of five or six feet, had pushed on his chest until he cried several times, and had struck Jonathan on the head with the edge of his bottle.

After medical evaluation confirmed that the infant had been battered on prior occasions, the information was amended to add two more counts of felony battery. The examining doctors found evidence of prior broken ribs, a broken bone in the child's hand, and an excess amount of fluid on the child's brain which indicated a concussion.

Prior to trial, Mr. Wynn moved that the charges be severed for trial on the ground that they were allegations of distinct and discrete offenses and had been joined solely because of their similarity to each other. The Trial Court denied the motion, pointing out that the same witnesses would testify, the offenses allegedly occurred in the same home, by the same defendant, to the same victim, and amounted to a continuing course of conduct and thus should be tried together.

Mr. Wynn also objected to videotaped expert testimony in which witnesses used the terms, "child abuse," "battered child

syndrome," or "abuse of a child" on the ground that the probative value was substantially outweighed by its prejudicial effect. Ark. R. Evid. 403. The Trial Court overruled the objection.

During the trial, Mr. Wynn specifically renewed his objection to the videotaped expert testimony prior to its being shown to the jury. The record contains the following reporter's insertion:

> (AT THE CLOSE OF THE CASE, MRS. RAWLINS [Mr. Wynn's counsel] RENEWS HER MOTION FOR ACQUITTAL AND RENEWS ALL OBJECTIONS AND MADE THROUGHOUT THE COURSE OF THE CASE . . . .)

The word "AND" indicates either an inadvertent insertion or perhaps an ellipsis; we cannot tell which.

1. Failure to renew motion for severance

According to Ark. R. Crim. P. 22.1(b), "[i]f a defendant's pretrial motion for severance was overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Severance is waived by failure to renew the motion." Failure to renew a motion for severance in accordance with the Rule constitutes a waiver of the objection. *See Brown* v. *State*, 315 Ark. 466, 869 S.W.2d 9 (1994).

Even if a general renewal of all "objections" could be said to constitute renewal of all motions, it does not make clear to the court the grounds for severance. At the outset of a criminal trial, the Trial Court has before it only allegations. It is possible in some instances to determine at that juncture that a severance is required. At the close of all the evidence, however, the Trial Court knows the extent to which the evidence demonstrates the reason for joinder of the charges for trial. The Trial Court is then in a far better position to know if the charges should have been severed for trial because they were joined "solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan." Ark. R. Crim. P. 22.2(a). It is for that reason that the Rule requires renewal of the motion at the close of all the evidence. Absent renewal of the motion for severance, the objection to joining the charges for trial is waived. Ark. R. Crim. P. 22.1(b); *Lunon* v. *State*, 264 Ark. 188, 569 S.W.2d 663 (1978). As the appellant, it is Mr. Wynn's duty to see

to it that the record supports his point of appeal. *Cox* v. *State*, 299 Ark. 312, 772 S.W.2d 336 (1989). We find in the record no renewal of the motion to sever.

2. *Failure to abstract testimony*

The appellant in a felony criminal appeal has "the duty. . .to abstract such parts of the record. . .as are material to the points to be argued in the appellant's brief." Ark. Sup. Ct. R. 4-3(g). Mr. Wynn has not abstracted any expert testimony containing the terms "child abuse," "child abuse syndrome," or "abuse of a child," although he refers to such testimony in the argument portion of his brief.

The record on appeal is confined to the abstract and can not be contradicted or supplemented by statements made in the argument portions of the briefs. *See Richardson* v. *State*, 292 Ark. 140, 728 S.W.2d 189 (1987). Further, scattered transcript references throughout an argument are not a substitute for a proper abstract. *See Watson* v. *State*, 313 Ark. 304, 854 S.W.2d 332 (1993). This Court will not explore the record for prejudicial error except in death or life imprisonment cases. *Id.* We decline to address the argument on this point.

Affirmed.

CORBIN, J., not participating.

Ledora BLACK *v.* WAL-MART STORES, INC.
d/b/a Sam's Wholesale Club

93-1121 872 S.W.2d 56

Supreme Court of Arkansas
Opinion delivered March 21, 1994

Page & Thrailkill, P.A., by: *Patricia A. Page*, for appellant.

Kenneth Breckenridge, P.A., by: *Kenneth Breckenridge*, for appellee.

TOM GLAZE, Justice. This is a slip and fall case. On February 21, 1992, the appellant, Ledora Black, was a customer in a Wal-Mart store, Sam's Wholesale Club #8143 located in Fort Smith, when she slipped and fell necessitating surgery to her

knee. Mrs. Black filed suit against Wal-Mart claiming her fall and resulting injury were due to Sam's negligence in allowing "a slick and slippery" area of the floor to remain.

Following Mrs. Black's deposition, Wal-Mart filed a motion for summary judgment citing the fact that Mrs. Black could produce no evidence that there was any substance on the floor which would have caused her fall or that the floor was slick or that Wal-Mart was negligent in any manner. On August 2, 1993, the trial court granted the motion for summary judgment, finding no genuine issues of material fact. Mrs. Black appeals from that order.

A property owner has a general duty to exercise ordinary care to maintain the premises in a reasonably safe condition for the benefit of invitees. In order to prevail in a slip and fall case, a plaintiff must show either (1) the presence of a substance on the premises was the result of the defendant's negligence, or (2) the substance had been on the floor for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. And the mere fact a person slips and falls does not give rise to an inference of negligence. *House* v. *Wal-Mart Stores, Inc.*, 316 Ark. 221, 872 S.W.2d 52 (1994); *Mankey* v. *Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993); *Sanders* v. *Banks*, 309 Ark. 375, 830 S.W.2d 861 (1992); *Boykin* v. *Mr. Tidy Car Wash, Inc.*, 294 Ark. 182, 741 S.W.2d 270 (1987).

Here, Mrs. Black does not allege that a foreign substance was on the floor, but only that the floor was slippery. In her deposition, Mrs. Black stated the following:

> I did not see any water, coke or substance on the floor because I was hurting so bad. I never thought it would be on the floor, all I know it was real slick. I think they had just waxed it. It was just real shiny and slick. They had just waxed it and there was no traffic, no walking on it yet. I know they had just waxed it because you could tell, it was real shiny. I'm not contending there was any water or substance on the floor that I saw, I was out of it almost I was hurting so bad.

While Mrs. Black was accompanied to the store by two companions, neither of them provided any testimony or other infor-

mation in this case, nor did Mrs. Black produce any other witnesses that could support her allegations.

In support of its motion for summary judgment, Wal-Mart submitted two affidavits in addition to Mrs. Black's deposition. Ken Redding, an employee of Sam's who was responsible for "safety sweeps," attested he had conducted a "safety sweep" of the area thirty minutes prior to Mrs. Black's fall, he found no foreign substance on the floor at that time, and no one reported such a substance on the floor where Mrs. Black fell either before or after her fall. Further, Redding stated that the floor is concrete and "does not contain any wax on the floor." Beverly Geren, also an employee of Sam's, stated in her affidavit that she was standing approximately twenty feet away and facing toward Mrs. Black when Geren saw the accident occur. Geren attested that Mrs. Black appeared to trip over her own feet and that she, Geren, was unaware of any substance on the floor.

For reversal, Mrs. Black argues that her deposition creates direct and circumstantial evidence supporting a prima facie case of negligence against Wal-Mart, and that a jury could find the waxed or otherwise treated floor resulted in a dangerous condition due to its slipperiness. For support, Mrs. Black cites *Nat'l. Credit Corp.* v. *Ritchey*, 252 Ark. 106, 477 S.W.2d 488 (1972), where this court adopted the California view:

> If wax, or . . . both wax and soft soap, are applied to the floor, it must be in such manner as to afford reasonably safe conditions for the proprietor's invitees, and if such compounds cannot be used on a particular type of floor material without violation of the duty to exercise ordinary care for the safety of invitees, by reason of the dangerous conditions they create, they should not be used at all. Of course slipperiness is an elastic term. From the fact that a floor is slippery it does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe. This is a question of fact.

Id. at 110 (citation omitted). In *Nat'l. Credit Corp.*, this court reversed the lower court's grant of summary judgment where the facts showed the floor had been cleaned with soap and water.

While the floor on which the plaintiff had fallen had not been waxed, it had been buffed with the same buffer used on an adjacent floor that was waxed.

In *J.M. Mulligan's Grille, Inc.* v. *Aultman*, 300 Ark. 544, 780 S.W.2d 554 (1989), the plaintiff fell on a floor she described as "slippery." While the plaintiff did not contend a foreign substance was on the floor, she argued instead that the floor was inherently and unreasonably slippery, and cited *Nat'l. Credit Corp.* as support. Rejecting her argument, this court distinguished the facts in the two cases and noted our decision in *Nat'l. Credit Corp.* was based on evidence that both soap and wax were used on the floor, plus there was evidence the floor had been buffed. On the other hand in *Mulligan's*, there was no evidence that wax or any other material had been applied to the floor.

The present case is like the situation in *Mulligan's*. Here, Wal-Mart's proof showed that the store's floor was concrete, had no foreign substance on it, nor did the floor contain any wax. Wal-Mart also showed that Mrs. Black tripped over her own feet. Mrs. Black, on the other hand, offered no evidence that wax or any other substance had been applied to the floor, but instead she made only the conjectural statement, "I know they had just waxed it because you could tell, it was real shiny." As this court stated in *Mulligan's*, in virtually every case involving a fall, the plaintiff will describe a floor as slick or slippery, and this alone is not sufficient to support a case for negligence. *J. M. Mulligan's Grille, Inc.*, 300 Ark. at 546, 780 S.W.2d at 555; *see also McDonald* v. *Eubanks*, 292 Ark. 533, 731 S.W.2d 769 (1987).

For the foregoing reasons, we affirm the trial court's granting of summary judgment.

DUDLEY and CORBIN, JJ., not participating. NEWBERN, J., dissents.

DAVID NEWBERN, Justice, dissenting. Ms. Black's deposition states with respect to the floor on which she allegedly slipped: "They had just waxed it . . . . I know they had just waxed it because you could tell, it was real shiny." In response, a store employee testified the concrete floor "does not contain any wax. . . ." That creates an issue of fact, and a summary judgment should not have been entered. The majority opinion engages in

weighing Ms. Black's deposition testimony against that presented by Wal-Mart. That should not be done at this stage of the case.

Ms. Black's allegation is that the floor had been made unsafely slippery; her testimony is that the condition of the floor was created because it had just been waxed. In *National Credit Corp.* v. *Ritchey*, 252 Ark. 106, 477 S.W.2d 488 (1972), we stated the obvious, *i.e.*, if wax is applied to the floor, it must be in such manner as to afford reasonably safe conditions for invitees. We held summary judgment should not have been granted in favor of the property owner because the matter of whether a waxed floor is reasonably safe presented a question of fact. The majority opinion attempts to distinguish the evidence in that case from that now before us. In my view, again, Ms. Black's observation that the floor had just been waxed is sufficient to raise a factual issue on that point.

The majority opinion relies on *J.M. Mulligan's Grille* v. *Aultman*, 300 Ark. 544, 780 S.W.2d 554 (1989), which is distinguishable. Ms. Aultman's contention was not that the property owner had done anything to heighten the slipperiness of the floor on which she was injured. It was, rather, that the floor was composed of a material which was too slick. The only evidence she presented was her testimony that the floor was "slippery." We noted that she offered no evidence that the materials of which the floor were constructed were in any way defective. A trial was held resulting in a verdict for the plaintiff. We held the Trial Court should have granted a directed verdict for the property owner as the evidence was insufficient to have gone to the jury.

The question whether Ms. Black's evidence will be sufficient to go to a jury is not before us. The question before us is whether it was error for the Trial Court to hold there was "no genuine issue as to any material fact." Ark. R. Civ. P. 56(c). It was error.

I respectfully dissent.

Michael JOHNINSON *v.*
Mark STODOLA, Prosecuting Attorney

93-1062 872 S.W.2d 374

Supreme Court of Arkansas
Opinion delivered March 21, 1994

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

Winston Bryant, Att'y Gen., by: *Cathy Dearden*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Michael Johninson was charged with first degree murder. He contended that five witnesses to that murder were in the same gang as the victim of the shooting. On December 10, 1992, his attorney made a Freedom of Information request pursuant to Ark. Code Ann. § 25-19-101, *et seq.* (Repl. 1992), to the prosecutor, appellee Mark Stodola, for access to the prosecutor's files or computer compilations to determine gang membership. Counsel contended that he only wanted to know gang membership and was not interested in information on gang activity. The prosecutor denied the request. Johninson then appealed the denial to circuit court under Ark. Code Ann. § 25-19-107(a) (Repl. 1992). On March 1, 1993, after hearing testimony from the Chief Investigator of the prosecutor's office, Skipper Polk, about the office's gang affiliation files, the circuit court denied the motion for access on the basis that it was exempt from the FOIA as part of an undisclosed investigation by a law enforcement agency into suspected criminal activity. Ark. Code Ann. § 25-19-105(b)(6) (Repl. 1992). The court declined to review the file at issue.

The issue raised by Johninson before this court has two prongs: 1) whether the circuit court erred in refusing to order disclosure of information pertaining to gang memberships of the five witnesses, and 2) whether the circuit court should have per-

formed an *in camera* review of the gang affiliation files before making its decision. We believe that the second prong of Johninson's argument has merit.

Our Freedom of Information Act provides for the disclosure of public records which are defined as including writings and data compilations in any form. Ark. Code Ann. §§ 25-19-103(1), 25-19-105(a) (Repl. 1992); *see City of Fayetteville* v. *Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990). Our policy regarding the FOIA has been enunciated clearly in our case law — we will interpret it liberally to accomplish the purpose of promoting free access to public information. *Depoyster* v. *Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989); *City of Fayetteville* v. *Rose*, 294 Ark. 468, 743 S.W.2d 817 (1988); *Arkansas Gazette Co.* v. *Southern State College*, 273 Ark. 248, 620 S.W.2d 258 (1981).

There are exemptions to the FOIA, one of which directly relates to this case:

> (b) It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter:
>
> . . . .
>
> (6) Undisclosed investigations by law enforcement agencies of suspected criminal activity.

Ark. Code Ann. § 25-19-105(b)(6) (Repl. 1992). Exemptions to the FOIA are to be construed narrowly. *Young* v. *Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992); *Hengel* v. *City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991); *Legislative Joint Auditing Comm.* v. *Woosley*, 291 Ark. 89, 722 S.W.2d 581 (1987).

One commentator on the FOIA in Arkansas has this to say about the criminal investigation exemption:

> The need for subsection (b)(6), the basic exemption, is obvious; for example, disclosure of such records would hamper the police in investigating a crime before formal charges had been filed and could be detrimental to persons under investigation but subsequently exonerated of all wrongdoing. Despite these and other compelling reasons for the exemption, its precise meaning is hardly clear.

J. Watkins, Arkansas Freedom of Information Act, p. 86 (2d ed. 1994). In discussing what constitutes an investigation, we cited authority in *Hengel* v. *City of Pine Bluff, supra*, to the effect that investigatory records are records dealing with the detection of crime. *See Caledonian Record Pub. Co.* v. *Walton*, 154 Vt. 15, 573 A.2d 296 (1990). We have also held that an undisclosed investigation includes those that are open and ongoing. *Martin* v. *Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990).

In the case at hand, the evidence of what information concerning gang affiliation was kept by the prosecutor came from Chief Investigator Polk. Polk testified that the prosecutor participates in a group with other law enforcement agencies, including the Arkansas State Police, called the Pulaski County Gang Enforcement Network. Information on gang activity is exchanged among members of the group and kept in a variety of forms including paper and computer data. That information was described in the following colloquy:

> PROSECUTOR: Okay. The information that is contained down in this area of our office, would it be fair to classify it as raw intelligence?
>
> POLK: Yes, sir, unsubstantiated in most occasions.
>
> PROSECUTOR: Okay. Are there references to informants?
>
> POLK: Yes.
>
> PROSECUTOR: Are there conclusions stated by law enforcement officers; just, "I believe X"?
>
> POLK: Yes, sir.
>
> PROSECUTOR: Are you concerned or do you have any concerns with the disclosure of any of this information? And if so, would you please elaborate.
>
> POLK: Yes, sir. Your Honor, if I may, the information that we have is part of an ongoing investigation that we, along with the other major law enforcement agencies, started six months ago on gangs in Pulaski County. Everyday there is some sort of intelligence information developed or followed up on in regards to this. It's an ongoing thing

> that we will probably be doing from now on for at least in my foreseeable immediate future.
>
> That information, a lot of it is unsubstantiated. I think some people would be put at risk if names were divulged. I think there may be some embarrassment publicly for some people that may — somebody may say that Joe Blow is a gang member and that's all that somebody may say with no back up or, in fact, there may be other evidence that indicates they are not gang members. So we don't know. We don't know what kind of information it is.

Polk added that there were no individual files on the potential witnesses named by Johninson, although on cross examination he testified that he "could probably" search the files for individual names.

At the conclusion of Polk's testimony, the circuit court stated that the gang investigation described by Polk "is as much a part of a law enforcement investigation as any criminal case out there." The court was then asked by Johninson's counsel to reconsider an *in camera* review of the files for information about the five witnesses. The court refused based on what it had heard from Investigator Polk.

We conclude that the circuit court must review the relevant files *in camera* in order to make its decision that this exemption applies across the board to those files. While Investigator Polk presented an overview of the Pulaski County Gang Enforcement Network and the investigative aspect of the files involved as well as the dangers that might result from disclosure, the scope of those files and what information comprised them was left somewhat vague and undefined. It was also less than clear whether the names of the five witnesses and their status could be pulled from the files, and if so, whether this would in any way impair or frustrate an ongoing investigation. It is incumbent on the court to determine whether the exemption applies, and this can be done only by reviewing the relevant information in question.

We do not intend to send a signal by this opinion that the circuit court should release any information to Johninson. That is a matter to be decided by the circuit court after its review. We

hold that in order to invoke a narrowly construed exemption under the FOIA, the circuit court must peruse the pertinent data in question in order to make an informed decision.

Remanded.

HAYS, J., would affirm.

CORBIN, J., not participating.

Dennis POGUE *v.* STATE of Arkansas

CR 93-1097 872 S.W.2d 387

Supreme Court of Arkansas
Opinion delivered March 21, 1994

[redacted]

Garnet E. Norwood and *Ronald Marc Chaufty*, for appellant.

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

ROBERT L. BROWN, Justice. This case concerns post-conviction relief sought by the appellant Dennis Pogue following his conviction for delivery of a controlled substance. Specifically, Pogue was found guilty on November 7, 1990 of delivering crystal methamphetamine, and sentenced to ten years imprisonment. He appealed his judgment of conviction to the Arkansas Court of Appeals, and it was affirmed on March 4, 1992. On May 1, 1992, Pogue filed his motion for post-conviction relief and premised his grounds on allegations of ineffective assistance of counsel. The circuit court denied the motion on March 11, 1993. We affirm.

The State initially questions the timeliness of the appeal from the denial of the motion. We conclude that it was timely filed. When Pogue was convicted in November of 1990, an earlier version of Ark. R. Crim. P. 36.4 was in effect which provided for an appeal consolidated with any claim of ineffectiveness of counsel to be filed within 30 days of judgment. Effective January 1, 1991, we amended Rule 36.4 and reinstated a revised form of Ark. R. Crim. P. 37 dealing with post-conviction relief. *In the Matter of the Reinstatement of Rule 37 of the Arkansas Rules of Criminal Procedure*, 303 Ark. 746, 797 S.W.2d 458 (1990). Under the revised Rule 37, a petition claiming relief is required to be filed within 60 days of the date the mandate was issued by the appellate court. Ark. R. Crim. P. 37.2(c).

This case was affirmed on March 4, 1992, and the mandate, though the record does not reflect it, was issued on that date or thereafter. Pogue then filed his motion for post-conviction relief on May 1, 1992, which clearly was within 60 days of the mandate. The circuit court treated the motion as one filed under the reinstated Rule 37. The court was correct in doing this.

We have noted on two occasions that a Rule 37 petition, filed after January 1, 1991, is timely brought if it is within 60 days of the date the mandate was issued by the appellate court. Ark. R. Crim. P. 37.2(c); *see also Matthews* v. *State*, 305 Ark. 207, 807 S.W.2d 29 (1991) *fn. 1; Brown* v. *State*, 305 Ark. 53, 805 S.W.2d 73 (1991) *fn. 1*. This is so even if the conviction occurred during the time period when former Rule 36.4 was in effect. The Rule 37 action was appropriately brought in this case.

We turn next to the merits of the motion. Pogue was convicted largely on the basis of the testimony of a confidential informant, Randy Culp, who testified that he purchased crystal methamphetamine from Pogue on August 15, 1989. Culp was wired with a body microphone and the conversation involving the alleged drug purchase was tape-recorded and apparently presented as evidence at trial. Though the petition for post-conviction relief and the proceedings at the hearing were abstracted by Pogue in his brief filed as part of this appeal, none of the trial which resulted in his conviction and where he claimed counsel was ineffective was abstracted as required by Ark. Sup. Ct. R. 4-2(a)(6).

Pogue makes the following allegations of ineffectiveness against his court-appointed counsel in his petition:

> (a) Trial counsel was ineffective in that she was too heavily burdened by her case load of criminal Defendants prior to and during trial which effected (sic) her to the degree that she was not functioning as the "counsel" guaranteed by the Sixth Amendment as demonstrated by:
>
> > (1) Counsel failed at the trial to challenge the sufficiency of the evidence on the basis that Petitioner proved entrapment by a preponderance of the evidence. Counsel only generally challenged the evidence.
> >
> > (2) Counsel failed to make a proper motion and/or objection to the admissibility of the tape and its transcription since no expert in transcribing such an inaudible tape testified, Petitioner should have had the assistance of an expert witness regarding transcription of the tape. Had the Court heard expert

testimony the tape and its transcription would not have been allowed in evidence.

(3) Counsel failed to serve as effective counsel by allowing Petitioner to testify.

(4) Counsel failed to serve as effective counsel when she did not insist that the Court rule on her Motion for Directed Verdict of Acquittal at the close of the State's case, renewed at the close of all of the evidence.

(b) Counsel did not determine and investigate certain defense witnesses in order to develop the defense of entrapment to the charge . . . .

The circuit court ruled against Pogue on his motion, and we cannot say based on what is before us that it erred in so doing. None of the trial proceedings is abstracted for this court as already mentioned and as required by Ark. Sup. Ct. R. 4-2(a)(6). The trial testimony is contained in the record, but we have said many times that there is only one record and seven justices which makes examination of the record by each justice virtually impossible. *Watson* v. *State*, 313 Ark. 304, 854 S.W.2d 332 (1993); *Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 305 (1980). It is, therefore, beyond the ken of the full court to know what transpired at trial in the absence of an adequate abstract. We will not explore the record for prejudicial error. *Watson* v. *State, supra.; Bowers* v. *State*, 292 Ark. 249, 729 S.W.2d 170 (1987).

Hence, we affirm the circuit court's decision regarding much of what Pogue raises in his motion because we have inadequate information before us to do otherwise. Specifically, the abstract does not inform us as to the extent that the defense of entrapment was mounted by trial counsel, the motions or objections made or not made at trial, whether certain rulings were obtained from the trial court, or whether additional evidence or testimony was warranted.

For those claims of ineffective counsel that we are able to reach, they must be examined in light of the standard set in *Strickland* v. *Washington*, 466 U.S. 668 (1984). That standard provides a two-prong test that must be met: (1) that the deficient

performance of counsel must have resulted in errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment, and (2) prejudice resulted which deprived the petitioner of a fair trial. *Id.* There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and the petitioner alleging differently has the burden of overcoming that presumption. *Wainright* v. *State*, 307 Ark. 569, 823 S.W.2d 449 (1992). In assessing trial counsel's performance, we make every effort to eliminate the distorting effects of hindsight. *Burnett* v. *State*, 310 Ark. 202, 832 S.W.2d 848 (1992).

We observe that at the post-conviction hearing the issue of whether trial counsel was ineffective in allowing Pogue to testify was disputed. Pogue testified that this opened him up to questioning about his prior criminal record. Trial counsel retorted that she fully advised him of the ramifications of his testimony. This dispute over Pogue's taking the stand appears to be more a debate over trial strategy than evidence of ineffectiveness of counsel. Such matters do not form the basis of post-conviction relief. *McDaniel* v. *State*, 282 Ark. 170, 666 S.W.2d 400 (1984). Nor does the bald assertion that trial counsel as public defender had a heavy caseload and was overworked. Assuming the allegation of too much work was true, no correlation between caseload and prejudice to the defendant was shown. Again, prejudice must be exhibited for an ineffectiveness claim to be successful. *Burnett* v. *State*, 293 Ark. 300, 737 S.W.2d 631 (1987).

We find no fault with the circuit court's ruling.

Affirmed.

CORBIN, J., not participating.

WORMALD U.S., INC. *v.* CEDAR CHEMICAL CORPORATION

92-1423 873 S.W.2d 152

Supreme Court of Arkansas
Opinion delivered March 22, 1994

Chisenhall, Nestrud, & Julian, P.A., by: *Charles R. Nestrud, Jim L. Julian* and *Ann P. Faitz* and *Schieffler Law Firm*, by: *Daniel Schieffler*, for appellant.

Apperson, Crump, Duzane & Maxwell, by: *Allen T. Malone* and *David Solomon*, for appellee.

RANDY F. PHILHOURS, Special Justice. This case involves a suit brought pursuant to the provisions of the Arkansas Remedial Action Trust Fund Act (RATFA). Appellant, Wormald U.S., Inc.

(Wormald), attempts to appeal from a partial summary judgment granted in favor of Cedar Chemical Corporation (Cedar). We dismiss the appeal.

Cedar brought suit against Wormald for recovery of costs incurred by Cedar in cleaning up contamination on Cedar's property in compliance with a Consent Administrative Order of the Arkansas Department of Pollution Control and Ecology. The suit was brought pursuant to the provisions of RATFA. Ark. Code Ann. §§ 8-7-501 — 522 (Repl. 1993).

After the issues were joined, Cedar filed a motion for partial summary judgment. In its motion, Cedar argued that Wormald, as successor in interest to the entity which allegedly caused the contamination of the property in question, be declared a responsible party for the costs associated with implementing the Consent Administrative Order of the Arkansas Department of Pollution Control and Ecology. Wormald then filed its third party complaint against Helena Chemical Company and unspecified John Doe defendants.

The chancellor heard oral arguments on Cedar's motion and ruled that Cedar was entitled, as a matter of law, to a judgment against Wormald in the sum of $1,722,086.78. That decision reflected the total cost incurred by Cedar under the Consent Administrative Order. The judgment additionally states: "The Court also hereby determines that there is no reason for delay, and that entry of said judgment is hereby directed pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure." The Order admittedly did not address all of Cedar's claims in the suit. It also did not address any issues which involve the third party complaint filed by Wormald. No supporting factual findings, as required by Rule 54(b), accompanied the trial court's determination.

An order dismissing one party from a multi-party or multi-claim lawsuit usually is not an appealable order. *Davis* v. *Wausau Ins. Cos.*, 315 Ark. 330, 867 S.W.2d 444 (1993); *Arkansas Dep't of Human Servs.* v. *Farris*, 309 Ark. 575, 832 S.W.2d 482 (1992). The same can be said for an order granting a motion to dismiss one claim of a multi-party, multi-claim lawsuit. An appeal from such an order, however, is permissible under Rule 54(b)

when the trial court directs the entry of a final judgment as to one or more of the claims or parties and makes express findings that there is no just reason to delay the appeal. *Davis*, 315 Ark. at 332, 867 S.W.2d at 445; *Wallner* v. *McDonald*, 308 Ark. 590, 825 S.W.2d 265 (1992). In order to determine that there is no just reason for delay, the trial court must find that a likelihood of hardship or injustice will occur unless there is an immediate appeal. The trial court must also set forth facts to support its conclusion. *Davis*, 315 Ark. at 332, 867 S.W.2d at 445; *Barr* v. *Richardson*, 314 Ark. 294, 862 S.W.2d 253 (1993); *Wallner*, 308 Ark. at 592, 825 S.W.2d at 267; *Franklin* v. *Osca, Inc.*, 308 Ark. 409, 825 S.W.2d 812 (1992). In this case the record does not reflect the factual underpinnings supporting a Rule 54(b) certification. Even if the factual underpinnings existed, however, that is not enough. These facts must be set out in the trial court's order. *Davis*, 315 Ark. at 331, 867 S.W.2d at 445.

The judgment granting the partial summary judgment does not include specific findings of any danger of hardship or injustice which could be alleviated by an immediate appeal. In addition, the judgment does not detail facts which establish that such a hardship or injustice is likely. Due to the failure to comply with Rule 54(b), we dismiss this appeal without prejudice to refile it at a later date.

Appeal dismissed.

Special Justice RALPH HAMNER joins.

HAYS and CORBIN, JJ., not participating.

Jimmy ELLIS *v.* STATE of Arkansas

CR 93-1173 872 S.W.2d 71

Supreme Court of Arkansas
Opinion delivered March 21, 1994

Appellant, pro se.

No response.

PER CURIAM. The appellant Jimmy Ellis was found guilty by a jury in 1992 of possession of a controlled substance and sentenced as a habitual offender to forty-five years imprisonment. We affirmed. *Ellis* v. *State*, CR 92-1295 (March 29, 1993). Appellant subsequently filed in the trial court a timely *pro se* petition pursuant to Criminal Procedure Rule 37 seeking a new trial or other appropriate post-conviction relief. The trial court denied the petition after a hearing, and appellant lodged the record in this court on appeal. Shortly after the record was lodged, appellant requested appointment of counsel. The motion was denied as there is no right to counsel in a post-conviction proceeding. *Ellis* v. *State*, CR 93-1173 (December 13, 1993), citing *Pennsylvania* v. *Finley*, 482 U.S. 551 (1987). Appellant was granted an extension of forty days to submit his brief. The brief was filed January 24, 1994, and his reply brief was filed March 9, 1994.

On March 2, 1994, appellant filed another motion for appointment of counsel, or in the alternative, for permission to allow a fellow inmate where he is incarcerated to serve as the unpaid "legal advocate of record." He further asks that he be permitted an extension of five days and access to the transcript on appeal so that the fellow inmate may assist him in preparing another brief.

While a prisoner may avail himself of the assistance of an unpaid lay person in conducting his legal affairs, this court will not extend to a non-attorney permission to proceed as counsel-of-record before this court. States are not obligated to provide for post-conviction relief. When a state undertakes to provide for collateral attack on a criminal judgment, due process requires only that the proceeding be fundamentally fair. *Fox* v. *State*, 309 Ark. 619, 832 S.W.2d 244 (1992), citing *Pennsylvania* v. *Finley*, 481 U.S. 551 and *Evitts* v. *Lucey*, 469 U.S. 387 (1985). Appellant has not demonstrated that he is entitled to the assistance of a lay advocate-of-record or an extension of time to file another brief.

Motion denied.

CORBIN, J., not participating.

Bryon FOSTER *v.* STATE of Arkansas

CR 94-229 873 S.W.2d 153

Supreme Court of Arkansas
Opinion delivered March 21, 1994

Bill Luppen, for appellant.

No response.

PER CURIAM. Bryon Foster, by his attorney, has filed a motion for a rule on the clerk.

His attorney, William Luppen, admits by motion and brief that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979).

The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

DUDLEY and CORBIN, JJ., not participating.

HAROLD M. and Darla M. *v.* Brenda CLARK and Paul Clark

93-868 872 S.W.2d 410

Supreme Court of Arkansas
Opinion delivered March 28, 1994
[Rehearing denied May 2, 1994.]

Sam Sexton III, for appellants.

Ronald E. Bumpass, for appellees.

JACK HOLT, JR., Chief Justice. The present appeal arises from the setting aside of a judgment characterized by the trial court as a default judgment. On appeal, the appellants, Harold M. and Darla M., in their capacity as guardians and next friends of a minor child, argue that the judgment in question was not one of default but was instead a judgment on the merits and that the trial court was without statutory authority to set it aside.

We agree with the appellants to the extent that the circuit court erroneously set aside what was in fact a judgment on the merits with respect to appellee Brenda Clark. Therefore, we reverse the circuit court's decision with respect to Ms. Clark. At the same time, though, we have determined that appellee Paul Clark's position was substantially different and that the judgment against him was one of default. Thus, the circuit court correctly set aside the judgment so far as it pertained to Mr. Clark.

Appellants Harold M. and Darla M., who are the parents of the child, Dee Ann M., secured the services of attorney Sam Sexton III and filed a complaint on April 12, 1989, against appellee Brenda Clark, alleging negligence. The complaint stated that the child, while in the care of her babysitter, Brenda Clark, was repeat-

edly raped by Brenda Clark's brother-in-law, Danny Clark, and contracted genital herpes. (Danny Clark was convicted on a criminal charge of abusing the child.) Brenda Clark secured the services of attorney John Buergler, who filed an answer in her behalf on May 2, 1989. Ms. Clark made periodic payments to counsel.

The record is silent regarding what transpired between May 1989 and February 1990, when the circuit court filed its notice that trial was set for March 26, 1990. Subsequently, in a letter dated March 21, 1990, attorney Sexton wrote a letter to the circuit judge stating that "Mr. Buergler and I wish to jointly move the Court for a continuance." A copy of the letter was sent to attorney Buergler. Trial was rescheduled for July 23, 1990.

In the meantime, Harold and Darla M. determined that Danny Clark had a history of prior sexual abuse of children and that this information was known to both Brenda Clark and her father-in-law, appellee Paul Clark, the owner of the property where Brenda Clark resides and where Dee Ann M. was raped. They also were informed that both Paul and Brenda Clark had taken action that prevented Danny Clark's ex-wife from alerting them that Danny Clark was a child molester. Attorney Sexton, in a letter to the circuit judge dated June 11, 1990, requested that the trial date be moved again.

On June 12, 1990, Harold and Darla M. filed a motion to add Paul Clark as an additional party defendant. In an amended complaint filed on July 20, 1990, the appellants alleged that Mr. Clark, as the property owner, had a duty to warn them of the potential danger on the property to their child. They sought damages from him for negligence in his failure to provide such a warning. Mr. Clark, who was personally served by certified mail with the summons and complaint on July 27, 1990, also retained Mr. Buergler and paid him as counsel for about ten months. No answer was filed in his behalf.

Notice of a December 5, 1990 trial date was filed on October 26, 1990. The form indicated that notice had been mailed to attorneys Buergler and Sexton on October 24, 1990. Subsequently, a copy of a letter from the appellants' attorney requesting a continuance, dated November 6, 1990, was sent to Mr. Buergler as counsel for the Clarks. On January 10, 1991, a letter from Cir-

cuit Judge John G. Holland's administrative secretary and an order signed by the judge transferring the case from his division to that of Circuit Judge Don K. Langston were sent to both Mr. Sexton and Mr. Buergler.

A jury trial was set for November 25, 1991, and letter notice from the circuit court was sent on July 22, 1991, to attorneys Buergler and Sexton. On November 19, 1991, about a week before the trial date, the appellants filed a motion for default judgment, noting that "To date, although over fifteen months [have] passed since the service of the pleadings upon both defendants, no response to the defendant's Amended Complaint has been filed."

On November 25, 1991, appellants Harold and Darla M. appeared and testified, and a judgment of $350,000 was rendered against the Clarks for joint and several liability on the basis of their failure to warn the child's parents of Danny Clark's dangerous propensity to molest children. The judgment was entered of record on December 6, 1991.

Neither Brenda Clark nor Paul Clark was informed of the proceedings, and they only discovered the judgment in August 1992. On September 28, 1992, they filed a motion to set aside the default judgment. A hearing was held on April 19, 1993, and it was learned at that time that the record of the November 1991 proceedings had been lost. Harold and Darla M. filed a motion requesting that the court make findings of fact and conclusions of law and reconstruct the record. Although the trial court denied that motion, it adopted *in toto* an affidavit filed with the court by the appellants' attorney as the record of the underlying case.

Thereafter, the trial court declared that the default judgment was set aside in accordance with Ark. R. Civ. P. 55(c) and issued its order accordingly. Attorney Buergler surrendered his license on May 3, 1993, in lieu of disbarment proceedings. The Clarks, meanwhile, engaged other counsel for purposes of perfecting this appeal.

For reversal, Harold and Darla M. contend that Ark. R. Civ. P. 55(c), under which the trial court set aside the judgment of November 25, 1991, is inapplicable as to their circumstances and that the trial court consequently erred in employing the rule to vacate what it mischaracterized as a "default judgment." We agree in part with the appellants' position.

Unfortunately, the record of the proceedings which led to the underlying judgment of December 6, 1991, could not be found or no longer existed. After setting aside the judgment, the trial court denied the motion by Harold M. and Darla M. to reconsider the setting aside of the judgment, to make findings of fact and conclusions of law, and to reconstruct the record. Nevertheless, the court, in its order of May 19, 1993, did "adopt the Affidavit of Plaintiffs' Counsel, Sam Sexton III, filed in this matter as being true and correct" for purposes of establishing a record.

Attorney Sexton's affidavit recited that a trial was held in the matter. Further, counsel stated in his affidavit that the appellants made no request at trial for a ruling upon the motion for default judgment they had filed, and the court never ruled on their motion. Moreover, the affidavit revealed, testimony taken from both Darla M. and the victim indicated that the child had been sexually abused by Danny Clark while Brenda Clark was babysitting her at a residence owned by Paul Clark. Testimony was also presented to show that the victim, who was a small child at the time the abuse occurred, had contracted genital herpes from sexual contact with Danny Clark. Attorney Sexton further declared that testimony was given to establish that both of the appellees knew of Danny Clark's propensities to molest small children and that his former wife had been obstructed by the Clarks in her efforts to warn the appellants.

It is important to note that, while the trial court declined to make any findings of fact or conclusions of law in connection with the proceedings of November 25, 1991, neither did it disavow any of the statements of counsel in the affidavit it had expressly ratified as "true and correct." That affidavit and, indeed, the judgment entered on December 6, 1991, both speak of a trial having been held. In addition, the trial court's judgment of record began with the notation that "Now on this 25th day of November, 1991, comes before the Court the above-styled matter for trial." The findings are said to have been "[b]ased upon the pleadings, testimony and evidence presented, and other matters before the Court."

Most significantly, the court's judgment made a specific finding of negligence: "The Court finds that based upon the evidence presented that both Defendants were negligent in their supervi-

sion of and warning to the minor child, Dee Ann M[_____], and that such negligence was a proximate cause of the damages of Dee Ann M[_____], a minor child." A judgment was clearly delivered upon the merits. That finding is now the law of the case. *See Sphere Drake Ins. Co.* v. *Bank of Wilson*, 312 Ark. 540, 851 S.W.2d 430 (1993).

[redacted] In *Diebold* v. *Myers General Agency, Inc.*, 292 Ark. 456, 459, 731 S.W.2d 183, 185 (1987), this court held that "when a judgment is based upon the evidence presented to the court at a trial, as opposed to being based on the failure of a party to appear or attend, the judgment is not a default judgment, and Rule 55 does not apply." Thus, it is really a matter of no particular moment that, in its order of April 19, 1993, the trial court characterized the judgment previously entered on December 6, 1991, as a "default judgment." By its own adoption of the affidavit sworn by counsel for Harold and Darla M. as a substitute for a record of trial, the circuit court conceded that the judgment it was setting aside was based on the evidence recited in the affidavit. We have, therefore, no choice other than to hold that the underlying order in this matter was a judgment on the merits — that is, insofar as it pertained to appellee Brenda Clark, in whose name an answer had been filed on May 2, 1989.

Appellee Paul Clark's situation, however, is entirely another matter. Unlike Mrs. Diebold, one of the defendants in *Diebold* v. *Myers General Agency, Inc., supra*, Mr. Clark did not answer the complaint or otherwise appear in the case. He was, quite simply, in default. The question thus becomes whether the court, by taking evidence prior to reaching a judgment, could change Paul Clark's status from that of a defaulting defendant to that of a party against whom judgment was entered on the merits. If the judgment against Mr. Clark is on the merits, he is not entitled to the benefit of Ark. R. Civ. P. 55(c); if, on the other hand, the judgment is a default judgment, he is entitled to the benefit of the rule's liberal provisions for setting a default judgment aside.

[redacted] If, by taking evidence against a party who has neither answered nor appeared, a court could cause a judgment on the merits to be entered against that party, the purpose of Rule 55(c) would be subverted. The reason for our amendment of the rule in 1990 was to foster judgments on the merits rather than on tech-

nicalities. *See In the Matter of Changes to the Arkansas Rules of Civil Procedure, the Arkansas Inferior Court Rules, and the Administrative Orders of the Supreme Court*, 304 Ark. 733 (1990), and the Reporter's Note to Rule 55. It would be wrong, though, to say that judgment is based on the merits when the underlying claim remains completely uncontested.

To permit a court to convert what would otherwise be a default judgment into one on the merits by taking evidence against someone not present in any sense of the word would be to compound the problem we sought to cure in the 1990 amendment. Such a judgment would be taken against one whose failure to appear might well fall within the circumstances enumerated in Rule 55(c), and yet that party would be deprived of the benefit of the rule.

Were the shoe on the other foot and Mr. Clark attempting to avoid a default judgment, he might be able to contend successfully that Ms. Clark's answer inured to his benefit. *See Smith* v. *Edwards*, 279 Ark. 79, 648 S.W.2d 482 (1983). Indeed, his counsel mentioned that possibility at the hearing on April 19, 1993. The rule permitting such an inurement was not, however, intended to apply — and, so far as we know, has never been applied — to the detriment of one in Paul Clark's position. For these reasons, we affirm the trial court's order setting aside the judgment against Paul Clark.

However, we reverse the trial court's order setting aside the judgment against Brenda Clark. That judgment must stand. She had answered the complaint and was not in default. She does not argue lack of notice of the application for judgment. *See* Ark. R. Civ. P. 55(b). The circuit court took evidence and decided her case on the merits.

The standard by which we review the granting or denial of a motion to vacate a default judgment is whether the trial court abused its discretion. *B & F Engineering, Inc.* v. *Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). We hold that, with respect to Mr. Clark, there was no abuse of discretion by the circuit court.

Affirmed in part; reversed and remanded in part.

Margaret ALEXANDER *v.* TOWN AND COUNTRY DISCOUNT FOODS, INC.

93-1181 872 S.W.2d 390

Supreme Court of Arkansas
Opinion delivered March 28, 1994

[redacted]

Carney & Cooper, Law Firm, P.A., by: *Mark F. Cooper*, for appellant.

Snellgrove, Laser, Lanaley & Lovett, by: *P. Sanders Huckabee*, for appellee.

ROBERT H. DUDLEY, Justice. The plaintiff tripped and fell over a mat as she was entering defendant's store. The trial court granted a summary judgment in favor of the defendant. The plaintiff appeals and states:

> The fact that *res ipsa loquitur* may not have been applied to slip and fall cases in the past should not preclude this court from now reversing, changing or perhaps modifying previous Arkansas law and holding that the doctrine of *res ipsa loquitur* from this point forward will apply in slip and fall cases.

The court of appeals certified the case to this court. We affirm the summary judgment.

[redacted] We have often held that the doctrine of *res ipsa loquitur* is not applicable to slip and fall cases. *Mankey* v. *Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993); *Safeway Stores, Inc.* v. *Willmon*, 289 Ark. 14, 708 S.W.2d 623 (1986); *Haggans* v. *Jonesboro Cable TV, Inc.*, 252 Ark. 191, 477 S.W.2d

840 (1972); *Miller* v. *F.W. Woolworth Co.*, 238 Ark. 709, 384 S.W.2d 947 (1964). The reason the doctrine is not applicable to slip and fall cases is that the sole cause of the injury is not necessarily a negligent act by the defendant. There are possibilities of negligence by third parties as well as the plaintiff.

Affirmed.

Beulah Irene MALOY *v.*
STUTTGART MEMORIAL HOSPITAL

93-606 872 S.W.2d 401

Supreme Court of Arkansas
Opinion delivered March 28, 1994

Robert Dittrich, for appellant.

Bynum & Kizer, by: *F. Wilson Bynum, Jr., Maxie G. Kizer*, and *Keith B. Hall*, for appellee.

STEELE HAYS, Justice. This is an appeal from a writ of garnishment on a certificate of deposit held in joint tenancy. The trial court found the funds were in fact those of the debtor and sustained the garnishment. The debtor appealed to the Court of Appeals and the order was affirmed by a three to three decision. *See Maloy* v. *Stuttgart Memorial Hospital*, 42 Ark. App. 16, 852 S.W.2d 819 (1993). We granted appellant's petition to review. When we review a decision of the Court of Appeals under Rule 1-2(f) of our rules we review the case as though it had been originally filed in this court. *Patterson* v. *State*, 267 Ark. 436, 591 S.W.2d 356 (1979). *See also Cagle Fabricating & Steel, Inc.* v. *Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992); *Hall's Cleaners* v. *Worthen*, 311 Ark. 103, 842 S.W.2d 7 (1992); and *Leach* v. *State*, 311 Ark. 485, 845 S.W.2d 11 (1993).

Beulah Irene Maloy, appellant, was indebted to the Stuttgart Memorial Hospital, appellee, for $6,234.94. On June 8, 1990, a default judgment was entered in favor of the hospital. On September 16, 1991, the hospital served a writ of garnishment on Farmers and Merchants Bank of Stuttgart, Arkansas. The bank responded that it had two certificates of deposit totalling $8,620.79, held jointly in the names of appellant and her mother, India Ola Glover.

On September 27, 1991, appellant filed her objection to the garnishment and a motion to dismiss the writ on the grounds that the funds on deposit were not hers, but her mother's. On the same date an order directing the garnishee to pay the sum of $7,703.79 to the hospital was filed with the clerk of the circuit court. It was agreed between the parties that the hospital's attorney would hold the sums paid to him pursuant to the writ of garnishment until a hearing could be held upon appellant's motion to dismiss.

A hearing was held in the circuit court of Arkansas County on December 19, 1991, and only the appellant presented evidence — testimony from her mother, her brother and herself. On January 24, 1992, the motion to dismiss the writ of gar-

nishment was denied and the previous order directing delivery of $7,703.79 to the hospital was allowed to stand.

[redacted] The seminal case in Arkansas on the question of garnishment of a joint banking account is *Hayden* v. *Gardner*, 238 Ark. 351, 381 S.W.2d 752 (1964), where the court set down the following rules:

> 1. [T]he joint account should be garnishable only in proportion to the debtor's ownership of the funds, as to which parol evidence is admissible to show the respective contributions of each depositor, as well as any intent of one to make a gift to the other.
>
> * * *
>
> 2. [The court should first consider that] *all* of the joint bank account [is] prima facie subject to garnishment and that the burden [is] on each joint depositor to show what portion of the funds he or she actually own[s]. [Our emphasis.]

The court concluded:

> We believe this is the fair and reasonable rule because the depositors are in a much better position than the judgment creditor to know the pertinent facts.

This appears to be the majority rule. *See* Note, *Joint Bank Account as Subject of Attachment, Garnishment, or Execution by Creditor of One of the Joint Depositors*, 11 A.L.R.3rd 1465 (1967 and Supp. 1993); *Baker* v. *Baker*, 710 P.2d 129 (Okla. App. 1985); The approach was summarized in *Traders Travel Intern, Inc.* v. *Howser*, 753 P.2d 244 (Hawaii 1988):

> We now adopt the majority view that the debtor presumptively holds the entire joint bank account but may disprove this supposition to establish his or her actual equitable interest. In this way, the debtor, at an evidentiary hearing, may prevent the judgment creditor from seizing more than the debtor's fair share of the account. The judgment creditor, moreover, may introduce its own evidence on this issue. Should the debtor fail to show by a preponderance of the evidence that he or she does not possess the whole joint account, however, then the judgment creditor

> may confiscate all the deposits therein to satisfy the garnishment.

Under this approach, the hearing in this case began with the presumption that appellant was entitled to the whole of the certificate of deposit. The burden was on appellant to disprove this proposition and establish her actual interest in the CD. The crucial testimony was given by appellant's mother, Ms. Glover. She testified that the source of the funds was from various articles owned by her and her late husband liquidated after his death. She put the proceeds into several joint CDs with each of her children. Only the CDs held jointly with appellant were at issue.

As to her reasons for putting the funds in these joint CDs, Ms. Glover gave divergent accounts: On the one hand she intended the money to remain hers throughout her life and at her death to be divided among her children. She explained this was so the children could more easily pay her bills if she became incapacitated. On the other hand she stated she put the money in joint names with her children to enable her to keep the money from creditors, a nursing home in particular, if she should have to enter one. She testified she'd heard that could be done, that she knew this at the time she opened the joint CDs and that her intent was to put the money beyond the reach of a potential nursing home creditor.

When there are issues of credibility and conflicting testimony, we defer to the superior position of the factfinder to resolve those questions. *Guaranty National Insurance* v. *Denver Roller, Inc.*, 313 Ark. 128, 854 S.W.2d 312 (1993). The trial court made no findings in this case but simply held for the hospital, creating the inference that Ms. Glover failed to persuade the trial court she intended to keep the money for herself.

Appellant contends the only argument for sustaining the garnishment is that Ms. Glover intended a gift to appellant and there was no proof of actual delivery. *Coristo* v. *Twin City Bank*, 257 Ark. 554, 520 S.W. 2d 218 (1975). Without delivery, appellant concludes, there is insufficient proof to show any intention to make a gift. Appellant's argument is unpersuasive for it misinterprets the burden of proof. There is no necessity for the hospital to prove a gift, so whether or not delivery was demon-

strated is irrelevant. The analysis begins with the presumption that all the funds are garnishable. It is incumbent on the appellant as the depositor to prove otherwise. *Hayden* v. *Gardner, supra*. The hospital's right to the funds is not dependent on finding a gift to appellant. Its claim is presumptively established as a judgment creditor having garnished funds of which the judgment debtor is a joint depositor.

As to remanding the case to the trial court to have Ms. Glover joined as a party, suggested by the dissent, neither party has raised this issue and we see no reason to do so on our own.

While the joinder of parties will not be invariably waived if not raised, *see Martin* v. *Wilks*, 490 U.S. 755 (1991), the necessity for joinder fades when that party's interest has been fairly litigated. As the *Martin* opinion points out:

> We have recognized an exception to the general rule [that a stranger to a judgment is not bound by it], when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone else with the same interests who is a party.

At 762, fn2.

This court came to the same result in *Carrigan* v. *Carrigan*, 218 Ark. 398, 236 S.W.2d 579 (1951). In that case we held that where the wife of a party in a former suit had testified at that trial, and in fact was the witness whose testimony consumed a large part of the record, res judicata would be applied to her in a subsequent proceeding. We said:

> The strict rule that a judgment is operative, under the doctrine of res judicata, only in regard to parties and privies is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by the employment of counsel, filing of an answer, payment of expenses of costs of the action, or doing of such other acts as are generally done by the parties.

We are not suggesting that an individual similarly situated

to Ms. Glover could not be properly joined as a party at this stage of the proceedings, upon her own request and under the appropriate circumstances. In this case, however, Ms. Glover was an active participant in the proceeding before the trial court. In fact, it was on her testimony that the case was decided. Nor has the dissent suggested how Ms. Glover's rights could have been better protected. Ms. Glover and the appellant clearly had the same interests and both testified to those ends.

In the absence of apparent prejudice or a request to intervene, we do not find it appropriate, under the equitable doctrine that governs ARCP 19, to remand the case sua sponte. *See Wright and Miller, Federal Practice and Procedure*, § 1609 at 143; § 1611 at 171-176 (1986).

The dissenting opinion cites the rule mentioned in *McLarty Leasing Systems, Inc.* v. *Blackshear*, 11 Ark. App. 178, 668 S.W.2d 53 (1984). That rule, retiring at best, expressly excludes testimony which is self-contradictory or from which differing inferences may be drawn. *Jolley* v. *Meek*, 185 Ark. 393, 47 S.W.2d 43 (1932); *Kansas City Southern Railway Co.* v. *Lewis*, 80 Ark. 396, 97 S.W. 56 (1906). Here, the testimony of Mrs. Glover, as we have noted, contained conflicting versions of her purpose in establishing the joint CDs. We cannot conclude that her testimony was arbitrarily disregarded by the trial court.

Affirmed.

CORBIN, J., dissents.

DONALD L. CORBIN, Justice, dissenting. I dissent. The majority opinion will have a greater impact on the citizens of Arkansas than appears at first glance. Many families, as is common practice, create accounts in the names of a parent and one or more child. Certainly most are unaware how easily a creditor of one of the children can access the funds placed in those accounts, which is the result of the majority's ruling.

The majority relies on *Hayden* v. *Gardner*, 238 Ark. 351, 381 S.W.2d 752 (1964), calling it the seminal case in Arkansas on the question of garnishment of a joint banking account. *Hayden* determined that a joint account should be garnishable only in proportion to the debtor's ownership of the funds, as to which parol

evidence is admissible to show the respective contributions of each depositor, as well as any intent of one to make a gift to the other. The rule in *Hayden* makes sense. Noticeably absent from the majority's result, however, is a direction to remand so as to join the co-tenant, the mother of the appellant, as was done in *Hayden*. The mother, Mrs. India Glover, was called as a witness but was not a party to this action. The *Hayden* court ordered the wife to be added as a party upon remand in order to determine the extent of contribution or ownership of the certificate of deposit held jointly by the debtor husband and his wife. The court in *Hayden* clearly stated:

> It goes without argument that Mrs. Gardner has (or might have) some interest in the money in the joint account. Therefore she should have been made a party to the garnishment proceedings against the bank. This can be done upon remand.

Id. at 354, 381 S.W.2d at 754. If we are to follow the ruling in *Hayden*, then the majority should have, at minimum, remanded for this purpose.

Like the federal rule, ARCP Rule 19 provides the means for adding parties that are necessary or indispensable; i.e. compulsory joinder. The emphasis is placed on what practical effects a judgment might have upon an absent party. *See* Reporter's Notes to Rule 19 (1993). Here, an elderly woman testified regarding her ownership of monies; the result of which was that her monies were taken without being made a party to the action and her rights unprotected. The factors should be used to determine on an ad hoc basis "whether in equity and good conscience the action should proceed among the parties before it" despite the absence of a party. *See* ARCP Rule 19; D. Newbern, *Arkansas Civil Practice and Procedure* § 5-3 (2d ed. 1993). This is certainly a case in which in equity and good conscience, the mother of appellant should have been joined as a party. Should her claim then be regarded as *res judicata*, as the majority would assert, then all the more reason she should have been joined below.

Further, the majority's result ignores the overwhelming weight of the evidence. The evidence submitted leads to the conclusion that appellant did not have any ownership interest in the

certificates of deposit. The testimony of appellant, her mother, and her brother revealed that all the monies in the certificates of deposit belonged to the mother, Mrs. Glover, and was derived thirteen years beforehand through the sale of assets after the death of her husband. The mother testified that she wanted the monies to eventually go to her children upon her death. Appellant and her brother never considered the money theirs and knew of their mother's intentions. The most noteworthy pieces of evidence were the three certificates of deposit introduced into evidence, all in the names of appellant or Mrs. India Ola Glover. Mrs. Glover had signed the notice of penalty for early withdrawal for each of the certificates and had signed notices for withdrawal of interest. Neither appellant nor her brother ever exerted any ownership or control over the certificates of deposit. This evidence was uncontradicted by appellee.

The court of appeals pointed out in *McLarty Leasing System, Inc.* v. *Blackshear*, 11 Ark. App. 178, 182-83, 668 S.W.2d 53, 56 (1984) the rule with regard to uncontradicted testimony:

> Under our established rules of law the trier of fact is not bound to accept the testimony of any witness even if uncontradicted and is the judge of the weight of the testimony and credibility of the witnesses. It does not, however, have the right to arbitrarily disregard the testimony of any witness and where the uncontradicted testimony of even an interested witness is unaffected by any conflicting inferences to be drawn from it, and is not improbable, extraordinary or surprising in its nature or there is no other ground for hesitating to accept it as truth, there is no reason for denying the finding of verity dictated by such evidence.

See also Knighton v. *International Paper Co.*, 246 Ark. 523, 438 S.W.2d 721 (1969); *Maloy* v. *Stuttgart Memorial Hospital*, 42 Ark. App. 16, 852 S.W.2d 819 (1993) (Mayfield, J., dissenting). Even if one agrees with the majority that there were two conflicting accounts of what Mrs. Glover's intent was in setting up the accounts, the certificates themselves and Mrs. Glover's actions in endorsing the certificates one time to receive interest income are clear and convincing evidence of the mother's claim of ownership.

The evidence presented in this case and the manner in which the result is reached leads me to the inescapable conclusion that the trial court and the majority at least partially base their decision on an intervivos gift of the certificates to appellant. This clearly runs afoul of the rules cited in our recent case of *Irvin* v. *Jones*, 310 Ark. 114, 117, 832 S.W.2d 827, 828 (1992) wherein we emphasized the following:

> 'In all gifts a delivery of the thing given is essential to their validity; for although every other step be taken that is essential to the validity of a gift, if there is no delivery, the gift must fail. Intention cannot supply it; words cannot supply it; actions cannot supply it; it is an indispensable requisite, without which the gift fails, regardless of the consequences. . . .'

(quoting *Ragan* v. *Hill*, 72 Ark. 307, 80 S.W. 150 (1904)).

In the instant case, there was no delivery. The mother maintained possession. The mother alone took interest income. Appellant never asserted nor ever intended to assert ownership over the funds clearly placed in both names for the purpose of caring for the mother. The actions taken with regard to the certificates coupled with the uncontradicted testimony of the mother, appellant, and the brother cannot be summarily disregarded. The decision below and now here is arbitrary and should not be allowed to stand.

Constance Bolin YOUNG *v.* William Kelly YOUNG

93-949 872 S.W.2d 856

Supreme Court of Arkansas
Opinion delivered March 28, 1994

[redacted]

Pettus Law Firm, by: *E. Lamar Pettus*, for appellant.

Jones, Hixson & Jones, by: *Lewis D. Jones* and *J. Scott Hardin*, for appellee.

STEELE HAYS, Justice. This is a contempt proceeding involving a property settlement in divorce. In a hearing requested by William Young (appellee) to locate some of the marital property, Constance Young (appellant) refused to answer questions on the basis of her Fifth Amendment rights. The trial court found no legitimate Fifth Amendment privilege and that any privilege she might have had was waived. Mrs. Young still refused to answer and was found in contempt. She brings this appeal from the order requiring her to answer and from the order of contempt. We affirm the trial court.

The Youngs were divorced in 1986 in Dallas County, Texas.

The property settlement agreement left the bulk of the household effects to be divided later and provided for the appointment of a receiver in the event no agreement was reached. Mrs. Young was awarded the residence for three years, at which time it was to be sold. Mr. Young was to lend Mrs. Young $10,000 a month for those three years, to be repaid when the house was sold.

In May 1988, a receiver was appointed to inventory the furniture. It was valued at $1,869,305.00 and in 1989 the court divided the furniture, one-half to each party. The residence did not sell, and in October of 1991 the court appointed a receiver to sell the property.

Early in 1992, Mr. Young sought a preliminary injunction against Mrs. Young alleging she had forcibly removed various fixtures from the house, i.e., mantels, paneling, fountains, etc., to block a sale by discouraging prospective buyers. Mr. Young requested sanctions against further destruction of the home or removal of its fixtures. In February 1992, a Texas district court awarded Mr. Young $3,247,171.97 against Mrs. Young for breach of contract, emotional distress, and exemplary damages. This judgment was reduced by $1,800,000.00 when Mr. Young purchased the marital home.

Mr. Young then filed the judgment in the circuit court of Washington County, Arkansas. Subsequently, approximately five self-storage units of furniture and fixtures from the home were discovered in Springdale, Arkansas. A judicial sale of that property was held, which reduced the judgment by another $1,000,000.00.

In May of 1993 Mrs. Young was tried and convicted of the offense of mail fraud in connection with a plot to bomb the marital home. She was sentenced to twenty-four months in prison. Mr. Young continued efforts to discover the remaining fixtures and furniture. He requested a hearing and Mrs. Young appeared for oral deposition on March 25, 1993, but refused to answer questions as to the whereabouts of the property on the basis of self-incrimination. On May 7, 1993, the trial court found Mrs. Young had no legitimate Fifth Amendment privilege and issued an order compelling discovery and requiring Mrs. Young to answer all questions concerning the whereabouts of the property. The

May 7th order did not specify a date for the discovery as ordered, so on May 13, a judge sitting in exchange modified the May 7th order by ordering Mrs. Young to appear on May 15.

Mrs. Young again refused to answer specific questions on the basis of self-incrimination. On May 17, Mr. Young filed a petition for contempt and after a hearing the trial court entered an order on May 27, finding there was no Fifth Amendment privilege, and alternatively, a waiver of the privilege. Mrs. Young was found in contempt of the May 7, 1993, order and the trial court directed the sheriff to arrest and incarcerate her. She appeals from the orders of May 7 and May 13 and from the finding of contempt.

Initially we note that an order of contempt is a final, appealable order. *Frolic Footwear* v. *State*, 284 Ark. 487, 683 S.W.2d 611 (1985); *Taylor* v. *Taylor*, 26 Ark. App. 31, 759 S.W.2d 222 (1988). Moreover, the appeal brings up, in addition to the contempt order, the two earlier orders on which the contempt order was based and which Mrs. Young also challenges. ARAP Rule 2(b).

I

Mrs. Young contends she had a right to assert her privilege not to incriminate herself under the Fifth and Fourteenth Amendments to the United States Constitution and art. 2, § 8 of the Arkansas Constitution. The trial court rejected that contention and, in the alternative, found that the privilege was waived. We sustain the trial court on the ground of waiver.

Mrs. Young cites only *Dunkin* v. *Citizens Bank of Jonesboro*, 291 Ark. 588, 727 S.W.2d 138 (1987), pertinent to this issue. In that case Mrs. Dunkin, defending a wrongful death claim arising from the homicide of her estranged husband, refused to answer interrogatories propounded to her on the grounds that her answers might tend to incriminate her. The trial court ordered her to respond and, when she still refused, struck her answer asserting self-defense.

We affirmed the order, noting that ARCP Rule 37(d) provides that the failure to serve answers or objections to interrogatories "*may not be excused* on the ground that the discovery sought is objectionable *unless the party failing to act has applied for a protective order* as provided in Rule 26(c)." (Emphasis in original text.) Since Mrs. Dunkin had not asserted the privilege in

a timely and proper manner, it was rejected. As to the substantive issue, the opinion said, "The privilege applies alike to civil and criminal proceedings whenever the answers might tend to subject the party giving it to criminal responsibility." *Camelot Group Ltd.* v. *W.A. Krueger Co.*, 486 F.Supp. 1221 (S.D.N.Y. 1980).

Relying on this general statement from *Dunkin,* the trial court in this case concluded there was little chance that appellant would be subjected to criminal prosecution. The *Dunkin* case, however, did not reach the necessity of showing the incriminating nature of each question asked, nor was the case decided on that basis.

We have found no other cases of our own on the question of proving the claim of a Fifth Amendment privilege, so we have turned elsewhere for guidance.

In a leading case in this area, *In Re Folding Carton Anti-Trust Litigation*, 609 F.2d 867 (7th Cir. 1979), the court said:

> We cannot agree that a witness' constitutional privilege against self-incrimination depends upon a judge's prediction of the likelihood of prosecution. Rather, we conclude that it is only when there is but a fanciful possibility of prosecution that a claim of fifth amendment privilege is not well taken. . . .
>
> When a witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution.

In *Choi* v. *State*, 560 A.2d 1108 (Md. 1989), the state had relied on the prosecuting attorney's representation in the trial court that the witness "was not at risk of prosecution." To that the court stated:

> The rarity of prosecutions under a particular statute, or a prosecuting attorney's indication in a particular case that he will not prosecute, are not sufficient to defeat a claim of privilege under the standards of *Hoffman* v. *United States*, 341 U.S. 479 (1951) and other cases.

See also United States v. *Miranti*, 253 F.2d 135 (2d Cir. 1958); *In Re Grand Jury Proceedings (Samuelson)* 763 F.2d 321 (8th Cir. 1985).

Here, evidence that Mrs. Young had removed fixtures from the marital home would have subjected her at least to the *possibility* of felony criminal penalties in Texas for tampering with and damaging the property of another, notwithstanding the fact that she had an interest in the property. Texas Cr. Code, § 28.03, § 28.05. The *probability* of such prosecution is not controlling, nor are assurances by Mr. Young and the receiver that they will not promote prosecution.

As to the questions Mrs. Young refused to answer, we believe they sought to elicit information that can be withheld under a Fifth Amendment claim. Mrs. Young was withholding answers to the whereabouts of the furniture and fixtures and to any dealings she might have had in transporting that property. A witness is not required to show the testimony she declines to give will result in direct criminal exposure, it is enough if the information, used with other evidence, would lead to a conviction. *Kastigar* v. *United States*, 406 U.S. 212 (1972). It is stated in *United States* v. *Johnson*, 488 F.2d 1206 (1st Cir. 1973), quoting from *Hoffman* v. *United States*, 341 U.S. 479 (1951):

> The privilege protects not only answers which directly reveal criminal activity, but also those that might furnish a link in the chain of evidence necessary to convict.

In sum, we believe the nature of this testimony and the *possibility* of prosecution are sufficient to create a valid Fifth Amendment privilege.

II

The trial court held that even if Mrs. Young did have a Fifth Amendment claim, it was waived. This conclusion was based on two things, first a letter from her lawyer to Mr. Young's lawyer offering to sell the items "which she removed from the home in Fort Worth." Second, the trial court found Mrs. Young had waived her privilege through two affidavits she filed with the court with "respect to facts concerning the property involved in this case."

As to the letter, it will not qualify as a waiver of her privilege as it was not compelled testimony. It is clear from the case law that a waiver can only occur where compelled testimony is involved. Where a disclosure of facts may tend to incriminate

a witness, that tendency is not removed by a showing that the witness had elsewhere made a statement tending to incriminate himself. *Temple* v. *Commonwealth*, 74 Va. 892 (1881), cited in *Ex Parte Berman*, 287 P. 125 (Cal. Dist. Ct. App. 1930). To the same effect see *McCormick on Evidence, supra*, § 140; *In Re Neff*, 206 F.2d 149 (3rd Cir. 1953).

The two affidavits are not included in the record but they were apparently filed by Mrs. Young in connection with the judicial sale of the marital property found in the self-storage units in Springdale. Mrs. Young argues that the affidavits were not made part of the record to the detriment of the opposing side. She then states: "However, appellant does admit. . .these affidavits were offered to show the Notice of Sale was deficient." The argument misconstrues the burden of proof on appeal.

The burden of proving error on appeal is on the appellant, not the appellee. *Looper* v. *Madison Guaranty Savings & Loan Ass'n*, 292 Ark. 156, 292 S.W.2d 225 (1987). It is appellant's burden to bring up a record sufficient to demonstrate error. *Bratton* v. *Gunn*, 300 Ark. 140, 777 S.W.2d 219 (1989). When an appellant fails to demonstrate error we affirm. *Jenkins* v. *Goldsby*, 307 Ark. 558, 822 S.W.2d 842 (1992). We will accept as correct the decisions of the trial court which the appealing party does not show to be wrong. *Blissard Management and Realty, Inc.* v. *Kremer*, 289 Ark. 419, 711 S.W.2d 813 (1984). Although we cannot presume that any portions of the record not designated for appeal will support the trial court's action, we will not reverse the lower court unless the record shows apparent error. *Sharum* v. *Dodson*, 264 Ark. 57, 568 S.W.2d 503 (1978); *Young* v. *Young*, 288 Ark. 33, 701 S.W.2d 369 (1986); *Rhodes* v. *State*, 293 Ark. 211, 736 S.W.2d 284 (1987).

The trial court concluded the affidavits constituted a waiver and nothing in the record refutes that. Contrary to Mrs. Young's argument that Mr. Young had failed to include the affidavits in the record, it was incumbent on her to produce a record which reflected that the affidavits did *not* support a waiver. Significantly, Mrs. Young does not deny that the affidavits constituted a waiver, but relies on the fact that they are not in the record. Having failed to demonstrate any error on the part of the trial court in finding there was a waiver, we affirm the trial court on that point.

III

Several procedural errors are advanced under a second assignment of error. Mrs. Young submits the trial judge should not have ordered her to appear for a deposition one day after the filing of a motion to that effect. However, the trial court, after convening the court on May 13, 1993, stated he was not ruling on Mr. Young's motion, but was amending the May 7 order to specify a date and time for the deposition, namely, May 15 at 10:00 a.m.

[redacted] The trial court has inherent power to modify an order with or without notice to any party by motion of a party or on its own within ninety days of filing. ARCP Rule 60(b). Presumably the trial court was cognizant of the notice problem, but arguably there was an emergency (Mrs. Young's incarceration was to begin in June) and the court undertook to amend the earlier order under its plenary power to amend or modify within ninety days. *Blissard Management & Realty, Inc.* v. *Kremer*, 284 Ark. 136, 680 S.W.2d 694 (1984).

[redacted] It is also argued that it was error for one judge, on exchange, to modify the earlier May 7 order of the sitting judge. No authority is cited and we do not find this point to have been made to the trial court.

Mrs. Young insists the trial court erred in holding her in contempt. She argues she was found in contempt of the May 7 order, which only required her to answer questions, and not to appear on a particular date for that purpose. Her brief states:

> Actually, following the logic of the trial court, there could be no contempt of the May 7, 1993 order, but only a contempt of the May 7, 1993 order *together* with the May 13, 1993 order, because the May 7, 1993 order did not provide for a time to appear for deposition. (Brief at 81).

While it is not entirely clear how we are asked to address this argument, we find no support for the point asserted. The Order of Contempt, at R. 133, purports to be "pursuant to the court's orders of May 7, 1993, and May 13, 1993," and that Mrs. Young's refusal to answer questions "was in direct violation of the Orders of this court and was in contempt of the orders of this court." Citing page 260 of the record, Mrs. Young contends the

trial court told her at the May 27, 1993, hearing that she was only in violation of the May 7, 1993, order. However, we cannot identify such comments by the trial court either in the abstract or in the record and the order itself is clearly to the contrary.

For the reasons stated, the orders appealed from are affirmed.

CORBIN, J., not participating.

Charles H. CRAMER and Leslie L. Cramer *v.* ARKANSAS OKLAHOMA GAS CORPORATION

93-1049 872 S.W.2d 390

Supreme Court of Arkansas
Opinion delivered March 28, 1994

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *James A. Arnold II* and *Gill A. Rogers*, for appellants.

Daily, West Core, Coffman & Canfield, by: *Michael C. Carter*, for appellee.

DAVID NEWBERN, Justice. The issue in this appeal is whether a complaint stated a claim upon which relief could be granted. Ark. R. Civ. P. 12(b)(6). The complaint alleged that Arkansas Oklahoma Gas Corporation (AOG) negligently caused

injury to trees in the process of constructing a gas pipeline on property it had taken through eminent domain proceedings for the purpose of constructing a pipeline. We hold the complaint was properly dismissed because a landowner who receives compensation for his property, as if taken in fee, is not entitled to further damages for injury to the property when the injury is due to negligent installation of equipment by the party who condemned it.

AOG, the appellee, attempted to negotiate an agreement with Charles H. Cramer and Leslie Cramer, the appellants, for an easement for a gas pipeline across the Cramers' land. The Cramers expressed concern that the line would harm a group of red oak trees growing within the area of the proposed easement. AOG attempted to address the Cramers' concerns by proposing an easement wider than the standard 20 feet so as to disturb the trees as little as possible while laying pipe.

The Cramers ultimately refused to grant the easement, and AOG exercised its power of eminent domain to condemn a 40-foot wide easement across the property as well as an adjacent 20-foot wide construction easement. The damages assessed in favor of the Cramers included recovery for the value of the 40-foot wide strip where the easement was to be placed, and which included the oak trees, and the rental value of the additional 20-foot wide construction easement.

The Cramers asserted their damages claim for injury to the trees by way of a counter-claim in the condemnation proceeding. The counter-claim was dismissed without prejudice by a consent order in which it was stated that the Cramers could file a subsequent negligence action. A summary judgment was entered in favor of AOG's condemnation of the land and damages were awarded to the Cramers.

The Cramers then filed their negligence action. AOG moved to dismiss on the ground of *res judicata*. The action was dismissed, however, for failure to state a claim upon which relief could be granted. The order of dismissal stated, in part:

> That no separate cause of action for negligence in the construction of the pipeline across the Plaintiffs' property contained within the right-of-way easement condemned by

> the Defendant exists, as the Defendant, in paying fair market value for the taking, has paid for all damages which may result to the property contained within the easement as a result of the construction of its pipeline.

The complaint contended that AOG had, by agreeing to try to protect the trees, assumed a duty which it had then breached by its negligence. The Trial Court was correct in holding the complaint insufficient to state a claim upon which relief could be granted. AOG owed no such duty in view of having paid for the land as if purchasing the fee.

The Cramers' primary citation is to *John H. Parker Construction Co.* v. *Aldridge*, 312 Ark. 69, 847 S.W.2d 687 (1993). In that case the landowner had entered into a negotiated agreement granting a "blanket easement" to a water users association to permit the laying of a water pipeline. The landowner then sued for damages to trees caused by negligent placement and installation of the pipeline. The Trial Court refused to instruct the jury that when landowners grant an easement they waive damages arising from the normal construction of the right-of-way and may recover only if they prove the work was done unnecessarily, negligently, or unskillfully. We held it was not error to refuse such an instruction.

The distinction between the *John H. Parker Construction Co.* case and this one is that here we do not have a negotiated easement but an eminent domain condemnation which required the condemning authority to pay full value as if taking the fee.

The owner of land which is condemned for the purpose of providing an easement is entitled to be paid the full value of the land embraced within the easement as if the fee had been taken. *Baucum* v. *Arkansas Power & Light Co.*, 179 Ark. 154, 15 S.W.2d 399 (1929). In the *Baucum* case we noted that the condemning authority might be responsible in the future for negligent *use* of the easement, but in *Arkla Gas Co.* v. *Burkley*, 242 Ark. 662, 416 S.W.2d 263 (1967), we reasserted the rule that the owner of condemned land is entitled to its full value and said: "The rule. . .tends to eliminate future litigation over damages sustained by reason of future additional construction on the easement. . . ."

While it is true that the landowner is entitled to continue using the surface of the right-of-way for purposes not inconsistent with the easement, we have held that an injury which occurs to timber on the land when the construction occurs is not compensable separately. *Arkansas Louisiana Gas Co.* v. *Maxey*, 242 Ark. 698, 416 S.W.2d 701 (1967). We can think of no reason why the same rule should not apply to the trees in question here, and we have been cited to no authority which would be to the contrary.

Other jurisdictions are in accord with the rule that a landowner whose property is condemned is entitled to the market value of the property and is not entitled to separate damages resulting from destruction of crops, ornamental shrubs, or trees which may be injured in the process of constructing the easement because the value of those items is included in the damages awarded to the landowner when the land is condemned. *See, e.g., Mississippi State Highway Comm.* v. *Viverette*, 529 So.2d 896 (Miss. 1988); *White* v. *Natural Gas Pipeline Co. of America*, 444 S.W.2d 298 (La. Ct. App. 1960).

Affirmed.

Theresa POCKRUS, Benton County Tax Collector,
and Shirley Sandlin, Benton County Tax Collector *v.*
BELLA VISTA VILLAGE
PROPERTY OWNERS ASSOCIATION

93-531 872 S.W.2d 416

Supreme Court of Arkansas
Opinion delivered March 28, 1994

George R. Spence, Deputy Prosecuting Attorney, for appellants.

R. Douglas Schrantz, for appellee Bella Vista Village Property Owners Association.

W. Paul Blume, for amicus curiae Arkansas School Board Assocation.

Winston Bryant, Att'y Gen., by: *Dinah M. Dale*, Asst. Att'y Gen., for amicus curiae Assessment Coordination Division.

TOM GLAZE, Justice. This appeal ensues from the Benton County Chancery Court's decision to enjoin Theresa Pockrus, the Benton County Tax Collector, from collecting the 1991 ad valorem taxes owed by Bella Vista Village Property Owners Association. Those taxes were the result of a reappraisal and reassessment commenced in 1990. Benton County assessor, Shirley Sandlin, utilized a cyclical reassessment plan recommended by the Arkansas Assessment Coordination Division (ACD) which would permit Sandlin, with her limited staff, to complete within a five-year period, the reappraisal of all property located throughout the entire county. Surveys showed that Benton County's annual assessment ratio was about to fall below the minimum required eighteen percent, and as a consequence, was in jeopardy of losing "state turnback" money.

Bella Vista Village filed suit, alleging that the collection of taxes based on the reassessment plan used by Sandlin and Pockrus was illegal. It asked further that the chancery court enjoin the collection of the 1991 ad valorem taxes until a proper county-wide assessment is achieved. The chancellor granted the relief sought, and Sandlin and Pockrus bring this appeal.

The parties' dispute centers on the ACD's cyclical reappraisal plan. Based on that plan, Sandlin divided the county real estate parcels into four and one-half areas and each area was to be reassessed annually over a five-year period. Each area includes numerous taxing units (towns, school districts, improvement districts) which require the application of various millage rates. Under the plan, Bella Vista Village was the first area reassessed because it (1) had the largest number of parcels in the county, (2) had the greatest number of taxpayer complaints requesting assessment adjustments, and (3) contained the greater number of variances.

At trial, Bella Vista Village first contended that the cyclical reassessment plan used by Sandlin and Pockrus violated the Equal Protection Clause of the United States and Arkansas Constitutions. Bella Vista Village pointed out that, because its property would be reassessed the first year, it would pay immediately based on the new assessed value while the remaining four areas would continue to be taxed based on old assessment values. It argued this disparate treatment of taxpayers would exist for four years or until the fifth or last area is reassessed. The chancellor rejected this equal protection argument finding that Bella Vista Village had failed to show that varying economic conditions which might occur during the five-year reassessment scheme would not cause adjustments which would allow a constitutionally permitted "rough equality" in tax treatment for all real property owners. *See Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster County, West Virginia*, 488 U.S. 336, 343 (1988).

Although the chancellor discarded Bella Vista Village's first argument, he did find merit in its second contention that ACD's recommended cyclical reassessment plan violates Ark. Const. art. 16, § 14, which incorporates most of Ark. Const. amend. 59.[1] In his findings, the chancellor stated as follows:

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[1]Amendment 59 is now compiled in Ark. Const. art. 16, § § 14, 15 and 16.

> Art. 16, § 14(a), and its enabling statutes, provide a safeguard that, if reassessment shall result in an increase in the aggregate value of taxable real and personal property in *any taxing unit* in this state of ten percent or more over the previous year, the rate of city or town, county, school district and community college district tax levied against the taxable real and personal property of *each taxing unit shall, upon completion* of the reappraisal, *be adjusted or rolled back* by the governing body of the taxing unit *for the year for which levied.* (the chancellor's emphases)

After stating the foregoing, the chancellor found that Bella Vista Village's parcels are partially located in three different school districts (taxing units), and under ACD's cyclical reassessment plan, a complete appraisal or reassessment would not be performed during the plan's first year in any of the three taxing units. Thus, he concluded ACD's reassessment plan violated Amendment 59 because it prevented Bella Vista Village taxpayers from receiving the benefits of equalization of taxes (roll back in taxes) provided for and allowed under that Amendment. In sum, the chancellor held the reassessment plan or procedure the county assessor and collector used to revalue property and levy taxes was in conflict with the state constitution. He stated further that, under Amendment 59, every taxpayer has the right to review the comparisons between the increase in the aggregate value of taxable property in each taxing unit in the year in which the tax collection is levied to be confident that he is paying only his fair share of the tax burden.

[redacted] While we would like to reach the merits of the trial court's rulings, we find it impossible to do so because that court had no subject-matter jurisdiction of this matter. It is settled law that county courts have exclusive jurisdiction in all matters relating to county taxes. *McIntosh* v. *Southwestern Truck Sales*, 304 Ark. 224, 800 S.W.2d 431 (1990); Ark. Const. art. 7, § 28. Nonetheless, there is no doubt that a court of equity may grant relief against a void or illegal tax assessment. *Scott County* v. *Frost*, 305 Ark. 358, 807 S.W.2d 469 (1991). In *Cook* v. *State*, 312 Ark. 438, 850 S.W.2d 309 (1993), this court set out a number of cases where the collection of taxes had been successfully enjoined under the illegal exaction provision. *See Greedup* v.

Franklin County, 30 Ark. 101 (1875) (an attempt to collect a county levy in excess of the five mills allowed by the constitution); *Lyman* v. *Howe*, 64 Ark. 436, 42 S.W. 830 (1897) (a tax based upon an assessment not made by the assessor); *Ragan* v. *Venhaus*, 289 Ark. 266, 711 S.W.2d 467 (1986) and *Merwin* v. *Fussell*, 93 Ark. 336, 124 S.W. 1021 (1910) (attempts to collect taxes not properly voted by the people); *McDaniel* v. *Texarkana Cooperage & Mfg. Co.*, 94 Ark. 235, 126 S.W. 727 (1910) (a tax levied by a county having no jurisdiction over the property); *City of Little Rock* v. *Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982) and *Waters Pierce Oil Co.* v. *Little Rock*, 39 Ark. 412 (1882) (taxes which were not authorized by the city's delegated power of taxation).

Although illegal taxes can be enjoined by a court of equity, this court has also strictly adhered to the rule that, if the taxes complained of are not themselves illegal, a suit for illegal exaction will not lie. *Miller* v. *Leathers*, 312 Ark. 522, 851 S.W.2d 421 (1993); *Schuman* v. *Ouachita County*, 218 Ark. 46, 134 S.W.2d 42 (1950). The *Miller* court, quoting from *Pledger* v. *Featherlite Precast Corp.*, 308 Ark. 124, 823 S.W.2d 852 (1992), stated the established rule that a flaw in the assessment or collection procedure, no matter how serious from the taxpayer's point of view, does not make the exaction itself illegal. *See also Scott County*, 305 Ark. 358, 807 S.W.2d 469; *McIntosh*, 304 Ark. 224, 800 S.W.2d 431.

Unquestionably, the ad valorem property taxes assessed here against Bella Vista Village are authorized by law. *See* Ark. Const. art. 16, § 5. And Bella Vista Village does not object to the actual valuations (current market value) or tax formula used to calculate the 1991 taxes. Instead, it contends only that the reassessment and tax collection scheme used by Sandlin and Pockrus to collect these *legal* ad valorem taxes is unconstitutional. In other words, Bella Vista Village effectually questions only the reassessment procedure or plan employed by the county assessor and collector as being a flawed one. Because this case does not involve a void or illegal tax assessment, the chancery court was without power to hear this matter. Therefore, we must reverse and dismiss.

CORBIN, J., not participating.

STATE of Arkansas *v.* PULASKI COUNTY CIRCUIT-CHANCERY COURT

93-948 872 S.W.2d 854

Supreme Court of Arkansas
Opinion delivered March 28, 1994
[Rehearing denied May 2, 1994.]

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

Gattis & Greene, P.A., Omar F. Greene, II, P.A. and *Warford & Broaddrick, P.A.*, by: *Lloyd Warford*, for respondent.

TOM GLAZE, Justice. According to findings set out in a Little Rock Municipal Court order dated August 19, 1993, Eric Walter, seventeen years of age, was detained in jail based on "felony charges filed in that court." Walter had been arrested on July 25, 1993, and had been "charged" as an adult in Little Rock Municipal Court with two counts of aggravated robbery and two counts of attempted capital murder. By its August 19 order, the municipal court denied Walter's request to transfer his case to juvenile court, stating municipal court had no authority to do so under Ark. Code Ann. § 9-27-318 (Repl. 1993).

After the Little Rock Municipal Court's order was entered, Walter's counsel filed a petition for writ of habeas corpus and for injunctive relief in Pulaski County Chancery Court, and after a hearing, the chancellor ordered Walter's release, stating the municipal court lacked jurisdiction to order his detention.[1] The chancellor further enjoined the prosecuting attorney from "charging any juvenile as an adult in any municipal court in the 6th District." In its order, the chancery court also found that, by the time it had issued its order, the prosecuting attorney had filed Walter's felony charges in circuit court, but even so, the court concluded

[1]The chancery court actually entered an order dated August 25, 1993, and an amended order dated September 14, 1993, which were essentially identical.

Walter's chancery case was not moot, since the issues involved were capable of recurrence. The state filed no appeal from the chancery court's order. Instead, it chose to file with this court the state's petition for writ of prohibition against the chancery court, asking us to bar that court from enforcing that part of the chancery court's order enjoining the prosecuting attorney from filing felony criminal charges in municipal courts against juveniles who are to be tried as adults in circuit court. We granted the state a temporary stay of the chancellor's order and requested the parties to file briefs.

The state frames the issues before us, by contending that the chancery court erred in holding municipal courts have no jurisdiction whatsoever over juveniles accused by the state of having committed felony criminal offenses. It further contends the chancery court had no jurisdiction to enter a continuing injunction against the prosecuting attorney, barring him from charging juvenile defendants in municipal courts with having committed felony criminal offenses. We initially note that the state's general usage of terms such as "accused," "charge" and "charging" without defining them or placing them in specific context, tends to cloud what happened in this case or what the state actually seeks to prohibit.

Recently, we made it very clear in *Rhoades* v. *State*, 315 Ark. 658, 869 S.W.2d 698 (1994), *rehearing denied*, (Supp. Opinion delivered on March 14, 1994), that the Juvenile Code provides that, when a case involves a juvenile sixteen years or older, and the alleged act would constitute a felony if committed by an adult, the prosecuting attorney has the discretion to file a petition in juvenile court alleging delinquency, or to file charges in circuit court and to prosecute as an adult. In *Rhoades*, we also referred to the well-settled law that felony charges in circuit court are required to be brought by indictment or information. Furthermore, this court in *Long* v. *State*, 284 Ark. 21, 680 S.W.2d 686 (1984), held that municipal courts are without jurisdiction to try felony cases. And finally, we have made it clear that, under Ark. Code Ann. § 9-27-313(b) (Repl. 1993), an officer taking a juvenile into custody must immediately take the juvenile before the court out of which the warrant was issued and that court shall decide whether jurisdiction is in juvenile court or circuit court under § 9-27-318. *Rhoades*, 315 Ark. at 660, 869 S.W.2d at 699.

While we think most of the parties' arguments made here are sufficiently answered by a reading and understanding of these earlier decisions, we are unable to address the state's arguments more fully, since we hold prohibition does not lie in this case. First, we are unable from the record before us to tell whether Walter was arrested pursuant to an arrest warrant, an arrest without a warrant made under ARCP Rule 4.1 and Ark. Code Ann. § 9-27-313 (Repl. 1993), or whether charges were actually filed in the Little Rock Municipal Court as was specifically stated in that court's order. Obviously, this factual issue is relevant for us to know before being able to determine what role the municipal court performed in this matter. As pointed out, felony charges (information or indictment) must be filed and tried in circuit, not municipal, courts.

As this court has said repeatedly, a writ of prohibition is an extraordinary writ and is only granted 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. *Loftin*, 279 Ark. 461, 652 S.W.2d 627 (1983). In the present case, the chancery court would have had authority to grant Walter relief by writ of habeas corpus if the state had actually filed its charges by felony information or indictment against Walter in municipal court. By the same token, the chancery court may have otherwise lacked such power in other instances. However, it is impossible to determine from the record before us whether Walter was before the municipal court as a result of a reasonable cause arrest or perhaps, as a result of an arrest warrant. Regardless, the municipal court, even in these custody and arrest circumstances, must determine if the nature of the alleged crime is a felony so an appropriate charge or petition can be filed in circuit or chancery court as discussed above.

In sum, this court in *Miller* held that such a writ is a narrow, extraordinary writ which should not be granted even if part of the order is beyond the jurisdiction of the judge, since those questions can be properly raised on appeal. *Miller*, 279 Ark. at 463, 652 S.W.2d at 628. From the record before us, the chancery court appears to have had authority to issue relief in this matter even though under some circumstances (left undefined here) it might have acted beyond its jurisdiction. As pointed out earlier, the state did not appeal the chancery court's order even though

to have done so would certainly have afforded the state no harm, especially since it subsequently chose to file its felony charges against Walter in circuit court, rendering his case moot.

For the reasons given, we must deny the petition for writ of prohibition.

CORBIN, J., not participating.

John Eric ARCHER *v.* BENTON COUNTY CIRCUIT COURT, The Honorable Tom J. Keith

CR 93-1284 872 S.W.2d 397

Supreme Court of Arkansas
Opinion delivered March 28, 1994

Mashburn & Taylor, by: *Scott E. Smith*, for appellant.

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

DONALD L. CORBIN, Justice. Petitioner, John Eric Archer, seeks a writ of prohibition against the Benton Circuit Court to prevent a trial on two counts of delivery of a controlled substance. The Benton Circuit Court denied petitioner's motion to dismiss the charges on speedy trial grounds, and he now seeks a writ of prohibition in this court pursuant to A.R.Cr.P. Rule 28.1(d). This court has jurisdiction of cases of prohibition. Ark. Sup. Ct. R. 1-2(a)(6). There is no merit to petitioner's argument, and we deny his request for a writ of prohibition.

A criminal defendant's constitutional right to a speedy trial is protected by Article VIII of the Arkansas Rules of Criminal Procedure (Rules 27 - 30). This court adopted Rule 28 for the purpose of enforcing the constitutional right to a speedy trial. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983). Rules 28.1(c) and 28.2(a) require the state to bring a defendant to trial within one

year from the date a charge is filed in circuit court, unless prior to that time, the defendant has been arrested and is in custody or lawfully at liberty, in which case the defendant must be brought to trial within one year from the date he or she was arrested. *Lynch* v. *State*, 315 Ark. 47, 863 S.W.2d 834 (1993). Rule 30.1 provides that if a defendant is not brought to trial within the requisite time, he or she will be discharged, and the discharge constitutes an absolute bar to prosecution of the same offense and for any other offenses required to be joined with that offense.

The felony information filed against petitioner in Benton Circuit Court on March 1, 1993, accused him of committing two counts of delivery of marijuana in violation of Ark. Code Ann. § 5-64-401 (Supp. 1991), both Class C felonies, on September 27, 1991, and October 4, 1991. Petitioner was arrested on these charges on December 25, 1992, pursuant to a warrant. The arrest warrant was issued on April 16, 1992, after the Rogers Municipal Court judge determined probable cause existed according to an affidavit completed by the Rogers Police Department and signed by the deputy prosecuting attorney. The affidavit of probable cause was filed of record in Benton Circuit Court on April 16, 1992.

The sole issue presented in this case is the meaning of the phrase "the date the charge is filed" in Rule 28.2(a). The pertinent part of Rule 28 states as follows:

> RULE 28.2. When Time Commences to Run.
>
> The time for trial shall commence running, without demand by the defendant, from the following dates:
>
> (a) from the date the charge is filed, except that if prior to that time the defendant has been continuously held in custody or on bail or lawfully at liberty to answer for the same offense or an offense based on the same conduct or arising from the same criminal episode, then the time for trial shall commence running from the date of arrest[.]

Petitioner contends the state filed charges against him on April 16, 1992, when the affidavit of probable cause to arrest him was filed in circuit court. Accordingly, petitioner argues that pursuant to A.R.Cr.P. Rules 28.1(c) and 28.2(a), the twelve-month

period for his trial began to run on April 16, 1992. Respondent also relies on Rule 28.2(a) but contends that charges were filed against him in circuit court when the information was filed on March 1, 1993. Thus, respondent argues the charges were filed after petitioner's arrest on December 25, 1992. Therefore, according to Rule 28.2(a), respondent argues the time for petitioner's trial began to run on the date of his arrest.

[redacted] Rule 28.2(a) is silent with respect to which particular charging instruments must be filed to satisfy the requirement that charges are filed. This silence is no doubt due to the fact that the requisite charging instruments in any case vary according to the classification of the crimes charged and the jurisdiction of the charging courts. The Arkansas Constitution provides that no one shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except for those cases which the General Assembly makes cognizable by justices of the peace or courts of similar jurisdiction. Ark. Const. art. 2, § 8. Amendment 21 to the Arkansas Constitution provides that an offense which previously had to be charged by grand jury indictment may now be charged by information filed by the prosecuting attorney. Thus, only felonies must be charged by grand jury indictment or by information filed by the prosecuting attorney. Ark. Const. art. 2, § 8; amend. 21; *Long* v. *State*, 284 Ark. 21, 680 S.W.2d 686 (1984). City attorneys cannot file felony charges, and municipal courts are without jurisdiction to try felony cases. *Hagen* v. *State*, 315 Ark. 20, 864 S.W.2d 856 (1993). The requirements for informations and indictments are set out in Ark. Code Ann. § 16-85-403 (Supp. 1993) and Ark. Const. art. 7, § 49. *Id.*

Misdemeanors and violations of city ordinances need not be charged by information or indictment. *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Burrow* v. *Hot Springs*, 85 Ark. 396, 108 S.W. 823 (1908). Pursuant to Article III of the Arkansas Rules of Criminal Procedure, these lesser charges may be charged by the issuance of a warrant, citation, or summons to command an accused to court. *Hagen*, 315 Ark. 20, 864 S.W.2d 856. City attorneys can file charging instruments in municipal court for misdemeanor violations of state or city law committed within the jurisdiction of the municipal court. *Id.* (citing Ark. Code Ann. § 14-42-112(c) (Supp. 1993)).

Petitioner relies on our recent decision in *Hagen*, 315 Ark. 20, 864 S.W.2d 856, which held that a city attorney's form affidavit of probable cause to arrest constituted a sufficient charging instrument to protect Hagen's due process right to be charged with the misdemeanor for which he had been convicted. Petitioner contends that *Hagen* should be extended to apply to his felony case so that the probable cause affidavit filed against him in circuit court constituted a valid charging instrument to begin the running of the time for speedy trial. Petitioner emphasizes the similarities in the two cases by noting that the affidavit of probable cause in his case meets the requirements of a valid charging instrument as set out in *Hagen.*

We do not agree that *Hagen* applies to petitioner's case. The situation in *Hagen* and the facts before us are substantially different. *Hagen* involved a misdemeanor charge, and informations or indictments are not required for misdemeanors. *Long*, 284 Ark. 21, 680 S.W.2d 686; *Lovell*, 283 Ark. 425, 678 S.W.2d 318. Petitioner has been accused of two felonies and has a state constitutional right to be charged by indictment or information. Thus, different considerations apply in determining what constitutes a valid charging instrument in his case.

Petitioner's right to receive notice of the felony charges against him are protected by Ark. Const. art. 2, § 8, and amend. 21, which require those criminal charges to be filed by indictment or information. Therefore, we hold that for purposes of his speedy trial rights and Rule 28.2(a), the date charges were filed against petitioner is the date the felony information was filed in circuit court, March 1, 1993.

Having determined the date charges were filed against petitioner was the date the information was filed in circuit court, we agree with the state's contention that the date of appellant's arrest is the date the time for speedy trial began to run. A.R.Cr.P. Rule 28.2(a). Petitioner was arrested and lawfully at liberty on his recognizance when the information was filed on March 1, 1993. According to Rule 28.2(a), charges were filed after his arrest, and the twelve-month period for his trial began to run on the date of his arrest, December 25, 1992.

Petitioner moved the circuit court for dismissal on

speedy trial grounds on August 13, 1993. The trial court entered an order denying petitioner's motion to dismiss on November 19, 1993. Even assuming arguendo that there were no excludable periods charged to petitioner, the time for his speedy trial had not yet expired. Thus, petitioner did not make the requisite showing that his trial was scheduled to begin after the speedy-trial period had expired. *See State* v. *McCann*, 313 Ark. 286, 853 S.W.2d 886 (1993). The trial court did not err in denying his motion to dismiss.

Petitions for writs of prohibition will only be granted when clearly warranted. *Rhodes* v. *Capeheart*, 313 Ark. 16, 852 S.W.2d 118 (1993). Petitioner has not demonstrated that his speedy trial rights were violated, and a writ of prohibition is therefore not warranted.

Petition denied.

Yvonne DUCHARME *v.* James L. DUCHARME

93-1016 872 S.W.2d 392

Supreme Court of Arkansas
Opinion delivered March 28, 1994

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

J. Sky Tapp, for appellee.

ROBERT L. BROWN, Justice. This case raises the question of whether the State of Arkansas will enforce an agreement called an act of donation which is unknown under Arkansas law but was entered into under the laws of the State of Louisiana. The appellant, Yvonne Ducharme, urges that the act of donation, whereby she gave up her rights in certain real and personal property to her husband, appellee James L. Ducharme, for his life was extracted under duress or coercion. Appellee Ducharme counters that appellant Ducharme negotiated the act of donation without coercion or duress and that as a result of the agreement the couple reconciled. The chancery court refused to void the agreement. We find no error in the court's decision on this and other points raised, and we affirm.

Yvonne Ducharme and James Ducharme were married in Opelousas, Louisiana where they were living in 1979. It was the second marriage for both, and both had adult children by their previous marriages. Before the marriage, they entered into an antenuptial agreement.

In 1987, while still living in Opelousas, the couple separated. Yvonne Ducharme was in ill health, according to her testimony, and had spots on her lung that she feared might be cancerous. She and James Ducharme determined to reconcile, but as part and parcel of the reconciliation Yvonne Ducharme was told by her husband that she would have to give up her right and interest in all of his property. To accomplish such an agreement, or act of donation as it is termed in Louisiana, she met with her husband's attorney, Alex Andrus. At that meeting she refused to relinquish her total interest. After negotiating with Andrus, she did agree to give up her usufruct for her husband's life in certain notes receivable and real property located in Louisiana. Under Louisiana law, the usufruct is a "real right of limited duration on the property of another." La. Civ. Code Ann. art 535 (West 1980). The agreement constituting the act of donation was signed by the couple on October 2, 1987, and they reconciled.

In June of 1991, the Ducharmes moved to Arkansas to Hot Springs Village, and Yvonne Ducharme began selling real estate on a part-time basis. The next year she filed for divorce on September 16, 1992, and as part of the divorce action sought to void both the antenuptial agreement and the act of donation as viola-

tive of this state's public policy due to duress and coercion. Following a hearing, the chancery court issued a letter opinion on April 5, 1993, wherein it (1) declared the Louisiana antenuptial agreement null and void as contrary to Arkansas's public policy; (2) upheld the act of donation; (3) awarded alimony in the sum of $750 per month for a term of five years; (4) declared the Hot Springs Village home and the portable buildings located on the real property described as the Union Street property to be marital property and her interest to be one-half of the sale proceeds; (5) awarded her various marital gifts and her premarital property; (6) and awarded him his premarital property. The chancery court did not increase Yvonne Ducharme's interest based on work performed with regard to the real property. Nor did it grant her an interest in $31,000 in cash held by her husband. By an order on reconsideration Yvonne Ducharme was also awarded a one-half interest in the sale proceeds of a trailer park in Louisiana.

We begin by considering the validity of the act of donation, which Arkansas law does not recognize. The chancery court made no specific finding that the donation agreement executed in 1987 was a Louisiana contract, the legal effectiveness of which would be determined under Louisiana law, but that appears to be obvious. In 1987, the couple had married, and they were living in Opelousas as they had been for eight years. The property specified in Yvonne Ducharme's grant of the usufruct to her husband for life was Louisiana property. The State of Arkansas was not in the picture at that time. Yvonne Ducharme charges, however, that since 1991 the notes receivable under the act of donation have been in Arkansas and are being collected in Arkansas. According to her theory, Arkansas law should determine the agreement's validity.

We do not agree. In resolving choice of law matters for contract disputes, the law of the state with the most significant relationship to the issue at hand should apply. *See Robert A. Leflar, et al., American Conflicts Law* § 149 (4th Ed. 1986); *Standard Leasing Corp.* v. *Schmidt Aviation*, 264 Ark. 851, 576 S.W.2d 181 (1979); *Yarbrough* v. *Prentice Lee Tractor Co.*, 252 Ark. 349, 479 S.W.2d 549 (1972); *see also Snow* v. *Admiral Ins. Co.*, 612 F.Supp. 206 (D.C. Ark. 1985). Because of the history of the Ducharmes' marriage, the place of contracting, and the location of the real property specified in the agreement, we hold that

Louisiana's law applies to determine the legal efficacy of the act of donation.

Because the agreement is valid under Louisiana law, we next address whether it is unenforceable in Arkansas as contrary to this state's public policy. Yvonne Ducharme argues that the chancery court clearly erred in its analysis because in 1987 she had spots on her lungs and no medical insurance. Her only recourse was to reconcile with her husband and avail herself of his insurance, according to her argument, and the act of donation was purely a matter of leverage brought to bear by her husband. In other words, the agreement was coerced, she maintains.

On this point, the chancery court made the following findings in its letter opinion:

. . . .

> 3. That on the date of donation, the parties had been living separate and apart for some period of time.
>
> 4. The act of donation was given in contemplation of resumption of the marriage and in termination of the separation.
>
> 5. The terms of the donation were, at least in part, negotiated between the parties in that originally the donation was drafted whereby the wife would give all of her interest in the subject property to the husband. However, after discussions, the wife agreed only to donate a life estate.
>
> 6. The wife was not forced or coerced into executing the act of donation.
>
> 7. The wife had the option, rather than executing the act of donation, to seek a legal separation or divorce from the husband.
>
> 8. The wife had ample time to consider the matter prior to executing the donation, and ample time to consult with independent counsel if she so desired.
>
> 9. At the time of the donation, the wife was an experienced businesswoman and real estate broker. She was thoroughly familiar with real estate and business matters.

Therefore, the act of donation is valid and is enforceable.

. . . .

We cannot say that these findings by the chancery court are clearly erroneous or that it erred in its conclusion that the donation agreement is enforceable in this State. Yvonne Ducharme obviously knew what she was abandoning in exchange for reconciliation with her husband and made an informed and calculated decision to do that. No doubt, she gave up her rights in certain property for her husband's life in exchange for medical security, and that security was an incentive for her doing so. But Yvonne Ducharme had other options, as the court pointed out. She could have retained counsel to explore alternatives to the donation agreement or sued for separation or divorce and argued for continued medical coverage as part of those lawsuits. Moreover, there is also the fact that that agreement fostered a reconciliation in the Ducharmes' marriage which clearly was not against public policy. *See Schichtel* v. *Schichtel*, 3 Ark. App. 36, 621 S.W.2d 504 (1981). The Court of Appeals said in *Schichtel*:

> The law encourages the resumption of marital relations. Since the purpose of a reconciliation agreement is to restore marital relations, it harmonizes with public policy and will be upheld.

3 Ark. App. at 38, 621 S.W.2d at 506.

In sum, we agree with the chancery court that the facts in this case do not support an allegation of duress and coercion such as to render the agreement unenforceable in this state.

Appellant Ducharme's remaining three arguments are also without merit. She contends that the chancery court was wrong in not extending alimony until she was eligible for social security rather than just five years.[1] The award of alimony is a matter resting solely in the chancery court's discretion. *Burns* v. *Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993). The alimony award must always depend upon the particular facts of each case. *Dean* v. *Dean*, 222 Ark. 219, 258 S.W.2d 54 (1953). The ability of one

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[1]At the time of the hearing in 1993, Yvonne Ducharme was age 56.

party to pay and the need of the other party are primary factors to be considered in awarding alimony. *Burns* v. *Burns, supra.*

[redacted] The court found that Yvonne Ducharme had marketable skills. She knew the real estate business as a licensed seller and broker, and she had worked in other capacities including that of secretary and decorating consultant. She, therefore, had the means to support herself. That fact joined with the alimony award and other property given her in the divorce evidence that the chancery court weighed the relevant circumstances. We conclude that the chancery court acted well within its discretion in awarding alimony "for a specified period of time." Ark. Code Ann. § 9-12-312(b) (Repl. 1993).

[redacted] Nor do we concur with Yvonne Ducharme that the work expended by her as carpenter, plumber, electrician, cleaner, and repairer on the rental properties entitled her to a bonus award in certain property. It is unclear as to what exact property the appellant is referring to. Suffice it to say that she presents no persuasive reason for enlarging her one-half interest in the sale proceeds of the property to be sold pursuant to the chancery court's order. The remaining property appears to be subject to the act of donation, according to the chancery court's opinion, and we have affirmed that decision.

[redacted] Lastly, appellant Ducharme maintains that some $31,000 of cash assets are marital property to be divided equally. James Ducharme counters that these assets derived from property subject to the act of donation and that he is entitled to all of it. Again, Yvonne Ducharme cites no authority why this should not be the case and presents no proof as to the source of these funds. We have no basis for declaring that the chancery court abused its discretion on this point.

Affirmed.

CORBIN, J., not participating.

Christopher LAUGHLIN *v.* STATE of Arkansas

CR 93-1101 872 S.W.2d 848

Supreme Court of Arkansas
Opinion delivered March 28, 1994

Tim R. Morris, for appellant.

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

ROBERT L. BROWN, Justice. This case involves multiple convictions of rape and sexual abuse involving boys less than age 14. The appellant, Christopher Laughlin, received seven sentences, two of which were life terms. Laughlin appeals on several grounds: (1) one victim, L.M., who was age 12 at trial, gave testimony that was incompetent; (2) there was insufficient evidence to convict Laughlin for the rape of T.L. or the sexual solicitation of L.M.; (3) the trial court erred in not admitting testimony of T.L.'s sexual conduct with his brother; (4) the trial court erred in not

admitting testimony of J.M.'s sexual conduct with third parties; and (5) the trial court erred in not permitting cross examination of victim C.L. about prior criminal acts. The points on appeal are meritless, and we affirm.

The events in question took place between August 1, 1991, and April 16, 1992 in Rogers. Laughlin, who was age 32 at trial, had a house in the city. He would invite young boys to his house in the afternoons and often they would spend the night with him, with or without parental consent. At times, the parents of some of the boys used him as a babysitter. At his home the boys, who were all under age 14 at the time of the alleged offenses, testified that they played the video game, Nintendo, or watched television. They also testified that they drank alcoholic beverages, smoked cigarettes and marijuana, and read nudity magazines such as *Penthouse* and *Playboy*. A few of the boys would walk around the house naked and urinate off the back porch. On occasion, Laughlin would photograph the naked boys. From time to time Laughlin would masturbate with one of the boys or perform oral sex on a boy or have a boy perform oral sex on him. There was also testimony that he engaged in a form of anal sex with at least three boys, though there was no uncontradicted testimony of penetration.

The trial of this matter was held on February 2, 1993 and continued over six days. Laughlin was convicted of the following offenses with the following victims under age 14 and received these sentences:

J.W.	Rape	Life Imprisonment
S.L.	Rape	Life Imprisonment
T.L.	Rape	40 years
J.M.	Rape	40 years
K.W.	Sexual Abuse	10 years
C.L.	Sexual Abuse	10 years
L.M.	Sexual Solicitation of a child	1 year in the county jail and a $1,000 fine.

The life and 40-year sentences were to run consecutively; the

sexual abuse and sexual solicitation sentences were to run concurrently. Subsequent motions for amendment of judgment and a new trial were denied.

I. INCOMPETENT TESTIMONY

Laughlin first contends that the testimony of L.M., who was the victim in the sexual solicitation conviction, was not competent. He specifically urges that L.M. had a faulty memory and could not accurately convey what he experienced.

We give this argument little credence. This court has repeatedly stated that the competency of a child, in a case involving a sexual offense, is a matter that is primarily for the trial court to decide, acknowledging that the judge is best able to assess the child's intelligence and understanding of the necessity for telling the truth. *Holloway* v. *State*, 312 Ark. 306, 849 S.W.2d 473 (1993); *Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986); *Needham* v. *State*, 215 Ark. 935, 224 S.W.2d 785 (1949). The trial court begins with the presumption that every person is competent to be a witness. Ark. R. Evid. 601; *Jackson* v. *State, supra*. Under the guidelines set forth by this court for determining the competency of a child witness, the challenging party bears the burden of establishing that the witness lacks at least one of the following: (1) the ability to understand the obligation of an oath and to comprehend the obligation imposed by it; or (2) an understanding of the consequences of false swearing; or (3) the ability to receive accurate impressions and to retain them, to the extent that the capacity exists to transmit to the factfinder a reasonable statement of what was seen, felt, or heard. *Holloway* v. *State, supra, citing Logan* v. *State*, 299 Ark. 266, 773 S.W.2d 413 (1989).

In support of his contention, Laughlin points to instances in which L.M. demonstrated forgetfulness or contradicted another victim's testimony. He also relies on the fact that L.M. admitted that he did not tell the police officers the truth when he was first questioned.

Nevertheless, L.M., who was 12 at the time of trial, identified Laughlin and consistently testified that Laughlin touched his penis on at least two occasions. He answered questions clearly and gave sufficient detail of the acts committed by the appellant.

He also exhibited an ability to recall and give accurate impressions of reality, and there were no direct conflicts or irreconcilable differences in the victim's testimony with regard to the essential elements of the case. Further, his testimony was generally responsive to the questions. All of these factors are important in assessing competency. *See Jones* v. *State*, 300 Ark. 565, 780 S.W.2d 556 (1989); *Bowden* v. *State*, 297 Ark. 160, 761 S.W.2d 148 (1988); *Hoggard* v. *State*, 277 Ark. 117, 640 S.W.2d 102, *cert. denied*, 460 U.S. 1022 (1983).

The fact that L.M.'s testimony may not have been a model of lucidity does not render him incompetent. *Holloway* v. *State, supra; Bowden* v. *State, supra.* Any variances in his testimony were for the jury to resolve. *Id.* We cannot say that the trial court abused its discretion by declaring the witness competent. *See Curtis* v. *State*, 301 Ark. 212, 783 S.W.2d 47 (1990).

II. INSUFFICIENT EVIDENCE REGARDING T.L. AND L.M.

Laughlin next asserts that the evidence was insufficient to support the verdict for rape involving T.L. and sexual solicitation involving L.M.

We have recently described our analysis for determining whether the evidence is sufficient:

> The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas* v. *State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach* v. *State*, 310 Ark. 119, 835 S.W.2d 852 (1992). In determining the sufficiency of the evidence, we review the proof 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).

Moore v. *State*, 315 Ark. 131, 134, 864 S.W.2d 863, 865 (1993).

T.L., an eleven year old boy at the time of trial, gave precise testimony regarding the sexual conduct of Laughlin. He stated that he knew him and identified him in the courtroom. He

described the exterior and interior of Laughlin's house and the area surrounding the house. He further testified that he went to Laughlin's house on a Wednesday. There, he had a shower, and Laughlin took a towel and dried his "private off." In later testimony, T.L. stated that Laughlin touched his penis inside his underwear and hugged him. T.L. also performed oral sex on the appellant at his request. He then described in graphic detail how Laughlin performed oral sex on him on at least two separate occasions.

This testimony clearly qualifies as rape by deviate sexual behavior. Ark. Code Ann. §§ 5-14-101(1)(A), 5-14-103 (1987). The fact that L.M. remembers the toweling episode differently from T.L. is immaterial, since there is no requirement that T.L.'s testimony as a victim be corroborated. *Curtis* v. *State*, 301 Ark. 208, 783 S.W.2d 47 (1990). The testimony of a rape victim alone is sufficient to support a conviction. *Bishop* v. *State*, 310 Ark. 479, 839 S.W.2d 6 (1992); *White* v. *State*, 303 Ark. 30, 792 S.W.2d 867 (1990). And T.L.'s credibility, to the extent it was called into question, falls within the realm of the jury to assess. *Prater* v. *State*, 307 Ark. 180, 820 S.W.2d 429 (1991). Likewise, any inconsistencies between the testimony of the victims were for the jury to resolve. *White* v. *State, supra*. In sum, the evidence of rape which pertained to T.L. was sufficient.

With respect to the sufficiency of the evidence for the sexual solicitation of L.M., we hold that this issue was not preserved for appeal. Laughlin did request that the sexual abuse charge be reduced to sexual solicitation of a child. The trial court refused, but the jury then found him guilty of this lesser offense. However, Laughlin never moved for a directed verdict regarding the offense of sexual solicitation. We have held that the motion must be made in connection with the offense for which the defendant was convicted in order for the matter to be subject to our review. *Hickson* v. *State*, 312 Ark. 171, 847 S.W.2d 691 (1993). In the instant case, the directed verdict motion was made on the charge of sexual abuse but the jury in effect acquitted Laughlin of that charge by finding him guilty of the misdemeanor, sexual solicitation of a child. No motion for a directed verdict was made relating to sexual solicitation involving L.M. We decline to address the issue.

III. RAPE SHIELD STATUTE

At trial, Laughlin asked the court to allow questioning of two victims, T.L. and J.M., about their sexual conduct with other males. In both instances, Laughlin maintained that the testimony which he sought to elicit would disclose that the other males were guilty of the acts for which he is charged.

In the case of T.L., Laughlin attempted to cross-examine him about the victim's sexual relationship with his brother. He argued that this was relevant to show that it was in fact the brother who molested T.L. and not the appellant. The prosecutor objected on the basis that this violated the Rape Shield Statute, Ark. Code Ann. § 16-42-101 (1987). An *in camera* hearing was held, following which the trial court ruled that the testimony of any sexual activity with the brother before the trial was irrelevant and should be excluded.[1]

[redacted] Laughlin argues on appeal that the sexual conduct with the brother was relevant, but we agree with the trial court that it was not. The Rape Shield Statute broadly excludes evidence of specific instances of the victim's sexual conduct *prior to the trial. Slater* v. *State*, 310 Ark. 73, 832 S.W.2d 846 (1992). Under the statute, the trial court, upon proper motion, may engage in a balancing test to assess whether the probative value of the testimony sought outweighs the inflammatory nature of the testimony. Laughlin was unable to persuade the trial court that the testimony of sexual activity with the brother was relevant on the theory that T.L. had confused the brother and Laughlin in his mind. The trial court disallowed the inquiry, and we find no fault in its ruling.

Turning to the testimony of J.M., Laughlin asserts that testimony about J.M.'s homosexual encounters with other males bolsters Laughlin's defense that another individual molested J.M.,

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[1]The State first objected to the absence of a written motion by defense counsel as required by § 16-42-101(c)(1) when the issue of T.L.'s prior sexual conduct was raised, and the trial court sustained the objection. Later, when the issue of T.L.'s specific sexual activity with his brother was raised, no similar objection by the State was made, and the State proceeded to participate in the rape shield hearing *in camera*. The State does not argue on appeal that Laughlin failed to file a written motion with respect to T.L.'s testimony concerning his brother, and, thus, that issue is not before us.

and not the appellant. He also insists that this testimony would be probative of J.M.'s lack of credibility as a witness. Again, these arguments lack merit.

What precipitated this issue was the following sidebar conference that occurred at trial:

> DEFENSE COUNSEL: Your Honor, for the record, and from the previous court rulings, I plan or plan to have the Court's permission to ask him if he has done any of these acts prior or after the incidents with other individuals besides Chris Laughlin.
>
> THE COURT: Do you have any basis for believing that he has?
>
> DEFENSE COUNSEL: The only basis I have, your Honor, is that when his father met Chris Laughlin there was conversation that he didn't want his son going over to the bowling alley because that's where all the homosexuals were and was concerned about the crowd and his son going over to the bowling alley. That's the only basis I have.
>
> PROSECUTOR: Your Honor, I have no basis — in fact, I asked [J.M.] about it Friday and he said that he's never been — nobody's ever done anything like this to him before.
>
> THE COURT: Well, your request is denied.

Admissibility of a victim's prior sexual conduct as an exception under the Rape Shield Statute must be determined pursuant to precise procedures codified at Ark. Code Ann. §§ 16-42-101(c)(1–3). Admissibility of prior sexual conduct is discretionary with the trial court. *Gaines* v. *State*, 313 Ark. 561, 855 S.W.2d 956 (1993); *Marcum* v. *State*, 299 Ark. 30, 771 S.W.2d 250 (1989). In order to set in motion a relevancy decision by the trial court regarding prior sexual conduct, § 16-42-101(c)(1) requires that the defendant file a written motion with the court before resting to the effect that the defendant desires to present evidence of the victim's past sexual activity.

Here no written motion was filed and no *in camera*

hearing was conducted as required by § 16-42-101(c). Only an objection was made by defense counsel, and that was denied. We conclude that the procedure followed was defective and insufficient to invoke a relevancy determination under the Rape Shield Statute. It is also highly questionable that the "basis" cited for the objection by the defense counsel qualifies as a proffer of proof. Indeed, the defense counsel made no reference to the Rape Shield Statute in making his objection. We hold that Laughlin did not follow the procedure for raising an exception to the Rape Shield Statute, and, accordingly, his argument on appeal is without merit. *See Jackson* v. *State*, 284 Ark. 478, 683 S.W.2d 606 (1985).

For his last point of error, Laughlin argues that he was denied his right to effectively cross-examine C.L. when the court declined to allow inquiry into alleged misconduct of that witness. In support of this argument, he cites Rule 608(b) of the Arkansas Rules of Evidence which provides:

> (b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of [a] crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

We have interpreted Rule 608(b) to relate to inquiries into conduct on cross examination that are clearly probative of truthfulness or untruthfulness. *Dillon* v. *State*, 311 Ark. 529, 844 S.W.2d 944 (1993); *Parette* v. *State*, 301 Ark. 607, 786 S.W.2d 817 (1990). We have not interpreted the rule to permit cross examination into specific instances that are merely probative of dishonesty. *Rhodes* v. *State*, 276 Ark. 203, 634 S.W.2d 107 (1982).

At trial, Laughlin asked the court's indulgence to question C.L., age 9, about two specific instances of misconduct: (1) being detained by police while riding in a stolen car driven by his older

brother; and (2) being detained by police for riding stolen bicycles, again with his older brother. When arguing his position to the trial court, Laughlin explained that he wished to demonstrate the fact that criminal charges could be filed against C.L. and that this could be leverage against C.L. to testify against Laughlin which would diminish C.L.'s credibility.

The actions of C.L. involving the stolen bicycle and car which Laughlin seeks to probe are indicative of dishonest acts but do not necessarily evidence a proclivity for untruthfulness. This court has stated that "while an absence of respect for the property rights of others is an undesirable trait, it does not directly indicate an impairment of the trait of truthfulness." *Rhodes* v. *State*, 276 Ark. at 209, 634 S.W.2d at 111. We follow our reasoning in the *Rhodes* decision and hold that the specific incidents of alleged theft perpetrated by C.L. and his brother do not automatically translate into examples of untruthfulness. The trial court, accordingly, did not err in disallowing further questioning on these circumstances. *See also Hamm* v. *State*, 301 Ark. 154, 782 S.W.2d 577 (1990).

The record has been examined in accordance with Supreme Court Rule 4-3(h) for additional reversible error, and none has been found.

Affirmed.

CORBIN, J., not participating.

Andrew PICKENS, Jane Pickens & Lyn Ashman *v.*
Freddie BLACK, Executor

93-718 872 S.W.2d 405

Supreme Court of Arkansas
Opinion delivered March 28, 1994

The McMath Law Firm, by: *Sandy S. McMath*, for appellant.

Ramsay, Bridgeforth, Harrelson & Starling, by: *William C. Bridgeforth* and *David R. Bridgeforth*, for appellee.

THOMAS B. BURKE, Special Justice. Appellants are the surviving children of the decedent, R.A. Pickens. The decedent died testate, and appellants are neither beneficiaries under his will nor creditors of the estate. Appellee is the executor of the decedent's estate and is the son-in-law of the decedent's surviving spouse. His mother-in-law and his wife were also named as defendants below. Appellants prosecute this interlocutory appeal from an order of the probate court denying appellants' petition to remove the executor, for an accounting, for restitution, and for appointment of an administrator in succession, and from orders denying appellants' petition for appointment of special counsel and denying reconsideration of the petition for appointment of special counsel. The underlying dispute stems from appellants' desire to cause a wrongful death action to be commenced against the decedent's attending physician, appellee, his wife, and mother-in-law. We hold that the order denying the petition to remove the executor is appealable, but that appeal is dismissed because appellants have no right to prosecute the appeal. In addition, the probate court lacked jurisdiction to order an accounting and restitution, and the denial of those remedies is affirmed. The denial of appellants' petitions for appointment of special counsel and the denial of reconsideration are not clearly erroneous, and, therefore, we affirm the orders of the probate court.

Appellants' petition for removal of the executor alleged that the decedent's death was caused by the wrongful conduct of the decedent's attending physician, along with that of appellee, his wife, and mother-in-law, and that the appellee-executor would not commence a wrongful death action because he, together with his wife and mother-in-law, were prospective defendants. Appellants submitted various affidavits and deposition testimony in support of their contention that the decedent's death was caused by such wrongful conduct. Appellants also alleged that the executor had mismanaged estate assets and therefore committed waste. Appellants sought to remove the executor and to cause a successor to be appointed for the purpose of prosecuting the action for wrongful death and to require an accounting and restitution. The probate court denied the petition, holding that appellants were not beneficiaries under the decedent's last will and testa-

ment and, therefore, lacked standing to petition for the removal of the executor.

Rule 2 of the Arkansas Rules of Appellate Procedure governs when an appeal may be taken. Rule 2, however, preserves all statutory rights of appeal which were in existence at the effective date of the rules, July 1, 1979. Act 38 of 1973, which authorized this court to prescribe these rules, provides that rights of appeal shall continue as authorized by law. *See Court's Notes* to Ark. R. App. P. 2. Section 28-1-116 of the Arkansas Code Annotated of 1987 provides for appeals from probate causes involving wills, estates, and fiduciary relationships. It was enacted in 1949. It was in effect at the time Rule 2 was adopted and, therefore, determines whether there is a right of appeal in this case.

Section 28-1-116(a) of the Arkansas Code Annotated provides that a person aggrieved by an order of the probate court has a right to appeal. Subsection (b), however, provides that there is no right of appeal from an order appointing or refusing to appoint a special administrator. *In Re Estate of McLaughlin*, 306 Ark. 515, 815 S.W.2d 937 (1991). In addition, section 28-48-103(f) provides that an order appointing a special administrator shall not be appealable. Thus, any order of a probate court is generally appealable, but there can be no appeal from an order appointing or refusing to appoint a special administrator. In this case, the probate court order did more than refuse the appointment of a special administrator, *i.e.*, it refused to remove the executor because of an alleged conflict of interest. The denial or granting of a petition to remove an executor or administrator, other than a special administrator, is an appealable order. *See Barkley* v. *Cullum*, 252 Ark. 474, 479 S.W.2d 535 (1972); *Smith* v. *Rudolph*, 221 Ark. 900, 256 S.W.2d 736 (1953); Ark. Code Ann. § 28-1-116(a).(1987). That part of the order denying the removal of the executor is appealable.

Even though it is an appealable order, appellants have no right to appeal the order. The removal statute provides that an executor may be removed for various reasons, either upon the court's own motion or upon the petition of "an interested person." Ark. Code Ann. § 28-48-105 (a)(1) and (2) (1987). Appellants are not interested persons. The decedent died testate and left them nothing under the will. They are not heirs. They are

not creditors. They have no claim against the estate. The Probate Code defines "interested person" as "any heir, devisee, spouse, creditor, or any other having a property right, interest in, or claim against the estate being administered." Ark. Code Ann. § 28-1-102(a)(1) (1987). "Heir" is defined as "a person entitled by law of descent and distribution to the real and personal property of an intestate decedent." *Id.* at (a) (10). The statute regarding appointment of successor administrators also provides that one can be appointed upon petition of "an interested person." Ark. Code Ann. § 28-48-107(a) (1987).

Even though appellants are not interested persons, the trial court may have considered their petition for a successor personal representative as something that could cause the court to act on its own motion. It apparently did so and appointed a special administrator to investigate the wrongful death claim. This investigation was done by a person with no alleged conflict of interest and thus satisfied the concern about any possible conflict of interest on the part of the executor. The court did nothing further on its own motion. This action does not make appellants "interested parties," and it does not give them a right to appeal the court's refusal to appoint a successor representative.

Appellants assert an interest in the decedent's estate based on an alleged contract by the decedent to make a will devising certain real property to one of the appellants and based on their alleged interest as remaindermen in other real property whose interest vested upon the death of the decedent, who owned only a life estate. Appellants' claims to real property based on the alleged oral contract and their status as remaindermen are not claims against the estate, but represent claims made adversely to the estate by those who are not beneficiaries of the estate, *i.e.*, strangers to the estate. It has long been our rule that the probate court lacks jurisdiction to resolve such disputes. *Bratcher* v. *Bratcher*, 36 Ark. App. 206, 821 S.W.2d 481 (1991); *see also Morton* v. *Yell*, 239 Ark. 195, 388 S.W.2d 88 (1965). Thus, the probate court's denial of these remedies is affirmed.

After denying appellants' petition, the probate court appointed a special administrator, W. H. Dillahunty, a member of the bar of this court, for the purpose of determining whether an action for wrongful death should be commenced. The special

administrator's report stated that he had reviewed all of the materials and statutes relating to the contemplated wrongful death action, and he concluded that an action for wrongful death against the attending physician would likely survive a motion for summary judgment. He did, however, characterize the recoverable damages as considerably limited and pointed out that recovery was not certain and that there was no certainty a recovery would be of a sufficient amount to justify the expense of bringing the action. His report noted that potential damages were limited due to the widow's opposition to commencement of the action and due to the fact that no compensatory damages would be recovered in favor of appellants. The special administrator was of the opinion that independent counsel would not accept the case on a contingent fee basis, and he was unwilling to attempt to persuade competent counsel to accept the cause on such a basis.

After the filing of the special administrator's report, appellants filed a petition for the appointment of special counsel to commence the wrongful death action. The petition alleged that experienced trial counsel had agreed to commence the action on a contingent fee basis so as to result in no expense to the estate absent a recovery.

On the basis of the special administrator's report, the probate court entered an order denying the petition for appointment of special counsel and subsequently entered an order denying reconsideration of that petition. Appellants appeal from these two orders, and we address them on the merits because appellants are persons entitled to recover damages for mental anguish as the result of a wrongful death.

Appellants cite section 16-62-102(b) of the Arkansas Code Annotated of 1987, which provides that every wrongful death action shall be brought by and in the name of the personal representative of the deceased person. Appellants contend that the executor, together with his wife and mother-in-law, are prospective defendants in the wrongful death action which appellants seek to have commenced and that the probate court abused its discretion in refusing to appoint special counsel in light of the conflict between the executor's personal interest and his duties as a personal representative.

The probate court has broad discretion to appoint a special administrator. Section 28-48-103(a), in material part, provides:

> For good cause shown, a special administrator may be appointed. . . . after the appointment of an executor. . . . without the removal of the executor.

Ark. Code Ann. § 28-48-103(a) (1987). The appointment may be "for a specified time, to perform duties respecting specific property or to perform particular acts, as stated in the order of appointment." Ark. Code Ann. § 28-48-103(c) (1987).

In the case at bar, the probate court appointed the special administrator:

> for the sole purpose of determining whether or not a malpractice suit should be brought against Dr. Hoagland [the decedent's attending physician] and, further, to determine whether or not a wrongful death action should be initiated against Carol Pickens, Laurie Black and/or Freddie Black [the surviving spouse, her daughter, and appellee].

The effect of any conflict of interest of the executor in determining whether to initiate a wrongful death action was removed by the appointment of the special administrator. That appointment removed the executor from the decision-making process and ensured that the contemplated litigation would be considered independently and objectively. The special administrator's report is well-reasoned, and the probate court's orders based on it and denying the appointment of special counsel are not clearly erroneous. We do not reverse such orders unless clearly erroneous. *Newton County* v. *West*, 288 Ark. 432, 705 S.W.2d 887 (1986).

Affirmed.

CORBIN and BROWN, JJ., not participating.

HAYS and GLAZE, JJ., dissent.

TOM GLAZE, Associate Justice, dissenting. As I read the majority opinion, this court recognizes the appellants' (three surviving children of the decedent, R. A. Pickens) standing to question whether the executor, Freddie Black, had a conflict of interest that prohibited him from deciding whether a wrongful death

action should be brought against himself, his wife and mother-in-law and Dr. Hoagland, Pickens' attending physician at the time Pickens died. *See Wright* v. *Wright*, 248 Ark. 105, 449 S.W.2d 952 (1970). In his brief, Black relates that one of appellants' claims filed in a chancery court proceeding alleged that Black and his other co-defendants willfully caused the death of Pickens.[1] Assuming the validity of the appellants' claim, they, rather than Pickens' surviving spouse, would be heirs at law and share in any proceeds gained from a wrongful death suit.

Having accepted the appellants' standing in this cause — a point with which I agree — the majority opinion proceeds to dismiss the appellants' claim on the basis that the probate court acted properly when appointing a special administrator and in accepting his report and recommendation that a special counsel should not be authorized to pursue a wrongful death action. Based upon the evidence, I believe the probate judge was clearly wrong in adopting the special administrator's recommendation.

In their briefs, appellants set forth considerable evidence from which one could reasonably conclude Pickens' death at 12:20 a.m., April 10, 1991, resulted from an overdose of morphine prescribed by his treating physician, Dr. R. A. Hoagland. Pharmacists submitted affidavits reflecting their opinions that Pickens, considering his medical history, should not have been given morphine in any form. They also averred that morphine is a drug that should never be used without monitoring; nonetheless, Mr. Pickens was permitted to self-administer the morphine prescribed for him. Dr. Hoagland was shown previously to have had his license suspended by the Arkansas Medical Board, for prescribing excessive amounts of controlled drugs. Hoagland also had had his license suspended previously in Nebraska, as well as having been fined and placed on probation in Louisiana.

Dr. Hoagland's file reflected he had spoken to Mrs. Pickens the morning of April 9, 1991, and Mrs. Pickens informed Hoagland that Mr. Pickens had taken four morphine pills within a one-to-two hour period. Nevertheless, Hoagland waited another

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[1]At this point, I note that Black asserts in his brief that the chancery court has dismissed with prejudice this and other claims since the filing of this appeal. Nothing in the record supports this assertion, nor, if it were true, if those rulings have been appealed.

nine and one-half hours to examine Mr. Pickens. Hoagland examined Mr. Pickens at his home at 12:00 a.m. on April 10, and Pickens died shortly thereafter (Hoagland said) from acute myocardial infarction.

Mr. David Demarco, a licensed embalmer, was called to the Pickens home on April 10th and was met, Demarco said, by a man who appeared to be a doctor. Demarco removed Pickens' body, took it to a Pine Bluff funeral home and embalmed it that day. Pickens' funeral was conducted the day after his death. The coroner stated that, although not required, the Desha County physicians almost always notify him of an attended death, but Hoagland did not do so in this situation.

Based upon the foregoing and other like statements, affidavits, testimony and records, four trial attorneys, Robert C. Compton, David A. Hodges, David N. Laser and Walter R. Niblock, opined that a wrongful death action may be sustained against Dr. Hoagland and those persons having the care, custody and control of Mr. Pickens prior to his death. Even the special administrator, who was appointed by the probate court to evaluate such a claim, believed a negligence suit against Hoagland would most likely survive any motion for summary judgment.

The special administrator advised against the estate pursuing a wrongful death suit because Mrs. Pickens "is obviously not in favor of the suit and the material does not indicate that there is a loss of earnings for which compensatory damages would lie in favor of [Pickens'] surviving children." In sum, the special administrator felt the expense to the estate could not be justified, and did not feel independent counsel would accept the case on a contingency basis. In rebuttal, appellants submitted Mr. David Hodges' affidavit stating he would accept litigating the case on a graduated contingency fee basis and advance case expenses to be reimbursed upon any recovery.

In my view of the foregoing evidence, I am unaware of any compelling reason why a special administrator should not file a wrongful death action. Everyone, including the special administrator, agrees a strong case of liability exists if a wrongful death suit is filed. The only reasons for rejecting the filing of suit given by the administrator was his suggesting that the prospective

amount of damages would be small and to pursue the litigation would cost the estate. Of course, the amount of damages recoverable in most law suits is unpredictable, and considering the circumstances and evidence in this case, the estimated amount of damages, in my opinion, should not be the deciding factor. As to costs of litigation, the estate is in a position to contract with an attorney, who may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. *See* Rule 1.8(e) of the Ark. Rules of Professional Conduct. *But see also* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering, A Handbook on the Model Rules of Professional Conduct* § 1.8:601, at 274 (2d ed. 1993).

In sum, while certainly the probate judge acted prudently in appointing a special administrator to evaluate the merits of filing a wrongful death action, I believe he should not have felt bound by the administrator's suggestion. To the contrary, the judge, considering the facts and evidence presented, was clearly erroneous to do so.

HAYS, J., joins this dissent.

Wilbert JACKSON *v.* STATE of Arkansas

CR 93-1172 872 S.W.2d 400

Supreme Court of Arkansas
Opinion delivered March 28, 1994

Appellant, *Pro Se.*

No response.

PER CURIAM. The appellant Wilbert Jackson was convicted on September 7, 1989, of two counts of theft of property and of being an habitual offender. He was sentenced to twenty-six years imprisonment. The Court of Appeals affirmed. *Jackson* v. *State*, CACR 90-45 (November 14, 1990). The appellant claims he subsequently filed in the trial court a petition to correct an illegal sentence pursuant to Ark. Code Ann. § 16-90-111 and that the trial court denied it. Appellant has lodged a record on appeal of the order denying the petition and filed a brief.

The appellant has failed to submit an adequate abstract in the brief. Neither the petition to correct sentence nor the order he alleges to have been entered are abstracted. Our Rule 4-3 (g) provides that it is the duty of the appellant in a criminal case, even though the appellant may be acting *pro se*, to abstract such parts of the record which are material to the points to be argued in the appellant's brief. The failure to abstract a critical document precludes this court from considering issues concerning it. *Porchia* v. *State*, 306 Ark. 443, 815 S.W.2d 926 (1991). As the abstract in this case is flagrantly deficient, we affirm pursuant to Rule 4-2 (b) (2) which provides for affirmance of a judgment for noncompliance with the abstracting requirement.

Affirmed.

BROWN, J., dissents. *See Fruit* v. *State*, 304 Ark. 457, 802 930 (1991).

David REAGAN *v.* STATE of Arkansas

CR 94-237 872 S.W.2d 396

Supreme Court of Arkansas
Opinion delivered March 28, 1994

Paul H. Lee, for appellant.

No response.

PER CURIAM. On June 22, 1990, David Reagan was convicted of first-degree murder and sentenced to life in prison. His counsel, C.W. Knauts, filed a timely notice of appeal. Mr. Reagan then moved *pro se* for a new trial in which he alleged Mr. Knauts had a conflict of interest. Mr. Knauts petitioned the Trial Court to be relieved of further representation of Mr. Reagan. The petition was granted. Mr. Reagan's motion for a new trial was denied.

A transcript of the trial was tendered to the Clerk of this Court by the Circuit Clerk. The Clerk of the Supreme Court refused to docket the transcript because it was tendered too late. Mr. Reagan moved for a rule on the clerk. We denied the motion because Ark. Sup. Ct. R. 11(h), now Rule 4-3(j)(1), required that a motion to be relieved as counsel after the filing of a notice of appeal be submitted to this Court rather than to the Trial Court. Although we did not say so directly, the clear implication of our

opinion was that, as the Trial Court had no authority to relieve Mr. Knauts, he remained responsible for perfecting the appeal.

Our opinion concluded by stating that if Mr. Knauts would file a motion with an affidavit admitting his fault in not filing the transcript on time we would grant the motion for rule on the clerk and forward a copy of the opinion to the Committee on Professional Conduct. *Reagan* v. *State*, 304 Ark. 331, 802 S.W.2d 451 (1991). Three years have now passed, and Mr. Knauts has filed no further motion.

Mr. Reagan has moved for a belated appeal. A motion for belated appeal is superfluous at this point because a timely notice of appeal was filed. We will, therefore, treat the motion as one for rule on the clerk. *Strode* v. *State*, 301 Ark. 351, 783 S.W.2d 859 (1990). Mr. Reagan's current counsel, Paul H. Lee, has been appointed to represent Mr. Reagan in federal court proceedings and represents Mr. Reagan with respect to this motion. It is clear that, but for Mr. Knauts's failure to follow the rules of this Court in his initial quest to be removed as counsel and then failing to file an appeal on behalf of Mr. Reagan in response to our earlier opinion, Mr. Reagan's appeal would have been heard.

The direct appeal of a conviction is a matter of right, and a state cannot penalize a criminal defendant by dismissing his first appeal as of right when his appointed counsel has failed to follow mandatory appellate rules. *Evitts* v. *Lucey*, 469 U.S. 387 (1985). To cut off a defendant's right to appeal because of his attorney's failure to follow rules would violate the Sixth Amendment right to effective assistance of counsel. *Evitts* v. *Lucey, supra. See also Pennsylvania* v. *Finley*, 481 U.S. 551 (1987).

C.W. Knauts is relieved as counsel and Paul H. Lee is appointed to represent Mr. Reagan.

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

Motion granted.

Franklin Allen ROWE *v.* STATE of Arkansas

CR 94-261 872 S.W.2d 847

Supreme Court of Arkansas
Opinion delivered March 28, 1994

Gene O'Daniel, for appellant.

No response.

PER CURIAM. On July 28, 1993, Franklin Allen Rowe entered a guilty plea for possession of marijuana with intent to deliver and a conviction judgment was entered the same date. No timely notice of appeal was filed from that judgment. Rowe did, however, file a motion to withdraw his guilty plea on August 24, 1993, and on September 8, 1993, a hearing was held on that motion. The trial court orally denied Rowe's motion on September 8, but its order was not filed until December 21, 1993. Rowe filed a notice of appeal on October 7, 1993 from the trial court's oral ruling on September 8, instead of filing a notice after entry of the written order on December 21. In sum, Rowe did not appeal from the conviction judgment of July 28, and the notice of appeal he did file was premature to the December 21 written order, denying withdrawal of his plea. Rowe's transcript was also untimely tendered to this court since he waited too late to seek a timely extension.

This court has held that we will grant a motion for rule on the clerk when the attorney admits that the record was not timely filed due to an error on his part. *See, e.g., Tarry* v. *State*, 288 Ark. 172, 702 S.W.2d 804 (1986). Here, the attorney does not admit fault on his part, but instead implies that there was

a misunderstanding. He also claims that the December 21 order was never sent to him and if it had, he would have filed another notice of appeal. We have held that a statement that it was someone else's fault or no one's fault will not suffice. *Clark* v. *State*, 289 Ark. 382, 711 S.W.2d 162 (1986). Therefore, the petitioner's motion must be denied.

The appellant's attorney shall file within thirty days from the date of this per curiam a motion and affidavit in this case accepting full responsibility for not timely filing the transcript, and upon filing same, the motion will be granted and a copy of the opinion will be forwarded to the Committee on Professional Conduct.

STATE of Arkansas *v.*
PULASKI COUNTY CIRCUIT COURT
Steven Marshall, Chad Brown, and Terry Nutt, Intervenors

94-197 872 S.W.2d 414

Supreme Court of Arkansas
Opinion delivered March 28, 1994

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

G. L. Jegley, for appellee.

Davis and Holiman, by: *Richard E. Holiman*, for intervenors.

PER CURIAM. The State petitions for a writ of prohibition on grounds that the Pulaski County Circuit Court is without authority to order the prosecuting attorney to perform DNA testing on samples taken from three criminal defendants. Those defendants are the intervenors in this matter.

The three defendants were charged with rape. On August 3, 1993, the circuit court ordered that the defendants furnish blood, hair, and saliva samples to the prosecutor for analysis by the State Crime Laboratory. The State did not seek DNA testing by the FBI. By motions dated August 26, 1993, and September 2, 1993, the defendants requested that the circuit court order DNA testing of these samples from the defendants compared with evidence from the crime scene and the victim. On October 27, 1993, the circuit court ordered that the State send blood, saliva, and semen[1] samples under the control of the State Crime Laboratory to the FBI for DNA testing and analysis. The court noted in its order that the samples could be exculpatory for the defendants and that it was considering the defendants' rights to a fair trial

[1]The circuit court substituted "semen" for "hair" in the October 27, 1993 order.

in its decision. The State was ordered to pay for the DNA testing and analysis and to furnish the results to the defendants.

We believe that the circuit court lacked the authority to direct the prosecutor as to what scientific tests to perform in its investigation and trial preparation. A circuit court may not perform the duties of the prosecuting attorney. *See Johnson* v. *State*, 308 Ark. 7, 823 S.W.2d 800, *cert. denied*, 112 S.Ct. 3043 (1992). We have held in this regard that the powers given to a prosecutor to charge the accused are guarded by the doctrine of separation of powers. *See State* v. *Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993).

Moreover, the United States Supreme Court has determined that the defendant's right to a fair trial as embraced within the Due Process Clause is not violated "when the police fail to use a particular investigatory tool." *Arizona* v. *Youngblood*, 488 U.S. 1051, 109 S.Ct. 333 (1988). This court has specifically said that the State is not obligated to perform certain scientific tests, noting that a defendant cannot rely upon the State's discovery as a substitute for his or her own investigation. *Dumond* v. *State*, 290 Ark. 595, 721 S.W.2d 663 (1986). While a prosecuting attorney clearly has a duty to disclose all pertinent tests on tangible items pursuant to Ark. R. Crim. P. 17.1, the prosecutor is not required to make certain scientific tests on all materials seized. *Thomerson* v. *State*, 274 Ark. 17, 621 S.W.2d 690 (1981).

Because the circuit court lacks the authority under the United States Constitution, the Arkansas Constitution, our statutes, and common law to order the State to perform DNA testing on the mere possibility that the results might be exculpatory, issuance of a writ of prohibition is warranted.

Writ granted.

CORBIN, J., not participating.

Sharra DRUCKENMILLER *v.* Danny J. CLUFF

93-734 873 S.W.2d 526

Supreme Court of Arkansas
Opinion delivered April 11, 1994

Gary Eubanks & Associates, by: *James Gerard Schulze* and *Hugh F. Spinks*, for appellant.

Anderson & Kilpatrick, by: *Mariam T. Hopkins*, for appellee.

JACK HOLT, JR., Chief Justice. This appeal follows a defendant's verdict in an action for negligence arising from a motor-vehicle accident. The appellant, Sharra Druckenmiller, argues two points for reversal, asserting error on the trial court's part in submitting the issue of her own negligence to the jury and in refusing to give AMI Civil 3d, 614, the "sudden emergency" instruction. We hold that the trial court did not err in either instance, and we affirm its judgment.

Facts

On September 29, 1990, at about 3:20 p.m., Mrs. Druckenmiller was driving her Honda Accord west on Highway 100, a four-lane, divided thoroughfare, in Maumelle, Arkansas. Appellee Danny J. Cluff was headed east on Highway 100, driving a Freightliner truck owned by his employer, appellee M.S. Carriers, Inc.

At the intersection of Highway 100 and Murphy Road, Mr. Cluff began to make a left turn. Mrs. Druckenmiller was between seventy-five and one-hundred feet away, and, as she subsequently testified, she applied her brakes at a distance of approximately fifty feet from the truck. Her car skidded from the inside to the outside westbound lane and struck the truck. Mrs. Druckenmiller was injured and her vehicle damaged. The police cited Mr. Cluff for failing to yield right-of-way when making a turn.

In her complaint, Mrs. Druckenmiller alleged that Mr. Cluff

negligently made a left turn into the path of her vehicle, thereby causing a collision, damages, and personal injuries. The trial court submitted the issue of negligence with respect to both parties to the jury and refused to give a sudden emergency instruction proffered by Mrs. Druckenmiller. The jury rendered a general verdict in favor of Mr. Cluff and M.S. Carriers, Inc.

I. Submission of appellant's negligence to jury

On appeal, Mrs. Druckenmiller first contends that the trial court erred in submitting the issue of her negligence to the jury in the absence of any substantial evidence that she was guilty of any fault. She maintains that the photographic exhibits show that there is a straight stretch of road for a substantial distance before the intersection of Highway 100 and Murphy Road, rendering it improbable that she could have been going fast enough for Mr. Cluff not to have seen her approaching as he turned.

The trial court instructed the jury, under AMI Civil 3d, 203, that Mrs. Druckenmiller had the burden of proving that she sustained damages, that Mr. Cluff and M.S. Carriers were negligent, and that such negligence was a proximate cause of her damages. The court also employed AMI Civil 3d, 206, in instructing the jury that Mr. Cluff and M.S. Carriers asserted that Mrs. Druckenmiller was guilty of negligence which was a proximate cause of her own injuries and that they bore the burden of proving their contention.

To aid the jury in its determination of negligence on the part of either driver, the trial court read AMI Civil 3d, 901, which permits consideration of the following rules of the road:

> First, it is the duty of the driver of a motor vehicle to keep a lookout for other vehicles or persons on the street or highway. The lookout required is that which a reasonably careful driver would keep under the circumstances similar to those shown by the evidence in this case; and
>
> Second, it is the duty of the driver of a motor vehicle to keep his vehicle under control. The control required is that which a reasonably careful driver would maintain under circumstances similar to those shown by the evidence in this case.

> A failure to meet the standard of conduct required by either of these rules is negligence.

In addition, the trial court read AMI Civil 3d, 903, allowing the jury to consider as evidence of negligence the violation of the following statutory provision:

> The driver of a vehicle within an intersection intending to turn to the left shall yield the right-of-way to all vehicles approaching from the opposite direction which are within the intersection or so close thereto as to constitute an immediate hazard. The driver, after having so yielded and having given a signal when and as required by this chapter, may make the left turn after all other vehicles approaching the intersection which constitute an immediate hazard shall have cleared the intersection.

Ark. Code Ann. § 27-51-502 (1987).

Reading AMI Civil 3d, 2102, the trial court offered the jurors four options:

> If you should find that the occurrence was proximately caused by the negligence on the part of Danny Cluff and not by the negligence on the part of Sharra Druckenmiller, then Sharra Druckenmiller is entitled to recover the full amount of any damages you may find she has sustained as a result of the occurrence.
>
> If you should find that the occurrence was proximately caused by the negligence of both Sharra Druckenmiller and Danny Cluff, then you must compare the percentage of their negligence.
>
> If the negligence of Sharra Druckenmiller is of less degree than the negligence of Danny Cluff, then Sharra Druckenmiller is entitled to recover any damages which you may find she has sustained as a result of the occurrence after you have reduced them in proportion to the degree of her own negligence.
>
> On the other hand, if Danny Cluff was not negligent or if the negligence of Sharra Druckenmiller is equal to or greater in degree than the negligence of Danny Cluff, then

> Sharra Druckenmiller is not entitled to recover any damages.

The jury returned a general verdict in favor of Mr. Cluff and M.S. Carriers.

This verdict, in effect, was a declaration that the jury had concluded either that Mrs. Druckenmiller had not met her burden of proof that Mr. Cluff was negligent or that her own negligence was equal to or greater than any negligence assessed against Mr. Cluff. This court will affirm the verdict and judgment of the trial court if the verdict is supported by any substantial evidence; the question is not whether the evidence would have supported some other conclusion but whether it supports the conclusion reached by the trier of fact. *John Cheeseman Trucking, Inc.* v. *Dougan*, 313 Ark. 229, 853 S.W.2d 278 (1993).

The record of trial shows that Mrs. Druckenmiller, by her own testimony, provided a substantial evidentiary basis for the trial court to submit the issue of her negligence to the jury. For example, the following dialogue transpired during her cross-examination:

> Q Mrs. Druckenmiller, I want to take you a minute back to the day of the accident so we can make sure we understand what your testimony is about how the accident occurred. I think we all agree you were traveling on the inside lane closest to the median, is that correct?
>
> A Yes
>
> Q And you first saw Mr. Cluff approximately 75 to 100 feet away, is that correct?
>
> A Yes.
>
> Q Okay. And if I understand your testimony correctly from direct examination, are you saying you saw him in the middle of the intersection at that point?
>
> A No, he was pulling out into the intersection.
>
> Q Okay. In any event, you saw him moving into the intersection about 75 to 100 feet away?
>
> A Yes.

Q Okay. And you thought, at that point, that he was going to stop and you could just go on straight around his truck?

A Yes. I thought at that point that he saw me and that I would be able to manuever around in front of him.

Q Okay. So despite the fact that he was in the intersection, you made the decision to continue on toward the intersection, is that correct?

A Yes.

. . .

Q So, Mrs. Druckenmiller, you saw him doing that and you made the decision to continue on because you thought you could get around him, is that correct?

A Yes.

Q And you did not actually start applying your brakes until you were about 50 feet away from Mr. Cluff, is that correct?

A I had started applying my brakes. I did not have to slam on my brakes that —

Q Okay. You first started applying your brakes when you were approximately 50 feet away from Mr. Cluff, is that correct?

A Yes.

(T. 170-171) The jury could have concluded from the testimony that Mrs. Druckenmiller's collision resulted from her waiting to apply her brakes until she was approximately fifty feet away from Mr. Cluff's vehicle after having seen the truck turning at a distance of seventy-five to one-hundred feet.

Moreover, photographic evidence provided a basis for the jury to conclude that Mrs. Druckenmiller failed to keep her vehicle under control — the duty addressed by AMI 901. As she testified, she was traveling in the inside lane next to the median when she saw Mr. Cluff's truck in the intersection. The photographs of the accident site show that Mrs. Druckenmiller's car skidded from the inside to the outside lane before colliding with the truck.

As for Mr. Cluff's actions, the evidence presented was sufficient to enable the jury to determine, under AMI 903, incorporating Ark. Code Ann. § 27-51-502, that the truck driver had yielded right-of-way to "all vehicles" that constituted an "immediate hazard." Mr. Cluff testified that no vehicles were approaching from the opposite direction at the time he began making his left turn in the intersection. Indeed, he stated that he allowed two cars to pass by before he started turning. It was his belief, he stated, as an experienced driver, that he could see far enough down the road in order to make a turn safely.

It is the prerogative of the jury to believe or disbelieve the testimony of any witness. *Ford Motor Co.* v. *Massey*, 313 Ark. 345, 855 S.W.2d 897 (1993). Further, the jury may choose simply to believe a portion of the testimony of each party. *Johnson* v. *Clark*, 309 Ark. 616, 832 S.W.2d 254 (1992). Here, the jury implicitly found that Mrs. Druckenmiller's claim that Mr. Cluff's negligence was the proximate cause of the collision was not credible.

But, more to the point, Mrs. Druckenmiller's own statements on cross-examination amply warranted the trial court's submission of the question of her negligence to the jury. The trial court, therefore, did not err in this regard, and we so hold.

II. "Sudden emergency" instruction — AMI 614

In her second point for reversal, Mrs. Druckenmiller argues in the alternative that, if there was a submissible issue concerning her negligence, she was still entitled to the benefit of the "sudden emergency" instruction, AMI Civil 3d, 614:

> A person who is suddenly and unexpectedly confronted with danger to himself or others not caused by his own negligence is not required to use the same judgment that is required of him in calmer and more deliberate moments. He is required to use only the care that a reasonably careful person would use in the same situation.

Mrs. Druckenmiller proffered AMI 614 during the reading of instructions, and the trial court refused to give it but noted the proffer. The evidence presented at trial, however, showed that the sudden emergency instruction was not appropriate.

Recently, we have said that in order to warrant the giving of AMI 614, the driver must be in a stressful situation that dictates a quick decision regarding possible courses of conduct. *Diemer* v. *Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993). Before a person is entitled to the instruction, she must have been aware of the danger, must have perceived the emergency, and must have acted in accordance with the stress caused by the danger. *Id.*

For example, in *McElroy* v. *Benefield*, 299 Ark. 112, 771 S.W.2d 274 (1989), we approved the giving of the sudden emergency instruction because of the circumstances surrounding the accident. The appellee, Benefield, testified that, as he came over a rise in the road, he saw the appellants' vehicle sitting at the edge of the highway, and he decided to ease over to avoid hitting it. As he was doing so, however, the McElroys suddenly pulled out in front of him. Benefield slammed on his brakes, skidding a distance of 108 feet to the point of impact. We held that the evidence supported Benefield's contention that he was confronted with a sudden emergency.

On the other hand, in *Diemer* v. *Dischler, supra*, we held that "the trial court had a sound basis for finding that the danger was not so sudden or unexpected as to justify the instruction." 313 Ark. at 159, 852 Ark. at 795. There, the appellant, Diemer, had rounded a curve some distance from an intersection where a forklift driven by the appellee, Dischler, had begun to cross and was in her lane of traffic. Dischler stated that he saw Diemer's car heading toward him from a distance of between 200 to 300 feet at what appeared to be a "pretty fast" speed, and two accident reconstructionists testified that, given the posted speed limit and natural reaction time, Diemer could have stopped before hitting the forklift or could have exercised at least two options.

In the *Diemer* case, we noted that where the evidence of some negligence on the part of the requesting party is "very strong," that party is not entitled to the sudden emergency instruction. This view represents an attempted reconciliation of two previous, apparently inconsistent approaches, and was first formulated by the Arkansas Court of Appeals in *Ashmore* v. *Ford*, 267 Ark. 854, 591 S.W.2d 666 (Ark. App. 1979):

> Two lines of Arkansas Supreme Court cases have developed on the propriety of giving this instruction. Some say the language of the instruction pointing out that it applies only where the negligence of the party seeking the instruction did not cause the emergency is a sufficient safeguard, thus implying the instruction may be given even when there is some evidence of negligence on the part of the party seeking the instruction. *See, e.g., Hooten* v. *DeJarnett*, 237 Ark. 792, 376 S.W.2d 272 (1964). Others say a party is not entitled to the instruction where his own negligence has created the emergency. See, *e.g., Williams* v. *Carr, et al.*, 263 Ark. 326, 565 S.W.2d 400 (1978). These approaches are not inconsistent. When they are combined, the result is that the trial judge may give the instruction in cases where there is some negligence on the part of the party seeking the instruction, but the instruction should not be given where the evidence is very strong that the party requesting the instruction has "created" the emergency by his own negligence.

267 Ark. at 860, 591 S.W.2d at 670. We explicitly adopted the *Ashmore* v. *Ford* synthesis in *Scoggins* v. *Southern Farmers' Ass'n*, 304 Ark. 426, 803 S.W.2d 515 (1991), where we quoted the language of the opinion by the Court of Appeals and declared that "We regard that reasoning as sound. . . ." 304 Ark. at 433, 803 S.W.2d at 519.

In considering the present case, however, we have concluded that *Ashmore* v. *Ford*'s "very strong" standard is a confusing and misleading statement of the law where AMI 614 is concerned, and for this reason we retreat from our position set forth in both *Scoggins* v. *Southern Farmers' Ass'n, supra*, and *Diemer* v. *Dischler, supra*. The language of the sudden emergency instruction speaks in terms of "[a] person who is suddenly and unexpectedly confronted with danger to himself or others *not caused by his own negligence*" and supplies no verbal qualifier or intensifier to justify the "very strong" standard.

Thus, our cases since *Scoggins* v. *Southern Farmers' Ass'n, supra*, have interpolated a position regarding the instruction that is in fact inconsistent with AMI 614's clear language. Specifically, in *Diemer* v. *Dischler, supra*, we held that, under the sce-

nario presented, the trial court could have readily found that the evidence was sufficiently strong that Diemer had been speeding and thus helped to create the emergency and, therefore, that the trial court correctly refused to give AMI 614. The corollary to this rationale would necessarily be that if the evidence of negligence on the part of one seeking to invoke AMI 614 is merely slight, he or she is entitled to have the instruction read to the jury. The application of such a principle would amount to a subversion of the sudden emergency doctrine.

In reexamining the language of AMI 614 itself, we conclude that, when an emergency arises wholly or partially from the negligence of the person who seeks to invoke the sudden emergency doctrine, AMI 614 has no application and should not be delivered to the jury. *See Smith* v. *Stevens*, 313 Ark. 534, 855 S.W.2d 323 (1993); *Williams* v. *Carr, supra; Johnson* v. *Nelson*, 242 Ark. 10, 411 S.W.2d 661 (1967); *Hooten* v. *DeJarnett, supra.*

Applying this narrower reading of AMI 614, we hold that the trial court did not err in refusing to give the sudden emergency instruction. As quoted above, Mrs. Druckenmiller acknowledged that when she saw Mr. Cluff turning in the intersection, at a distance of between seventy-five to one-hundred feet, she decided to continue heading toward him in the belief that she could get around him. She did not apply her brakes until she was about fifty feet away from the truck, and, further, she "did not have to slam on my brakes." Like the appellant in *Diemer* v. *Dischler, supra*, Mrs. Druckenmiller had a clear view of a vehicle already in an intersection. Unlike the situation in *McElroy* v. *Benefield, supra*, there was no sudden veering into the path of an oncoming vehicle.

If there was an emergency here, it was one of Mrs. Druckenmiller's making. One who creates an emergency cannot take advantage of AMI 614. *Smith* v. *Stevens, supra.* As we have indicated, the instruction applies, by its own terms, only to emergencies not caused by a person's own negligence. *Id.* In the *Smith* case, two vehicles collided at the crest of a hill, and both drivers stated that they did not see the other vehicle until about two seconds before the impact and that they immediately made efforts to stop. We rejected one party's assertion that the other had created the emergency. Any emergency, we held, "was created by

the nature of the hill and the road." 313 Ark. at 538, 855 S.W.2d at 326.

In the present case, though, Mrs. Druckenmiller had the benefit of a level road and a clear field of vision. She simply waited too long to begin braking. To reiterate, one cannot create an emergency by her own action and then seek to benefit by requesting an instruction on sudden emergency. *Williams* v. *Carr, supra.* Hence, as we have held, the trial court did not err in declining to read AMI 614 to the jury.

Affirmed.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. I concur. Today, the court corrects an obvious misstatement of the law which has crept into a few Arkansas cases where AMI 614, our "sudden emergency" instruction, has been in issue. The recurring error is obvious and required this court's attention and correction.

AMI Civil 3d, 614 provides as follows:

> A person who is suddenly and unexpectedly confronted with danger to himself or others *not caused by his own negligence* is not required to use the same judgment that is required of him in calmer and more deliberate moments. He is required to use only the care that a reasonably careful person would use in the same situation. (Emphasis added.)

As can be readily discerned from AMI 614's language, the sudden emergency doctrine has no application and may not be asserted if the emergency arises wholly or partially from the negligence of the one who seeks to invoke the doctrine. *See Smith* v. *Stevens*, 313 Ark. 534, 855 S.W.2d 323 (1993); *Williams* v. *Carr*, 263 Ark. 326, 565 S.W.2d 400 (1978); *Johnson* v. *Nelson*, 242 Ark. 10, 411 S.W.2d 661 (1967); *Hooten* v. *DeJarnett*, 237 Ark. 792, 376 S.W.2d 272 (1964). *See also* J. D. Lee and Barry A. Lindahl, *1 Mod Tort Law* § 3.37 (rev. ed. 1993); W. Page Keeton, et al., *Prosser and Keeton on Law of Torts* § 33, at 196-197 (5th ed. 1984); Henry Woods, *Comparative Fault* § 4:8 (2nd ed. 1987 and Supp. 1993).

Contrary to AMI 614's clear language, several cases have surfaced that have stated the law differently. For example, in our most recent case of *Diemer* v. *Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993), this court, citing *Scoggins* v. *Southern Farmers' Assn.*, 304 Ark. 426, 803 S.W.2d 515 (1991), and *Ashmore* v. *Ford*, 267 Ark. App. 854, 591 S.W.2d 666 (Ark. App. 1979), said the following:

> AMI 614 requires the sudden emergency not be caused by the negligence of the party requesting the instruction. *We have held in this regard that where the evidence of some negligence on the part of the requesting party is "very strong," that party is not entitled to the instruction.* (Emphasis added.)

Diemer at 159. In applying the foregoing misstatement of the law in AMI 614, the *Diemer* court held that, under the facts existent there, the trial court could readily have found that the evidence was *sufficiently strong* that Diemer was speeding and helped create the emergency, thus, the trial court correctly refused to give AMI 614. Of course, the corollary rule would have been, if the evidence had been *slight* on the part of the party seeking to invoke AMI 614, he or she would have been entitled to have it read to the jury. Such a result is a misapplication of the sudden emergency doctrine.

This court's prior misapplication or misinterpretation of this doctrine is obviously not uncommon. In their treatise, Professors Prosser and Keeton state as follows:

> Despite the basic logic and simplicity of the sudden emergency doctrine, it is all too frequently misapplied on the facts or misstated in jury instructions. As a result, the model jury instructions in at least Illinois, Florida, Kansas and Missouri recommend that no such instruction be given, and Mississippi abolished the doctrine altogether in 1980.

W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 33, at 197 (5th ed. 1984).

Judge Henry Woods, in his edition and update, points to other states adhering to the comparative negligence concept that have since abolished the sudden emergency doctrine. *See Eslinger*

v. *Ringsby Truck Lines, Inc.*, 195 Mont. 292, 636 P.2d 254 (1981); *Knapp* v. *Standford*, 392 So. 196 (Miss. 1980); cited as *Contra Young* v. *Clark*, 814 P.2d 364 (Colo. 1991); *Keller* v. *Vermeer Mfg. Co.*, 360 N.W.2d 502 (N.D. 1984). *See also Miller* v. *Eichhorn*, 426 N.W.2d 641, 644 (Iowa App. 1988) and *Bellas* v. *Dressler Industries, Inc.*, 564 So.2d 1305 n. 4 (La. App. 1st Cir. 1990), cert. denied at 569 So.2d 988 (these two cases express doubt regarding the sudden emergency doctrine after their respective state's adoption of comparative fault).

Other more recent cases in sister jurisdictions have joined the trend either to restrict the use of the sudden emergency instruction in negligence cases or to abolish it altogether. *DiCenzo* v. *Izawa*, 723 P.2d 171 (Hawaii 1986) (inasmuch as the risk of prejudicial error in instructing the jury on the [sudden emergency] doctrine exceeds by far the possibility of error in not doing so, [the court] thinks the wiser course of action would be to withhold sudden emergency instructions); *Bass* v. *Williams*, 839 S.W.2d 559 (Ky. App. 1992) (with the adoption of comparative negligence, it is error to instruct the jury on a sudden emergency theory); *Cowell* v. *Thompson*, 713 S.W.2d 52 (Mo. App. 1986) (emergency instructions are no longer permitted under MAI); *Simonson* v. *White*, 713 P.2d 983 (Mont. 1986) (the use of the sudden emergency instruction in automobile cases is hereafter banned); *McClymont* v. *Morgan*, 238 Neb. 390, 470 N.W.2d 768 (1991) (the giving of an independent sudden emergency is not warranted in a negligence action). *See also* 10 ALR 5th 680, *Modern Status of Sudden Emergency Doctrine.*

In reviewing those cases from jurisdictions that have adopted comparative fault, the appellate courts have generally stated that the problem in giving the sudden emergency instruction is that it singles out one aspect of the general standard of care and may give the doctrine of sudden emergency undue emphasis and may unduly emphasize one party's argument regarding a certain part of the standard of care. The Hawaii Supreme Court worded it another way, saying, "It would be foolhardy to jeopardize the outcome of trial by giving a [sudden emergency] instruction adding little to the basic jury charge that must be given in any negligence action." *DiCenzo* v. *Izawa*, 723 P.2d at 173.

The utility of the sudden emergency doctrine seems of lit-

tle value to me in light of our state's adherence to the comparative fault doctrine view. In my view, where a sudden emergency occurs, that is only a circumstance for the jury to consider when determining whether a person was exercising ordinary care under the circumstances. An emergency instruction adds nothing to the established law applicable in any negligence case and serves only to leave an impression in the minds of jurors that a driver is somehow excused from the ordinary standard of care because an emergency existed.

The emergency instruction does little more than confuse attorneys and courts when weighing its application, and understandably so when they are about to agree upon giving the comparative fault instruction. If this has been confusing to the bench and bar (and the cases and treatises reflect it has been), surely we cannot expect any better from a jury which must be confounded by such choices.

I certainly agree with the court's decision to clarify our law that AMI 614 should never hereafter be applicable in situations where there is *any* evidence of negligence on the part of the party seeking to invoke it. Preferably, I think the court should abolish the use of the sudden emergency doctrine since its use is unnecessary, considering Arkansas's comparative fault instruction, and serves mainly to confound those who must apply it.

Roy A. FINCH, Jr. *v.* Jim NEAL, Executive Director, Arkansas Supreme Court Committee on Professional Conduct

93-1190 873 S.W.2d 519

Supreme Court of Arkansas
Opinion delivered April 11, 1994

[redacted]

James L. Sloan, for appellant.

Jeff Rosenzweig, for appellee.

JACK HOLT, JR., Chief Justice. The Arkansas Supreme Court Committee on Professional Conduct (Committee) issued a reprimand to appellant, attorney Roy Finch, for a violation of Rule 8.4(d), Model Rules of Professional Conduct, which provides "it is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice" and that he did so while acting as advocate for Don Jones. Mr. Finch appeals. We affirm the Committee's actions.

Ms. Diana McIntyre Kimbrell (McIntyre) filed a formal complaint with the Committee alleging that Roy Finch, as attorney for her ex-husband Don Jones, committed the following violations of the Model Rules of Professional Conduct:

(1) He knowingly made a false statement of material fact to a tribunal.

(2) He, in the course of representing his client, knowingly made a false statement of material fact to Stephen Cobb.

(3) He engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

(4) He engaged in conduct that is prejudicial to the administration of justice.

Mr. Finch filed an "affidavit in response" with the Committee. An evidentiary hearing was held after which the Com-

mittee, in executive session, unanimously found that Mr. Finch had violated Rule 8.4(d) (incorrectly cited as Rule 8.4(c) in the transcript of the hearing) by engaging in conduct that was prejudicial to the administration of justice. By a vote of six to one, the Committee issued a reprimand to Mr. Finch, with one of its members voting to issue a caution rather than a reprimand.

"Appeals from any action by the Committee after hearing shall be heard *de novo* on the record and the Arkansas Supreme Court shall pronounce such judgment as in its opinion should have been pronounced below." Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, § 5(H)(3). We affirm the Committee's action unless it is clearly against the preponderance of the evidence and will not reverse its findings unless they were clearly erroneous. *Arens* v. *Committee on Prof. Conduct*, 307 Ark. 308, 820 S.W.2d 263 (1991); *Muhammed* v. *Arkansas Sup. Ct. Comm. on Prof. Conduct*, 291 Ark. 29, 722 S.W.2d 280 (1987); Sexton v. Supreme Ct. Comm. on Prof. Conduct, 299 Ark. 439, 774 S.W.2d 114 (1989).

We are hampered somewhat in our *de novo* review because the Committee did not make specific findings; however, the record of proceedings and the parties' briefs are such that we can, on *de novo* review, determine and resolve the issues before us. The Committee's failure to make specific findings will be dealt with at length as a separate issue in this opinion.

In determining if Mr. Finch engaged in conduct that was prejudicial to the administration of justice, we look first at the chronology of events, beginning with Mr. Finch filing a motion to abate child support on Mr. Jones's behalf, a copy of which was sent to Ms. McIntyre. Accompanying the motion was a letter informing her that "the child support unit here claims that it no longer represents either of you in this matter. Thus I am not including them in the notice." Upon receipt of these materials, she called the Pulaski County Child Support Enforcement Unit (CSEU), which confirmed Mr. Finch's letter; however, she was advised that she could make application to re-open her file, and an application would be sent to her. Upon receiving the application, she returned it, but she claimed at the hearing that a CSEU employee told her that doing so would be futile because of the

short time available to respond to the motion to abate. Relying on this advice, she engaged private counsel, Mr. Maxie Kizer, to represent her, and he filed, on her behalf, a "response to motion," "requests for production," and "counter-petition," noting that Mr. Finch was served with a copy of each.

A few days later, Mr. Finch directed "requests for admissions" to Ms. McIntyre which contained a notation of service on "both attorneys for plaintiff," but he did not respond to Mr. Kizer's pleadings. During this time frame, Mr. Finch prepared an agreed order and submitted it to Steve Cobb, attorney for CSEU, who in turn made modifications, returned the order to Mr. Finch who approved the order and returned it to Mr. Cobb with instructions to file the order of record. Neither Ms. McIntyre nor her counsel, Mr. Kizer, were made aware of these actions.

This agreed order, which in essence discontinued child support to the detriment of Ms. McIntyre on her son's eighteenth birthday, was entered of record on July 10, 1992. On July 14, 1992, Mr. Finch sent a letter, along with a copy of the agreed order, to Mr. Kizer which stated in essence that CSEU was Ms. McIntyre's attorney of record at that time and that the agreed order abating child support was approved by CSEU attorney Steve Cobb on Ms. McIntyre's behalf. Apparently, the first knowledge Ms. McIntyre had as to the entry of the "agreed" order was by this letter of notice, and she surmised that Mr. Finch had persuaded Mr. Cobb to enter an agreed order on her behalf without consulting with her or employed counsel, Mr. Kizer.

As a result, Mr. Kizer filed a motion to set aside the order on July 28, 1992. The chancery court declined to set the order aside, noting that the only way it could do so, would be to determine that the judgment was obtained by fraud. Concluding that the intent of the previous order had been for Mr. Jones to pay child support through high school graduation, the court reinstated child support to Ms. McIntyre because her son had returned to her home and had enrolled in high school.

Meanwhile, the Committee conducted an evidentiary hearing on Ms. McIntyre's complaint against Mr. Finch, at which Ms. McIntyre, CSEU employees Adam Walloch and attorney Steve Cobb, and Mr. Finch testified. Mr. Cobb admitted that he

and Mr. Finch had worked on the order and explained that "there really wasn't an attorney of record" when the final order was entered. He conceded that he had not consulted Ms. McIntyre before approving the final order on her behalf.

Mr. Finch testified that both attorneys seemed to be representing Ms. McIntyre and acknowledged that Mr. Kizer had filed pleadings on Ms. McIntyre's behalf; however, he did not believe it was necessary to involve Mr. Kizer in perfecting the order as Mr. Kizer had never entered an appearance with the chancery court, and the record still showed CSEU as attorney of record. In examining the records of proceedings before us, we observe that they do not contain any information, other than the testimony of Mr. Cobb and Mr. Finch which are inapposite to one another, as to whether or not there was a designated attorney of record during the time frame in question.

Failure to make special findings

Mr. Finch contends that the Committee committed error by refusing to make special findings of fact and conclusions of law; however, in examining the record we note that Mr. Finch's request was general and somewhat nebulous in nature:

Mr. Finch: "May we request special findings?"

To which the following response was made by a Committee member, Mr. Virden:

> We have never made special findings and we just — we are not finding — I'll say this on the record, I don't think anybody will object: we are not saying that there was a fraud committed. We're saying there was a violation of Rule 8.4(c) [actually, Rule 8.4(d)].

Mr. Finch contends that the Committee committed error by refusing to state facts constituting a violation of Rule 8.4(d) or by failing to explain at the hearing what respondent did that constituted a violation, and that because of this failure, his "due process rights" were violated.

The Committee submits that Mr. Finch has waived this issue because he did not argue below that the failure to make special findings violated his due process rights. It is an elemen-

tary principle of administrative law that an issue must be raised at the hearing below in order to be raised on appeal. *Reed* v. *Alcoholic Beverage Control Div.*, 295 Ark. 9, 746 S.W.2d 368 (1988); *Arkansas Cemetery Bd.* v. *North Hills Memorial Gardens*, 272 Ark. 172, 616 S.W.2d 713 (1981); *Hawthorne* v. *Davis*, 268 Ark. 131, 594 S.W.2d 844 (1980); *Jeffrey Stone Co.* v. *Raulston*, 242 Ark. 13, 412 S.W.2d 275 (1967). However, inasmuch as Mr. Finch asked for "special" findings, we address this issue in a limited manner.

The Committee was established pursuant to Amendment 28 of the Arkansas Constitution which provides, "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." The Committee is not bound by rules of the court and is not required to strictly adhere to the rules of evidence or the rules of procedure, because "[t]o do so would unduly complicate and probably lengthen the proceedings before the Committee." *Sexton*, 299 Ark. at 447, 774 S.W.2d at 118.

In order to proceed in an orderly fashion, we have established procedural rules, and these rules, on their face, do not require the Committee to make findings of fact. Most pertinent is Section 5(F)(5-6) of the Procedures, which provides:

> (5) At the end of the hearing, the Committee shall hold an executive session to deliberate upon any disciplinary action to be taken.
>
> (6) The decision of the Committee shall be announced immediately with a statement of the votes of the individual members, if the decision is not unanimous. If a majority of the Committee votes to caution, reprimand, or suspend an attorney, the Committee shall have the Executive Director notify the complainant of the specific action taken against the attorney and file a copy of the letter of caution, reprimand, or suspension as a public record in the office of the Clerk.

In asking for "special findings," we assume Mr. Finch meant findings of fact and conclusions of law for he cites Ark. R. Civ. P. 52 in support of his position, which provides in pertinent part: "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, and judgment shall be entered pursuant to Rule 58." While this is a correct recital, we have held that the Committee is not bound by rules of the court and is not required to strictly adhere to the Rules of Evidence or the Rules of Procedure. *Sexton, supra.*

Granted, under the circumstances of this case, it would have been appropriate and most helpful for the Committee to have made findings as to Mr. Finch's conduct which was prejudicial to the administration of justice. By doing so, Mr. Finch would have understood the Committee's actions and this court would have been in a better position to evaluate the Committee's findings in our de novo review. Nevertheless, we will review this case on its record and pronounce such judgment as in our opinion should have been pronounced below.

Res judicata or collateral estoppel

For his next argument, Mr. Finch contends that because the chancery court found that there was not clear and convincing evidence of fraud justifying setting aside the decree abating child support, then the question of whether he should be sanctioned by the court for fraud or for engaging in "conduct that is prejudicial to the administration of justice" is barred by res judicata or collateral estoppel. As he limits his argument to res judicata, so will we, but we hold that this argument is meritless.

Mr. Finch is correct in his assessment of the basic elements for res judicata, for in *Ward* v. *Davis*, 298 Ark. 48, 765 S.W.2d 5 (1989), we enunciated these elements:

> The claim preclusion aspect of the doctrine bars relitigation in a subsequent suit when: (1) the first suit resulted in a judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action which was litigated or could have been litigated but was not; and (5) both suits involve the same parties or their privies.

Ward, 298 Ark. at 50., 765 S.W.2d at 6.

However, Mr. Finch's application of these elements

is erroneous, because he claims that the chancery court's disposition of Ms. McIntyre's motion to set aside the child support order precluded the determination by the Committee of whether he behaved badly as an attorney. The test in determining whether res judicata applies is whether matters presented in a subsequent suit were necessarily within the issues of the former suit and might have been litigated therein; when the case at bar is based on the same events and subject matter as the previous case, and only raises new legal issues and seeks additional remedies, the trial court is correct to find the present case is barred by res judicata. *Arkansas Louisiana Gas Co.* v. *Taylor*, 314 Ark. 62, 858 S.W.2d 88 (1993).

There are a number of reasons why res judicata does not bar action by the Committee. For instance, although the motion to set aside the decree was founded on allegations of fraud, Ms. McIntyre's complaint to the Committee alleged a number of professional conduct violations: false statement of material fact, dishonesty, fraud, deceit or misrepresentation, as well as conduct prejudicial to the administration of justice. Since the Committee's findings were predicated on conduct prejudicial to the administration of justice, rather than on fraud, Mr. Finch's claim of res judicata in this instance is a non-issue.

Conduct Prejudicial to the Administration of Justice

For his final argument, Mr. Finch contends that the Committee erred in concluding that he engaged in conduct prejudicial to the administration of justice because the Committee failed to refer to any standard against which to measure his conduct.

To support his argument, Mr. Finch cites a court of appeals decision, *Hollabaugh* v. *Arkansas State Medical Bd.*, 43 Ark. App. 83, 861 S.W.2d 317 (1993), which involved discipline of a physician. The Arkansas State Medical Board placed Dr. Hollabaugh on probation and directed her to refrain from writing certain narcotics prescriptions, and the circuit court affirmed this decision. Citing *Hake* v. *Arkansas State Medical Board*, 237 Ark. 506, 374 S.W.2d 173 (1964), the court of appeals in *Hollabaugh* reversed the circuit court, determining that there was not substantial evidence to support the board's decision:

There is a virtual absence of evidence in the record to sus-

> tain the board's findings, as well as no expert testimony to provide a standard for the board's medical opinions. The valuable property rights here involved cannot be taken from appellant upon such questionable compliance with due process.

Hollabaugh, 43 Ark. App. at 87, 861 S.W.2d at 319 (citing *Hake*, 237 Ark. at 520, 374 S.W.2d at 176).

However, what Mr. Finch fails to mention is that the court in *Hake* noted, prior to the above-cited passage, that the Medical Board had failed to comply with the Medical Practice Act (now Ark. Code Ann. § 17-93-410 (1987)), which required that "all evidence considered by the Board shall be reduced to writing and available for the purpose of appeal or certiorari to any of the parties of said hearing." *Hake*, 237 Ark. at 520, 374 S.W.2d at 176. There is not such a requirement in the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law.

In conducting a *de novo* review, it is obvious to us that Mr. Finch, while representing Mr. Jones in an effort to obtain an abatement of child support, was made aware that Mr. Jones' ex-wife, Diana McIntyre Kimbrell, had, during the course of the proceedings, employed private counsel in the person of Maxie Kizer to represent her. Although there may have been confusion as to whether she was also represented by CSEU, still, Mr. Finch was well aware of the fact that Mr. Kizer did in fact represent Ms. McIntyre. As mentioned previously, during the time frame in question, Mr. Kizer served Mr. Finch with a response to his motion to abate child support, request for production and a counter petition. Although Mr. Finch did not respond to these pleadings, he did acknowledge Mr. Kizer's participation in this litigation by sending him a request for admissions directed to Ms. McIntyre. In addition, upon obtaining an order abating child support, Mr. Finch sent a letter, along with a copy of the agreed order, to Mr. Kizer.

In short, Mr. Finch was well aware that Mr. Kizer represented Ms. McIntyre during the proceedings to abate child support, and his claim that Mr. Kizer was not the attorney of record at any given moment, which is subject to factual dispute,

is of little consequence under the circumstances. Whether it was intentional or unintentional, the facts remain that Mr. Finch drafted the proposed order, circumvented Ms. McIntyre and her counsel, Mr. Kizer, and negotiated a settlement of these proceedings without the benefit of input from either party. Mr. Finch's conduct under these circumstances was prejudicial to the administration of justice, and for these reasons we affirm the Committee's action.

CITY OF GREEN FOREST, et al. *v.* Hugh MORSE

93-1021 873 S.W.2d 154

Supreme Court of Arkansas
Opinion delivered April 11, 1994

Terry R. Ballard, for appellants.

F. Lewis Steenken, for appellee.

ROBERT H. DUDLEY, Justice. Plaintiff, Hugh Morse, was employed as a police officer by the defendant, City of Green Forest, in May 1986. Defendant William Andrews was the Chief of Police. Morse and Chief Andrews had a strained relationship. Andrews, rightly or wrongly, thought Morse had a number of faults as a police officer. On July 10, 1987, Morse engaged in a high speed chase which resulted in a wreck. Morse, an employee-at-will, was discharged by the City on July 27, 1987, for engaging in the high speed chase and for submitting an accident report that Andrews thought was false. Morse sued both the City and Andrews. A jury returned a $5,000 verdict against the City in the wrongful discharge, a $10,000 verdict against Andrews for wrongful discharge, and a $22,000 verdict against Andrews for the tort of outrage. Both the City and Andrews appeal. We reverse and dismiss.

We have consistently taken a narrow view in recognizing claims for the tort of outrage that arise out of the discharge of an employee. The reason is that an employer must be given considerable latitude in dealing with employees, and at the same time, an employee will frequently feel considerable insult when discharged. In this context we have written: "Because of the employer's right to discharge an at-will employee, a claim of outrage by an at-will employee cannot be predicated upon the fact of the discharge alone. However, the manner in which the discharge is accomplished or the circumstances under which it occurs may render the employer liable." *Harris* v. *Arkansas Book Co.*, 287 Ark. 353, 356, 700 S.W.2d 41, 43 (1985). In another employee discharge case, *Sterling Drug, Inc.* v. *Oxford*, 294 Ark. 239, 244-45, 743 S.W.2d 380, 383 (1988), we wrote, "The recognition of the tort of outrage does not open the doors of the courts to every slight insult or indignity one must endure in life." In other employee discharge cases we have held that the facts surrounding the discharge did not meet the criteria for the tort of outrage. *Smith* v. *American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d

683 (1991); *Sterling* v. *Upjohn Healthcare Servs., Inc.*, 299 Ark. 278, 772 S.W.2d 329 (1989); *Ingram* v. *Pirelli Cable Corp.*, 295 Ark. 154, 747 S.W.2d 103 (1988). The duty owed is a matter of law, and we have said that duty is to refrain from conduct that is so extreme and outrageous as to go beyond all possible bounds of decency and to be utterly intolerable in a civilized society. *M.B.M. Co.* v. *Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980).

Only once have we held that a plaintiff met the standard for proving the tort of outrage in an employee discharge case. That case was *Tandy Corp.* v. *Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984). The facts surrounding that discharge were so extreme and outrageous that they went beyond the bounds of decency and truly were intolerable. The employer, Tandy Corporation, thought that Bone, the manager of one of its stores in Little Rock, was stealing either money or merchandise. Bone suffered from a personality disorder which made him more susceptible to stress and fear than normal. His psychiatrist had prescribed, and he had been taking, a tranquilizer for three years. Bone's supervisor and two security officers came to the store to conduct an investigation of the losses. Bone was questioned at thirty minute intervals throughout the day. According to Bone, the security men cursed him, threatened him, and refused to allow him to take his prescribed medication. Bone was subsequently asked to take a polygraph examination and consented. At that time he was in a highly agitated condition and again asked for his medication. The request was denied. He testified that on at least three occasions he had asked to be allowed to take his medication, but each time his request was refused. He stated that once he reached in a desk drawer for his medicine, but one of the investigators slammed the drawer shut. He was eventually taken to another location in Little Rock for the examination, and, while there, hyperventilated. An ambulance was called, but Bone was taken home by the supervisor. The next day, Bone attempted to return to work, but was unable to do so. He was subsequently hospitalized for a week. In holding that Bone had met the standard for the tort of outrage surrounding the discharge, we endeavored to make the basis for the holding clear when we wrote:

> It was for the jury to decide whether under the circumstances it was outrageous conduct for the employer to deny Bone his medication and to continue to pursue the inves-

> tigation knowing Bone was on medication or Valium. *We emphasize that the notice to the employer of Bone's condition is the only basis for the jury question of extreme outrage.*

Tandy Corp., 283 Ark. at 408, 678 S.W.2d at 317 (emphasis supplied). The case was reversed and remanded on other grounds.

The facts of this case do not come close to meeting the standard for the tort of outrage. Viewing the evidence, and all inferences from that evidence, most favorably to appellee Morse, the facts do not show any act wholly beyond the bounds of decency surrounding the discharge. It is undisputed that a high speed chase and wreck occurred and that Morse filed an accident report. He was subsequently suspended with pay. The chief then wrote a letter to the City Council requesting the dismissal of Morse. A meeting of the Council was held. Subsequently, the City Council discharged Morse. The facts surrounding the discharge do not constitute the tort of outrage.

Morse contends that even if the facts immediately surrounding the discharge were insufficient for the tort of outrage, all of the other indignities that he endured during his tenure as a police officer were sufficient to meet the standard for the tort. He bases his argument on the case of *Hess* v. *Treece*, 286 Ark. 434, 693 S.W.2d 792, *cert. denied*, 475 U.S. 1036 (1985). In that case, Hess, a city director during most of the material time, had a very strong dislike for Treece, a city policeman, over an incident involving a girlfriend. Hess stated that he would have Treece's job at any cost. Over a two-year period he made vengeful attempts to have Treece fired and, in doing so, acted in a manner that went beyond the bounds of decency and inflicted severe emotional distress on Treece. Hess frequently called Treece's superior officers to complain about Treece. On one occasion he notified one of the superiors that Treece was in an apartment at a time when he was supposed to be at work. A police investigation found Treece innocent of the charge. Hess made other frenzied and groundless charges, which caused departmental investigations. Hess asked Treece's bookkeeper to watch his movements and report those movements back to him. Police supervisors testified they were called upon by Hess sometimes as often as twice a week over the two-year period to investigate Treece's conduct.

Treece's superiors frequently questioned him about his activities. Hess also contacted the city manager and the assistant chief and sought to have Treece fired. Hess employed a woman who lived in the same apartment as Treece to report on Treece's movements. Hess frequently called the police department from the woman's apartment, and he told her that he would spend every dime he had to see that Treece was fired. Hess even contacted a newspaper reporter and told him that Treece was being paid to perform private security duty while he was supposed to be on duty for the police department. Treece knew of Hess's actions and became concerned for his safety and the safety of his family. He changed his lifestyle because of the fear. Fellow police officers testified that over the two-year period Treece became distraught, nervous, frightened, and asked for their help. Under those facts, we affirmed the jury's finding that Hess's conduct was utterly intolerable in a civilized society.

The case at bar does not rise to the same level of conduct. Plaintiff Morse and defendant Andrews, the chief of police, had a rocky, fourteen-month employer-employee relationship. Morse was hired as a employee-at-will, and, under the applicable statutes, was a probationary police officer. His probation was extended on two occasions by Andrews. Andrews showed anger toward Morse on occasion and cursed him. The proof also showed that during the same period Andrews got angry at other officers and likewise cursed them. Andrews inquired about Morse's personal debts and whether he was paying his creditors, about his roommate, who was a former convict, and whether he had parties at which he served alcohol to minors. Andrews chastised Morse for drinking soft drinks in the squad car and accused him of fabricating an excuse for not attending a short course on the operation of a breathalyzer machine. There were other minor incidents. Morse testified that he was constantly on edge while working for the department. Morse testified that the accident report he filed was not false, and that Andrews was in error in thinking that it was. He also said that Andrews told him that sheriffs in three counties would arrest him for making a false report. Such proof does not reach the level of being so extreme and outrageous as to be utterly intolerable in a civilized society. As we said in *Sterling Drug, Inc.* v. *Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), we have not opened the doors of the court-

house to every insult or indignity one must endure in life. Accordingly, we reverse and dismiss the claim for the tort of outrage.

Appellants next contend that the evidence was not sufficient to support the awards for wrongful discharge. Again, the argument has merit. Morse was hired as a probationary officer. He was an at-will employee. "It is the general rule that 'when the term of employment in a contract is left to the discretion of either party, or left indefinite, or terminable by either party, either party may put an end to the relationship *at will* and *without cause*.'" *Wal-Mart Stores, Inc.* v. *Baysinger*, 306 Ark. 239, 244, 812 S.W.2d 463, 466 (1991) (quoting *Griffin* v. *Erickson*, 277 Ark. 433, 436, 642 S.W.2d 308, 310 (1982) (emphasis added). We further stated, "Generally, 'employment is held only by mutual consent, and at common law the right of the employer to terminate the employment is *unconditional* and *absolute*.'" *Baysinger*, 306 Ark. at 244, 812 S.W.2d at 466 (quoting *Griffin*, 277 Ark. at 436, 642 S.W.2d at 310).

In *Sterling Drug*, we approvingly quoted from a United States District Court opinion that outlined four exceptions to the employment-at-will doctrine. We quoted:

> Arkansas law would recognize at least four exceptions to the at-will doctrine, excluding implied contracts and estoppel. These are: (1) cases in which the employee is discharged for refusing to violate a criminal statute; (2) cases in which the employee is discharged for exercising a statutory right; (3) cases in which the employee is discharged for complying with a statutory duty; and (4) cases in which employees are discharged in violation of the general public policy of the state.

Sterling Drug, 294 Ark. at 245, 743 S.W.2d at 383 (quoting *Scholtes* v. *Signal Delivery Serv., Inc.*, 548 F. Supp. 487, 494 (W.D. Ark. 1982)). In *Sterling Drug*, we recognized a public policy exception when an employer discharges an employee for disclosing that the employer was submitting false information to the government in contract negotiations. We wrote: "Therefore, we hold that an at-will employee has a cause of action for wrongful discharge if he or she is fired *in violation of a well-established public policy of the state. This is a limited exception to the*

employment-at-will doctrine. It is not meant to protect merely private or proprietary interests." *Sterling Drug*, 294 Ark. at 249, 743 S.W.2d at 385 (emphasis supplied). In sum, the exceptions to the at-will doctrine will be recognized *to protect a well-established and substantial public policy* and not merely to protect the private or proprietary interests of the employee. The existence of a clear and substantial public policy presents a question of law.

All of the exceptions to the at-will doctrine listed in *Sterling Drug* are based on well-established and substantial public policy. Thus, under our established case law, the City had full discretion to discharge Morse with or without cause unless he came within one of the exceptions which are recognized to protect an established public policy. Stated differently, unless Morse could establish that his discharge would jeopardize some substantial and well-established public policy, the City had complete discretion to fire him.

Morse argues that he comes within an exception because he was discharged for complying with a statutory duty. He contends that (1) Ark. Code Ann. § 14-44-113 (1987) requires a police officer "to pursue and arrest any person fleeing from justice," (2) that he was pursuing a person who was fleeing from justice when he wrecked the police car, and (3) his discharge was the result of the wreck and therefore against public policy. Morse's contention that he is entitled to recover for wrongful discharge is without merit for two reasons. First, his construction of the statute is skewed. The word "pursue" means to follow with enmity. *Webster's Third New Int'l Dictionary* 1848 (1961). Enmity means ill will such as actuates a personal enemy. *Id.* at 754. The statute means that a police officer is charged with the duty of following a lawbreaker with dogged determination for the purpose of arresting him. It does not mean that a police officer is required to drive a police car at high speeds in contravention of departmental policy and required to endanger lives of others, in order to immediately arrest a misdemeanant. Second, Morse was not fired for violating a *substantial and well-established public policy*. There is no substantial and well-established public policy that requires a police officer to drive a police car at unsafe speeds in order to arrest a misdemeanant. Rather, cities have a legitimate public policy interest in preventing such dan-

gerous chases. There is no damage to a substantial public policy if cities are allowed to discharge police officers for engaging in dangerous high speed chases of misdemeanants.

Finally, Morse's argument ignores the obvious fact that the manner in which he pursued the misdemeanant was only one of the factors, albeit an important one, that contributed to his discharge. Chief Andrews testified, and Morse agreed, that Andrews constantly stated, rightly or wrongly, that Morse's performance as a police officer was lacking. Morse was fired for what was perceived, rightly or wrongly, by Andrews and the City Council as poor performance as a police officer, for the manner in which he conducted the pursuit, and for falsifying a report about the accident. However, even if he were fired solely for the manner in which he conducted the pursuit, there is no public policy that requires a police officer to pursue a nondangerous offender at high speeds. In sum, there was no evidence, or fair inference from the evidence, that Morse was fired solely for carrying out a well-established public policy of the State. Consequently, we must also reverse and dismiss the verdicts for wrongful discharge.

Reversed and dismissed.

HOLT, C.J., NEWBERN and BROWN, JJ., dissent in part and concur in part.

ROBERT L. BROWN, Justice, Concurring in part; dissenting in part. I concur completely in the majority's reversal of the verdict for tort of outrage but would affirm the jury's verdicts for wrongful discharge.

While Hugh Morse may well have been an at-will employee, he was fired in significant part for fulfilling his duties as a law enforcement officer and that raises a jury question of whether the public policy of the State of Arkansas has been contravened. As the majority points out, this court has held that one exception to the at-will doctrine occurs when an employee is discharged for performing a duty which that employee is obligated by statute to perform. *Sterling Drug, Inc.* v. *Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), *citing Scholtes* v. *Signal Delivery Service, Inc.*, 548 F.Supp. 487 (W.D. Ark. 1982). That is what occurred in this case.

The public policy of this state is found in its constitution and statutes. The statute applicable to these circumstances, according to the majority, defines the duty of police officers:

> (3) Pursue and arrest any person fleeing from justice in any part of this state; and
>
> (4) Apprehend any persons in the act of committing any offense against the laws of the state or the ordinances of the city and forthwith to bring such persons before the mayor or other competent authority, for examination or trial.

Ark. Code Ann. § 14-44-113(b)(3) & (4) (1987).

By dismissing Morse for a high speed chase of a DWI offender, Chief Andrews appears to have terminated Morse for doing precisely what he was supposed to do — pursue one who violates the law and flees from authority. Here, the chase began when Morse observed a suspicious individual get in a brown Dodge pick-up truck and begin driving erratically in the wrong lane. Morse pulled behind the truck and put on his blue lights. The driver refused to pull over and increased his speed to over 80 miles per hour. Morse got on his radio and reported the matter. He testified that he was told to give pursuit. He did so on a dusty road and wrecked his police car.

Chief Andrews responded to the accident scene. Morse told the Chief that the suspect must have rammed him. The Chief disagreed. Morse said he was pressured by the Chief to file his report of the incident as soon as possible. In his report, Morse apparently stated that the suspect rammed him. Chief Andrews did not believe that this occurred. Morse then prepared a second report which included information that he said he omitted from his first report. Chief Andrews still did not believe Morse's version of the events.

Chief Andrews sent the City Council a memo setting out his belief that Morse's actions violated police procedures outlined in his manual entitled "Andy's Red Book". The manual lists seven factors that should be considered *before* an officer engages in a high speed chase. They are: (1) type of violation; (2) weather conditions; (3) road conditions; (4) visibility; (5)

danger to motorists and pedestrians; (6) availability of assistance; and (7) probability of success. Applying these seven factors to the case at hand, the City Council first suspended Morse and then dismissed him.

At trial, Morse maintained that the high speed chase and accident was the sole reason for his dismissal. Chief Andrews disagreed but did admit that he too would have initiated pursuit against the suspect driver. The issue then seems to be when should Morse have broken off the chase.

It is clear that the dogged pursuit by Morse was an integral reason for his termination. It is also clear that Chief Andrews and Morse had a personality problem and that Morse believed that the Chief used the chase and accident as a means of getting rid of him. This, to my way of thinking at least, raises the spectre of penalizing Morse for doing his duty according to statute with unfortunate results. We have said that a firing caused by an employee's claim for workers' compensation benefits runs afoul of state policy. *Mapco, Inc.* v. *Payne*, 306 Ark. 198, 812 S.W.2d 483 (1991). In that case we noted that the employee had presented sufficient facts for the matter to go to the jury. That the public policy exception presents a fact question has been referenced in other cases. *See Cross* v. *Coffman*, 304 Ark. 666, 805 S.W.2d 44 (1991); *Webb* v. *HCA Health Services of Midwest, Inc.*, 300 Ark. 613, 780 S.W.2d 571 (1989).

Police chiefs and city councils must be endowed with the authority to fix policy and criteria for termination. And a law enforcement officer who goes too far and is overly zealous in executing his duties should be subject to punishment. The circumstances in this case, however, do present an issue as to whether other motives were at work here. At least a sufficient fact question has been raised.

In my judgment, this was a proper matter for the jury's resolution. The jury found in Morse's favor. I would defer to that verdict and affirm the judgments for wrongful discharge.

HOLT, C.J., and NEWBERN, J., join.

CORBIN, J., not participating.

Larry HUTCHERSON *v.* STATE of Arkansas

93-1211 873 S.W.2d 164

Supreme Court of Arkansas
Opinion delivered April 11, 1994

Appellant, pro se.

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

TOM GLAZE, Justice. Appellant Larry Hutcherson filed a petition for writ of habeas corpus in the Lincoln County Circuit Court in an attempt to set aside his 1976 conviction for capital felony murder rendered in Monroe County Circuit Court. He claimed the Monroe County Circuit Court lacked subject matter jurisdiction because the Interstate Agreement on Detainers Act (IAD) had been violated by authorities at the time he was convicted. The Lincoln County Circuit Court rejected Hutcherson's argument and request for writ, and Hutcherson brings this appeal from the lower court's decision. We affirm.

In 1975, Hutcherson was arrested and subsequently convicted on a federal felony charge, but before his conviction he escaped. An Arkansas state trooper was killed in Monroe County

during Hutcherson's capture. Hutcherson was convicted on the federal charge on May 14, 1975, and, in June of 1975, federal authorities released him on a detainer so the state could try him on a capital murder charge for the death of the state trooper. That trial resulted in a mistrial, but the federal authorities later released Hutcherson on a second detainer, so he could be tried again on March 17, 1976. At the second trial, he was convicted and sentenced to life imprisonment without parole. That conviction was affirmed on appeal in *Hutcherson* v. *State*, 262 Ark. 535, 558 S.W.2d 156 (1977). He has served his federal sentence and is now serving his life sentence in this state's penitentiary.

Hutcherson argues the Monroe County Circuit Court had no jurisdiction of his 1976 state murder conviction because the federal and state authorities violated the IAD, specifically, Article IV(e) of Ark. Code Ann. § 16-95-101 (1987) of that Act. That provision reads as follows:

> (e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Hutcherson claims that, under the foregoing terms, the Monroe County Circuit Court lost jurisdiction of the capital felony murder charge against him after he was first tried, suffered a mistrial and returned to federal prison. That reading of the IAD is clearly distorted, since that Act merely provides an indictment, information, or complaint is invalidated only where a criminal defendant is not brought to trial on pending state charges before he is returned to federal custody. Here, Hutcherson was brought to trial, although the first trial ended in a mistrial.

Even if Hutcherson's interpretation of the IAD had any merit — and it does not — we have held that a violation of Article IV(e) of that Act is a non-jurisdictional error and is therefore waivable by a criminal defendant. *Finley* v. *State*, 295 Ark. 357, 748 S.W.2d 643 (1988). Such an issue was one to be raised on direct appeal which Hutcherson did not do when he was tried

and convicted in 1976. *See Hutcherson*, 262 Ark. 535, 558 S.W.2d 156. This court has held repeatedly that a petition for writ of habeas corpus cannot serve as a substitute for an appeal of a criminal conviction. *See Mackey* v. *Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991); *Birchett* v. *State*, 303 Ark. 220, 795 S.W.2d 53 (1990).

Based on the foregoing authorities and reasoning, we affirm the trial court's denial of Hutcherson's request for issuance of a writ of habeas corpus.

Danny Lee MIDGETT *v.* STATE of Arkansas

CR 93-1040 873 S.W.2d 165

Supreme Court of Arkansas
Opinion delivered April 11, 1994

Val P. Price and *Christopher M. Jester*, for appellant.

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

TOM GLAZE, Justice. The twenty-eight year old appellant, Danny Midgett, was arrested and charged by information as a habitual offender for two counts of rape by deviate sexual activity of his two stepdaughters, who were ten and seven years old at the time, and for possession of a firearm by a convicted felon following events on the night of May 8, 1992. Subsequently, the

firearm charge was severed. Following trial by jury, Midgett was convicted on both counts of rape and sentenced to life imprisonment on each to run consecutively. Midgett appeals from that verdict.

The evidence at trial demonstrated Midgett was in the living room of his house on the night in question, and during that time he coerced the younger child to penetrate herself with her own hand, and he inserted his hand into her vagina. Further, evidence showed that Midgett had forced the older child to place his penis in her mouth, he had inserted his hand into her vagina, and had attempted to insert his penis into her vagina. At home during this time but in different rooms were the girls' two brothers and their natural mother. The mother, hearing the cries of her daughters and seeing her husband and older daughter naked together in a chair, left the house and called for help. When the sheriff's department arrived, at least three deputies viewed Midgett through a window as he was attempting to penetrate the older child.

After breaking down the door, the deputies chased Midgett through the house and out into the yard where Midgett was apprehended. At the time of his capture, Midgett was informed of his rights and indicated he was "pleading the fifth," but later gave an inculpatory statement. Evidence showed Midgett had been drinking heavily that night and that he was intoxicated.

At trial, Midgett elected not to present any witnesses or other evidence. For reversal, Midgett argues the trial court erred in failing to suppress his inculpatory statement, allowing the state to amend the information and instruct the jury accordingly, denying his motion for a directed verdict, and refusing to submit certain instructions to the jury. Because we find his arguments without merit, we affirm.

Midgett first argues his inculpatory statement should have been suppressed because it was not voluntarily given. He claims he was drunk, he had invoked his fifth amendment rights and he did not initiate the conversation. At the Denno hearing, the undisputed testimony was that Midgett had been informed of his constitutional rights at the time of his capture.

Deputy Sheriff Allan Hicks, the investigating officer, testi-

fied he first encountered Midgett shortly after midnight when Midgett was being transported from the scene of the crime, and Midgett had requested that he be taken to the hospital for injuries he sustained during his capture. Hicks testified that each time he questioned Midgett about his injuries, Midgett responded that he was pleading the fifth amendment. Hicks also testified that there was a strong odor of alcohol and that Midgett exhibited "at least some degree of intoxication." After Midgett's third response that he was pleading the fifth, Hicks determined Midgett's injuries did not warrant a hospital visit, and Midgett was transported to jail.

Around 2:30 a.m., Hicks met with Midgett at the jail and, still detecting a strong odor of alcohol, asked Midgett how much he had had to drink. Hicks went over the rights form and Midgett stated he understood each question. Hicks then asked Midgett to read the waiver statement and sign the form. Midgett read the statement but refused to sign, and stated that he wished to plead the fifth and wanted an attorney. As Hicks was leaving the room, Midgett asked Hicks to explain the charges against him. Hicks did so and testified Midgett said, "[W]hat he had done was wrong but what we had done to him was also wrong."

It is this statement that Midgett argues should have been suppressed. The trial court found that the time between the initial contact with Midgett around 12:15 a.m. and the 2:30 a.m. meeting at the jail was a reasonable time in which Hicks could have expected Midgett to have sobered. It further found that Midgett understood his rights and that his statement was given voluntarily and spontaneously.

The state has the burden of proving by a preponderance of the evidence that a custodial confession or inculpatory statement was given voluntarily or was knowingly and intelligently made. And while this court makes an independent determination based on the totality of the circumstances, a trial court will not be reversed unless its determination is clearly erroneous. *Hart* v. *State*, 312 Ark. 600, 852 S.W.2d 312 (1993); *Davis* v. *State*, 308 Ark. 481, 825 S.W.2d 584 (1992); *Anderson* v. *State*, 311 Ark. 332, 842 S.W.2d 855 (1992); *McDougald* v. *State*, 295 Ark. 276, 748 S.W.2d 340 (1988). Whether an accused had sufficient mental 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 to resolve. *McDougald*, 295 Ark at 280, 748 S.W.2d at 341. The fact that an appellant might have been intoxicated at the time of his statement, alone, will not invalidate that statement, but will only go to the weight accorded it. *Id.; Davis*, 308 Ark. at 488, 825 S.W.2d at 588.

[redacted] When the appellant claims intoxication at the time he waives his rights by making a statement, the test for an intelligent waiver is whether the individual had sufficient mental capacity at the time to know what he was saying under the totality of the circumstances. *Id.* at 488-489. Previously, this court has found it significant that the appellant answered questions without indications of physical or mental disabilities, remembered details of the interrogation, and gave the statement within a short period of time after his rights had been read to him. *McDougald*, 295 Ark. at 280.

[redacted] Here, the evidence showed Midgett was informed of his rights both at the scene of the crime and at the jail, Midgett was a convicted felon and knew enough to "plead the fifth", and Deputy Hicks went over the *Miranda* form with Midgett two hours after his capture. Even though he still smelled of alcohol, Midgett was able to acknowledge his understanding of each right, read the waiver statement, and request a court-appointed attorney. Upon Midgett's request for an attorney, Hicks correctly terminated the interview by rising from his chair and turning to leave the room when Midgett initiated further conversation. The fact that Midgett demonstrated concern for what charges would be filed against him is also significant evidence that he understood the situation and had the mental capacity to comprehend the gravity of the consequences. Based on the record before us, the trial court was not clearly erroneous in denying Midgett's motion to suppress.

Midgett next argues that, prior to trial, the state filed an information on him to include two counts of rape by deviate sexual activity pursuant to Ark. Code Ann. § 5-14-103 (Repl. 1993); but following presentation of the evidence, the court allowed the state to amend the information by adding a charge of rape by sexual intercourse against the older child. Midgett contends he was both surprised and prejudiced by the state's amendment and this constituted error.

As long as the amendment does not change the nature or degree of the crime charged and the appellant is not surprised, the state may amend an information at any time prior to submission of the case to the jury. *Kilgore* v. *State*, 313 Ark. 198, 852 S.W.2d 810 (1993). In *Cokeley* v. *State*, 288 Ark. 349, 705 S.W.2d 425 (1986), this court held rape is a single crime with two different methods of commission. Ark. Code Ann. § 5-14-103 (Repl. 1993) provides in relevant part as follows:

> (a) A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person:
>
> . . .
>
> (3) Who is less than fourteen (14) years of age.

Deviate sexual activity is described as sexual gratification by penetration, however slight, of the anus or mouth of one person by the penis of another or of the vagina or anus of one person by any body member or foreign instrument manipulated by another; while sexual intercourse is defined as penetration, however slight, of the vagina by a penis. Ark. Code Ann. § 5-14-101(1) and (9); *Bliss* v. *State*, 282 Ark. 315, 668 S.W.2d 936 (1984). The penalty for rape is the same whether it is by deviate sexual activity or by sexual intercourse.

At trial, Deputy George Williamson testified that he saw Midgett penetrate the older child:

> When I bent down to look in the window, I saw a naked man standing there and a young girl sitting on a chair with her legs spread out. The man was holding his penis in his hand and ramming it into the girl. I was about 2-3 feet from him that he was attempting to get his penis into the girls (sic) vagina. He had his penis in her vagina and kept ramming it in to her.

While deputies Spencer Moore and Steve Bradley were not able to testify that they saw Midgett actually penetrate the child, they were able to testify that Midgett was naked and kneeling in front of the child who was sitting naked on a chair with her legs spread, and Midgett was making movements and the appearance of sexual intercourse. The older child, herself, testified

that "right before the police got there, Danny tried to put his private part inside mine."

Additionally, the older child testified about an event that occurred earlier that same night when Midgett had her outside the house:

> When I was outside and didn't have any clothes on it was because Danny made me pull them off. He *put his* thing in my private part when he had me take my clothes off.

Consistent with the foregoing law and evidence, the trial court was correct in allowing the state to amend the information to conform to the proof and to instruct the jury accordingly since the amendment did not change the nature or degree of the crime. *See Wood* v. *State*, 287 Ark. 203, 697 S.W.2d 884 (1985). Since he was already charged with two counts of rape, Midgett cannot claim surprise due to the amendment.

Midget's next point involves his motions for a directed verdict at the end of the Denno hearing, and again at the close of the state's case. Because Midgett did not present evidence, it was not necessary that he renew his motion after the defense rested. Midgett argues the evidence was insufficient to prove he raped the older child by sexual intercourse and insufficient to prove he raped the younger child by deviate sexual activity.

This court views the evidence most favorably to the appellee and the testimony of a rape victim is sufficient to support a conviction. *Prater* v. *State*, 307 Ark. 180, 820 S.W.2d 429 (1991); *Bishop* v. *State*, 310 Ark. 479, 839 S.W.2d 6 (1992); *White* v. *State*, 303 Ark. 30, 792 S.W.2d 867 (1990). Further, any inconsistencies in the victim's testimony is for the jury to resolve. *Id.*

The testimony of the older child alone is sufficient to support Midgett's conviction for rape by sexual intercourse. But when her testimony is coupled with the testimonies of the three deputies, the evidence against Midgett overwhelmingly supports his conviction for rape by sexual intercourse.

Midgett now argues it was physically impossible for the deputies to view the scene as they testified due to the layout

of the house. However, Midgett failed to abstract any impeaching testimony, or any diagrams or photographs to support his argument. This court has stated numerous times the record on appeal is confined to that which is abstracted, and failure to abstract a critical document or other evidence precludes this court from considering the issues concerning it. *Porchia* v. *State*, 306 Ark. 443, 815 S.W.2d 926 (1991).

Next, the evidence supporting Midgett's conviction for rape by deviate sexual activity of the younger child includes her testimony and testimony of a nurse. Midgett requested that the court strike the younger child's testimony from the record because immediately after the event, she did not tell the officers that Midgett "stuck his hand in my private thing" as she did at trial. The trial court correctly denied Midgett's motion to strike. While Midgett's attorney attempted to impeach the child on cross-examination, she was adamant that she did not remember talking to the officers after the event and that Midgett had penetrated "her private thing" with his hand.

A child who is called to testify is held to the same standard of competency as an adult, and a trial court must begin with the presumption that every person is competent to be a witness. *Holloway* v. *State*, 312 Ark. 306, 849 S.W.2d 473 (1993). The burden of persuasion is upon the party alleging the witness is incompetent by establishing the lack of at least one of the following: (1) the ability to understand the obligation of an oath and to comprehend the obligation imposed by it; or (2) an understanding of the consequences of false swearing; or (3) the ability to receive accurate impressions and to retain them, to the extent that the person can communicate to the factfinder a reasonable statement of what was seen, felt and heard. Further, the competency of a witness is a matter lying within the sound discretion of the trial court, which this court will not reverse on appeal absent clear abuse of that discretion. *Id.*

This court has held a child was competent to testify even when his testimony is not completely clear, and where the child had instances of not remembering and minor conflicts in his testimony. *Id.*; *Warbington* v. *State*, 240 Ark. 1073, 405 S.W.2d 281 (1966). In *Holloway*, 312 Ark. at 314, this court reaffirmed its view that the evaluation of the child by the trial court is par-

ticularly important because of the court's opportunity to observe the child and to assess the child's intelligence and understanding of the need to tell the truth.

Here, the younger child, who was eight years old at the time of trial, indicated her understanding of the need to tell the truth, the meaning of her oath, and the consequences of not telling the truth. The child testified not only about what Midgett did to her, but also about what she saw Midgett do to her sister. Variances in testimony do not warrant a finding of incompetence but are for the jury to resolve. *Holloway* at 316.

Additionally, Cindy Rothe, a licensed practical nurse at Methodist Hospital, testified as to the physical examination of the younger child in the emergency room on the night of the crime.[1] Rothe testified that the child had bruises and welts on her buttocks and small bruises billaterally on her inner thighs. The younger child suffered from erythema of the introitus and labia which Rothe testified indicated irritation and swelling of the vaginal area.

Taken as a whole, the evidence is more than sufficient to support both Midgett's convictions for rape by sexual intercourse and rape by deviate sexual activity.

Finally, Midgett argues the court should have instructed the jury on sexual abuse in the first degree as a lesser included offense and that this instruction was proffered to the court. However, because the record fails to reveal the proffer, and neither the proffer nor the instruction is abstracted, it is not necessary to address the merits of Midgett's argument. Additionally, Midgett argues the trial court erred by refusing to give a theory of the defense instruction which he also failed to proffer.

As this court as stated many times, the failure to proffer an instruction results in a waiver of that issue on appeal. *Vickers* v. *State*, 313 Ark. 64, 852 S.W.2d 787 (1993). Simply giving a set of instructions to the trial judge is not sufficient, and places the responsibility on the trial judge of bringing up a record on appeal which rightfully belongs on the appellant. *Id.*

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[1]It is not clear if this witness was offered as an expert, but if so, the defense did not object.

Pursuant to Ark. Sup. Ct. R. 4-3(h), the record has been reviewed and no other errors appear which were prejudicial to the appellant.

Affirmed.

Billy WHITEHEAD *v.* STATE of Arkansas

93-1259 873 S.W.2d 800

Supreme Court of Arkansas
Opinion delivered April 11, 1994

Ogles Law Firm, by: *John Ogles*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. On August 24, 1992, the Cabot Municipal Court issued an arrest warrant for appellant Billy Whitehead, who was sixteen years old. The warrant was based upon an affidavit by Janet Stanley, who averred Whitehead had raped Stanley's fourteen-year-old daughter on May 29, 1992, at a vacant house located behind a residence where both teenagers had attended a party.[1] On November 10, 1992, the municipal court conducted a probable cause hearing and bound Whitehead's case over to the Lonoke County Circuit Court for further proceedings; however, the state has never filed an information or indictment in circuit court, specifying any felony charge against Whitehead.[2] Nonetheless, the circuit court acted on Whitehead's motion to transfer his case to juvenile court, and denied it on July 19, 1993. Pursuant to Ark. Code Ann.

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[1]Curiously, the Stanley affidavit was captioned "In the Chancery Court Juvenile Division of Lonoke County, Arkansas —Affidavit for Petition for the Following Person: Billy Whitehead."

[2]Whitehead filed a motion to dismiss, but no ruling was obtained.

§ 9-27-318(h) (Repl. 1993), Whitehead brings this interlocutory appeal and contends the court erred in denying his transfer motion. He also argues he has never been properly charged by information or indictment, so the state's case should be dismissed.

Whitehead correctly points out that felony charges in circuit court are required to be brought by indictment or information. *State* v. *Pulaski County Circuit-Chancery Court*, 316 Ark. 473, 872 S.W.2d 854 (1994); *Long* v. *State*, 284 Ark. 21, 680 S.W.2d 686 (1984). In *Rhoades* v. *State*, 315 Ark. 662-A, 875 S.W.2d 814 (1994) (1994), we made it clear that, under Ark. Code Ann. § 9-27-313(b) (Repl. 1993), an officer taking a juvenile into custody must immediately take the juvenile before the court out of which the warrant was issued and that court shall decide whether jurisdiction is in juvenile court or circuit court under § 9-27-318. Then, under Ark. Code Ann. § 9-27-318(d) (Repl. 1993), the judge of the court in which a delinquency petition or criminal charges have been filed shall conduct a hearing to determine whether to retain jurisdiction or to transfer the case to another court having jurisdiction.

As pointed out above, the state never filed a felony charge by information or indictment against Whitehead, thus the circuit court had no authority to conduct a hearing under § 9-27-318(d). In addition, it is fundamental, established law that a party cannot be found guilty of a crime with which he or she was never charged. *Davis* v. *State*, 296 Ark. 524, 758 S.W.2d 706 (1988); *Brewer* v. *State*, 286 Ark. 1, 688 S.W.2d 736 (1985). Until a proper charging instrument (information or indictment) is filed by the state in this matter, the circuit court simply had no authority to proceed, much less rule on a transfer motion under § 3-27-318.[3]

In conclusion, we note the state's argument that Whitehead filed this interlocutory appeal under § 9-27-318(h)

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[3]The necessity of a charging instrument, before allowing the state to proceed against an accused, seems fundamental, but an information's significance here is further heightened by this court's prior holdings that a criminal information alone may be a sufficient basis for a circuit court's decision to refuse to transfer a case to juvenile court. *See Walker* v. *State*, 304 Ark. 393, 803 S.W.2d 502 (1991).

to obtain a ruling that the circuit court erred in denying his transfer motion and that Whitehead is limited only to those issues expressly permitted under that statute. This court, of course, has the discretion to treat an appeal from an order, judgment or decree which lacks judicial support as if it were brought up on certiorari, *Dennison* v. *Mobley, Chancellor*, 257 Ark. 216, 515 S.W.2d 215 (1974). Certiorari lies to correct proceedings erroneous on the face of the record where there is no other adequate remedy, and the writ is available to us in the exercise of superintending control over a tribunal which is proceeding illegally where no other mode of review has been provided. *Lupo* v. *Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993). Certiorari, however, may only be resorted to in cases where an excess of jurisdiction is apparent on the face of the record. *Id.* That is the situation before us now.

. The circuit court certainly has subject matter jurisdiction over criminal charges, but as discussed above, the record clearly reflects (and the state does not dispute) that no felony charge has, as yet, been properly filed against Whitehead. That being so, the circuit court's order denying transfer of this cause is a nullity and must therefore be quashed.

Writ granted.

AGRI BANK FCB, Formerly Farm Credit Bank of St. Louis and the Federal Land Bank of St. Louis *v.* Jordan MAXFIELD, Successor Trustee of the Maxfield Trust U/T/A Dated 11/8/85

93-1063 873 S.W.2d 514

Supreme Court of Arkansas
Opinion delivered April 11, 1994

Kemp, Duckett, Hopkins, & Spradley, by: *Hal Joseph Kemp*, for appellant.

Coxey & Coxey, by: *J. Kent Coxey*, for appellee.

ROBERT L. BROWN, Justice. This case concerns the construction of a warranty deed and whether the language of the deed evidenced on its face the retention of a vendor's lien in the amount of $95,000 so as to give appellee Jordan Maxfield, Successor Trustee, a priority lien. The chancellor ruled that a vendor's lien was sufficiently created and further ruled that the lien took priority over a mortgage in favor of appellant Agri Bank FCB. We hold that a vendor's lien for $95,000 was not evidenced by the deed, and we reverse and remand.

J.R. Maxfield, Jr. owned land in Carroll County known as the 5M Ranch. In 1979, he became ill and decided to sell this property. His sons, Jordan Maxfield and Morgan Maxfield, agreed to buy it. On February 4, 1980, Maxfield and his wife, Kathryn Maxfield, executed and delivered a deed to the 5M Ranch to Morgan Maxfield. The warranty deed read:

WARRANTY DEED WITH

ASSUMPTION OF DEBT

With Relinquishment of Dower

KNOW ALL MEN BY THESE PRESENTS:

THAT, we J.R. MAXFIELD, JR. and wife, KATHRYN J. MAXFIELD, hereinafter called Grantors, for and in consideration of the sum of Ten Dollars ($10) and other good and valuable considerations, to us in hand paid by MORGAN MAXFIELD, hereinafter called Grantee, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto Morgan Maxfield of Clay County, Missouri and unto his successors and assigns forever, all of the Grantors interest in certain real estate briefly described as 1,500 acres more or less, in Township 20 North Range 27 West, in Carroll County, Arkansas, known as the 5M Ranch, which property is more particularly described on Exhibit "A" and incorporated herein by reference.

TO HAVE AND TO HOLD the same unto the said Grantee and unto his successors and assigns forever, with all appurtenances thereunto belonging.

AND we hereby covenant with said Grantee that we will forever warrant and defend the title to the said lands against all claims whatsoever, said conveyance being subject to all recorded easements and encumbrances.

AND I KATHRYN J. MAXFIELD, wife of said J.R. MAXFIELD, JR., for and in consideration of the sum of money, do hereby release and relinquish unto the said Grantee all my right of dower and homestead in and to said lands.

SAID Grantee hereby assumes the payment of certain notes totaling $240,000.00 in conjunction with this transfer of the above described 1,500 acres, more or less, in Carroll County, Arkansas.

WITNESS our hands and seals on this 4th day of February, 1980.

/s/ J.R. Maxfield, Jr.

J.R. MAXFIELD, JR.

/s/ Kathryn J. Maxfield

KATHRYN J. MAXFIELD

/s/ Morgan Maxfield

MORGAN MAXFIELD

On February 4, 1980, Morgan Maxfield also executed and delivered to his father a promissory note in the amount of $95,000, payable on April 3, 1983. Jordan Maxfield, who was present, later testified that a Deed of Trust was executed by Morgan Maxfield at the same time, but no Deed of Trust was recorded or introduced into evidence at the hearing. There was no reference in the promissory note to a vendor's lien. No payment was made on the $95,000 promissory note. The warranty deed was recorded on April 4, 1980. On April 8, 1980, Morgan Maxfield executed a promissory note in the amount of $313,000 payable to Federal Land Bank of St. Louis (subsequently Farm Credit Bank of St. Louis and now Agri Bank FCB) and further executed a mortgage to secure the note. That mortgage was recorded on May 12, 1980.

Morgan Maxfield died in a plane crash on September 4, 1981, and his will was admitted to probate in Missouri. A petition for ancillary administration was filed in Carroll County, and several claims against the estate followed, including two claims by his father, J.R. Maxfield, Jr. One of those claims was for $95,000 predicated on the February 4, 1980 promissory note. The executor of the Estate objected to the claim.

On October 17, 1990, the 5M Ranch which secured the debt of the Agri Bank and allegedly the vendor's lien of J.R. Maxfield, Jr. was sold to Dam Site Better for $338,918.84 pursuant to an order of the probate court. On January 13, 1992, appellee Jordan Maxfield, Successor Trustee of the Maxfield Trust and the interest of J.R. Maxfield, Jr., filed an amended petition for declaratory judgment in chancery court asking that the $95,000 debt be declared to be a vendor's lien with first priority. Farm Credit Bank as predecessor to Agri Bank responded that its mortgage was in fact superior and that no vendor's lien for the $95,000 debt had been retained by the Maxfields. It counterclaimed for an unpaid debt

of $255,761.72 on its note plus interest, late charges, and attorneys fees, and prayed for foreclosure of its mortgage.

On June 4, 1993, the chancellor entered an order and found as follows on the vendor's lien question:

> A vendor's lien is created when the grantor of the real property retains in the document transferring title a lien securing the purchase price of the property. . . . The warranty deed clearly recites an existing indebtedness at the time the deed was executed. Even though the Deed provides for an assumption of the debt, that doesn't mean that it wasn't for a part of the purchase price of the property. In fact, there wasn't any testimony indicating the $240,000.00 debt mentioned in the deed was ever paid. The document creating the vendor's lien is clear and unambiguous and [the] Court does not need to go beyond it. The Court finds that a vendor's lien was retained by J.R. Maxfield in the property.

The chancellor then granted Jordan Maxfield, Successor Trustee, a vendor's lien securing the $95,000 promissory note and decreed it to be a first lien against the net sale proceeds of $338,918.84 derived from the sale of the 5M Ranch.

Agri Bank contends that the chancellor erred as a matter of law in finding that the warranty deed evidenced a vendor's lien on its face. We agree that this was error and reverse on this point.

The warranty deed in question was styled "Warranty Deed With Assumption of Debt With Relinquishment of Dower" and stated, "grantee hereby assumes the payment of certain notes totaling $240,000.00 in conjunction with this transfer of the above described 1,500 acres . . . ." There was no mention of the new $95,000 promissory note in the deed. Jordan Maxfield, Successor Trustee, urges that the express reference to the assumed payment "of certain notes" and the fact that part of the purchase price remained unpaid are enough to evidence a vendor's lien for the $95,000 note. We do not agree. A vendor's lien must either be stated in the deed or appear from the face of the deed. *Beard* v. *Bank of Osceola*, 126 Ark. 420, 190 S.W. 849 (1916). Here, neither circumstance occurred with respect to the new debt of $95,000.

There is a practical problem here, which we alluded to in a case dealing with a priority between mechanics liens and construction money mortgages, and which we believe to be relevant. *See Jack Collier East Co.* v. *Barton*, 228 Ark. 300, 307 S.W.2d 863 (1957). In *Barton*, we said:

> Practical considerations also sustain the view we have adopted, we think. It would place a great burden on materialmen and, in particular, laborers not to be able to rely on public records for protection. Otherwise they would have to rely on hear-say (sic) and oral agreements, and would have to make extensive investigations for which they are ill equipped. We have examined the authorities on which appellant, East, relies to show that actual notice is sufficient but fail to find in (sic) any merit in them as they pertain to a different situation.

228 Ark. at 305-306, 307 S.W.2d at 866.

The same holds true for Agri Bank in the case before us. The warranty deed at issue was recorded on April 4, 1980, and its mortgage from Morgan Maxfield signed four days later was recorded on May 12, 1980. Examination of the deed records would not have alerted a prudent researcher that a vendor's lien for a new promissory note in the amount of $95,000 had been retained. Partial payment by promissory note and by assumed debt are simply different means of satisfying the purchase price. The one does not necessarily follow the other. We conclude that the assumed debt language by itself did not put third parties, including Agri Bank, on notice that a vendor's lien in the amount of $95,000 for the new promissory note had been retained.

We reverse and remand for an order in accordance with this opinion.

Reversed and remanded.

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

CORBIN, J., not participating.

JACK HOLT, Chief Justice, dissenting. I dissent. The majority points out the pertinent language from the "Warranty Deed With Assumption of Debt" which stated that in consideration of

ten dollars and other good consideration the grantors conveyed the 5M Ranch, with the following declaration:

> SAID Grantee hereby assumes the payment of certain notes totalling $240,000.00 in conjunction with this transfer of the above described 1,500 acres, more or less, in Carroll County, Arkansas.

Morgan Maxfield, the grantee, signed the warranty deed and executed a promissory note dated the same day as the warranty deed, in favor of J. R. Maxfield, Jr. in the amount of $95,000.00. The thrust of Agri Bank's argument is that since the $95,000.00 note was not specifically set out in the warranty deed, then a vendor's lien was not created. After a hearing, the chancellor determined that the warranty deed was unambiguous and evidenced on its face a vendor's lien in favor of the trust, and further declared its priority over Agri Bank's mortgage, to which I agree.

I take issue with the majority's holding that the warranty deed with assumption of debt as written did not put Agri Bank on notice of the outstanding indebtedness. It is well settled that a vendor of land has an equitable lien on the land for the unpaid purchase price. *Wilson* v. *Shocklee*, 94 Ark. 301, 126 S.W. 832 (1910). Furthermore, a mortgagee who accepts a mortgage which recites a prior mortgage is estopped to deny the superiority of the prior mortgage. *Id.* Although our cases in this area are limited in number and are of some vintage, the law on vendor's liens has been addressed. Vendor's liens are discussed in *Talieferro* v. *Barnett*, 37 Ark. 511 (1881), wherein we held that a deed reciting that the land conveyed was held bound for the payment of the notes given was a valid expression of a lien. In addition this court has held that a subsequent purchaser is affected with notice of all recitals in the title deeds of his vendor, whether recorded or not. *Graysonia-Nashville Lumber Co.* v. *Saline Dev. Co.*, 118 Ark. 192, 176 S.W. 129 (1915). In *Graysonia* we noted an even older case, *Gaines* v. *Summers*, 50 Ark. 322, 7 S.W. 301 (1887) where we stated:

> A person purchasing an interest in lands, "takes with constructive notice of whatever appears in the conveyances constituting his chain of title." If anything appears in such conveyances "sufficient to put a prudent man on inquiry,

> which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry, and if he does not make it, he is guilty of bad faith or negligence," and the law will charge him with the actual notice he would have received if he had made it.

Gaines, 50 Ark. 322, 327, 7 S.W. 301, 302.

We have long held that if a purchaser is informed by recitals in his chain of title that property has been sold on credit, he is bound to inform himself as to whether this debt has been paid. *Stroud* v. *Pace & Allison*, 35 Ark. 100 (1879); and where purchase money notes were described in deed, those notes constituted notice that the vendor had a lien for the unpaid purchase money. *Ponder* v. *Gibson-Homans Co.*, 166 Ark. 591, 266 S.W. 682 (1924). One cannot rely on an abstract in the face of recitals in a deed since a mistake in the abstract of title would not relieve one from making inquiries suggested by the deed itself. *Union & Planters' Bank & Trust Co.* v. *Simmons*, 166 Ark. 285, 265 S.W. 953 (1924). Union & Planters' Bank & Trust was not relieved from inquiry since the deeds had recitals even though the mortgagor made a statement in his loan application that there were no liens on the land to be mortgaged. *Id.*

The same principles ring true in this case. The recital in the Warranty Deed with Assumption of Debt put Agri Bank on notice that there was some outstanding indebtedness which placed on it the responsibility of making inquiry as to whether this prior indebtedness had been paid. They, like the bank in *Union & Planters' Bank & Trust*, could not rely on an abstract or statements of Morgan Maxfield, mortgagor, when the deed reflected a prior indebtedness. Having failed to make responsible inquiry, Agri Bank cannot now complain.

The other argument raised by Agri Bank is not addressed by the majority, but I will address it here for it too is without merit. Agri Bank alternatively argues that if there was a valid vendor's lien, then J. R. Maxfield, Jr. waived this vendor's lien by accepting a deed of trust. Agri Bank points out that at the hearing Jordan Maxfield testified that concurrently with the execution of the warranty deed, Morgan Maxfield gave J. R. Maxfield, Jr. a

deed of trust and that J. R. Maxfield, Jr. accepted this deed of trust as security. This deed of trust was never recorded nor was the document ever produced. It was allegedly in the possession of Morgan Maxfield after its execution, and Morgan died before this action came before the chancellor. Considering Jordan Maxfield's testimony, Agri Bank asserts that any vendor's lien was waived and that the trust must rely on the deed of trust to establish the existence and priority of the lien. The deed of trust being unrecorded, Agri Bank asserts priority.

A deed of trust is in legal effect a mortgage, *Tate* v. *Dinsmore*, 117 Ark. 412, 175 S.W. 528 (1915), and if a mortgage is given, then an equitable vendor's lien is indeed extinguished as the vendor must then rely upon the mortgage. *See Jack Collier East Co.* v. *Barton*, 228 Ark. 300, 307 S.W.2d 863 (1957). However, as this court said in *Chapman* v. *Chapman*, 55 Ark. 542, 544, 18 S.W. 1037, 1037 (1892):

> In the absence of an express waiver of a vendor's equitable lien for unpaid purchase money of land, or circumstances which show that it was his intention to waive it, the lien exists. "If under all the circumstances it remains in doubt, then the lien attaches." Generally, the acceptance of security other than the obligation of the vendee is evidence of intention to waive the vendor's lien and rely upon the other security. But this is only *prima facie* evidence of waiver. Each case must be determined upon its particular circumstances.

It was evident in *Chapman* that where there was a mortgage taken in exchange of the vendor's lien but it was invalidly acknowledged, no intent to waive the vendor's lien could exist until a valid recorded mortgage was received.

The trust cites *Chapman* and asserts that, though it may be presumed that some document was executed, there is no proof that this document was a valid deed of trust, that it covered the lands in question, or that there was any intent on the part of J. R. Maxfield, Jr. to rely on this deed to waive his vendor's lien. I agree. It is well settled that those who claim under a lost deed must prove its contents by clear, satisfactory, and convincing proof. *Witt* v. *Graves*, 302 Ark. 160, 787 S.W.2d 681 (1990). In light

of the limited information regarding the deed of trust and the fact that the vendor's intent was not brought out in his testimony, neither the contents of the deed of trust nor waiver of the vendor's lien was established.

Upon review of a chancellor's findings, we will not reverse unless the findings are clearly erroneous or clearly against the preponderance of the evidence. *Riddick* v. *Street*, 313 Ark. 706, 858 S.W.2d 62 (1993). Under these circumstances, I cannot say the chancellor's decision was clearly erroneous. Thus, I dissent.

NEWBERN, J., joins in this dissent.

Raymond Dale DAVIS *v.* M.E. "Dale" REED, Warden

93-1231 873 S.W.2d 524

Supreme Court of Arkansas
Opinion delivered April 11, 1994

Appellant, pro se.

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

ROBERT L. BROWN, Justice. This appeal is taken from a denial of a petition for a writ of habeas corpus. The appellant, Raymond Dale Davis, contends on appeal as he did in circuit court that the original court accepting his guilty plea and sentencing him lacked jurisdiction to do so. We disagree and affirm the circuit court's decision to deny his petition for habeas corpus relief.

The facts precipitating Davis's petition are undisputed. On January 6, 1992, the prosecuting attorney for the Eleventh Judicial District-West filed two felony informations for capital murder and attempted capital murder against Davis in Lincoln County Circuit Court. Lincoln County and Jefferson County comprise the Eleventh Judicial District-West. The charged offenses occurred in Lincoln County.

Davis subsequently entered into plea negotiations with the prosecutor. On May 6, 1992, Circuit Judge Randall Williams of

the Eleventh Judicial District-West signed an order setting a hearing in the Jefferson County Courthouse for the purpose of taking a guilty plea from Davis and for sentencing. That order was filed with the circuit clerk in Lincoln County. On May 12, 1992, the plea proceedings and sentencing were held before Judge Williams in the Jefferson County Courthouse. Davis pled guilty to each of the three counts and was sentenced to 30 years imprisonment and two terms of life without parole, to run consecutively. Two reports of the plea negotiations and a judgment and commitment order were filed with the Lincoln County Circuit Clerk on the same day. Davis was subsequently incarcerated in the Arkansas Department of Correction.

On June 18, 1993, Davis filed a *pro se* petition for a writ of habeas corpus in Lincoln County Circuit Court, alleging that Judge Williams, who accepted his plea of guilty and sentenced him in Jefferson County, lacked jurisdiction to do so. Appellee M.E. Dale Reed, Warden of the Cummins Unit, moved to dismiss the petition, and the circuit court in Lincoln County with Judge Fred D. Davis, III, sitting denied the petition on the basis that the appellant had raised a venue question and not a jurisdictional issue as required for habeas corpus relief. This appeal followed.

We note initially that a writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when a circuit court lacked jurisdiction over the cause. *McConaughy* v. *Lockhart*, 310 Ark. 686, 840 S.W.2d 166 (1992); *Mackey* v. *Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991); *Birchett* v. *State*, 303 Ark. 220, 795 S.W.2d 53 (1990); *Wallace* v. *Willock*, 301 Ark. 69, 781 S.W.2d 484 (1989). An appeal is the proper procedure for the review of a circuit court's denial of a petition for a writ of habeas corpus. *Waddle* v. *Sargent*, 313 Ark. 539, 855 S.W.2d 919 (1993); *In Re Review of Habeas Corpus Proceedings*, 313 Ark. 168, 852 S.W.2d 791 (1993). On appeal, Davis argues the circuit court in Jefferson County lacked jurisdiction to take his plea and sentence him. His jurisdictional argument appears to embrace improper venue in Jefferson County and the absence of authority vested in Judge Randall Williams to act on his case.

To begin with venue and jurisdiction, though sometimes used interchangeably, are two distinct legal concepts. Venue

is the geographic area, like a county, where an action is brought to trial. *Black's Law Dictionary* 1557 (6th ed. 1990). Jurisdiction is the power of a court to decide cases and presupposes control over the subject matter and parties. *Black's Law Dictionary* 853 (6th ed. 1990). This court has stated that venue may be waived in a criminal case within the territorial boundaries of the judicial district. *See Waddle* v. *Sargent, supra; see also* Ark. R. Crim. P. 24.8(c)(1) (waiver of venue for plea of guilty for a second offense committed in another jurisdiction). Since Davis entered his plea in Jefferson County, a contemporaneous objection was required to raise the issue of improper venue and preserve it for appeal. *Harrod* v. *State*, 286 Ark. 277, 691 S.W.2d 172 (1985). In *Harrod*, the venue issue was decided by the defendant's failure to object to venue at sentencing and to request transfer to another county within the same judicial district. In the case before us, the same objection was lacking on Davis's part. Indeed, he voluntarily participated with counsel in the guilty plea and sentencing in Jefferson County. Any venue argument which Davis might have had was waived, and his objection cannot be raised for the first time on appeal.

For his second point, Davis appears to urge that the circuit judge — Randall Williams — had no authority to conduct any proceedings in this case. We begin by underscoring the fact that Judge Williams was a circuit judge for the Eleventh Judicial District-West. A circuit judge has the authority to preside over proceedings in any courtroom, in any county, within the judicial district for which that judge was elected. Ark. Code Ann. § 16-13-210 (1987); *Waddle* v. *Sargent, supra*. In *Waddle*, we said:

> Article 7, Section 13 of the Arkansas Constitution provides that a circuit judge "shall reside in and be a conservator of the peace *within the circuit for which he shall have been elected.*" (Emphasis added). In accordance with these provisions of our constitution, Ark. Code Ann. § 16-88-105 (1987) provides that circuit courts shall have jurisdiction to try criminal offenses within the bounds of the geographical judicial district as follows: "The local jurisdiction of circuit courts . . . shall be of offenses committed *within the respective counties in which they are held.*" (Emphasis added). Similarly, Ark. Code Ann. 16-13-210 (1987) provides that a circuit judge who is "*physically present in*

> *the geographical area of the judicial district* which he serves as judge may hear, adjudicate, or render any appropriate order with respect to, any cause or matter pending in any circuit court over which he presides[.]" (Emphasis added).

313 Ark. at 541-542, 855 S.W.2d at 920.

Since both Jefferson and Lincoln Counties comprise the Eleventh Judicial District-West, Judge Williams had authority to preside over Davis's plea to a Lincoln County charge even though the hearing was conducted in Jefferson County. The only issue under § 16-13-210 is whether venue was appropriate, but, again, Davis waived any argument of improper venue by his failure to object. *Harrod* v. *State, supra.*

Davis cites *Dix* v. *State*, 290 Ark. 28, 715 S.W.2d 879 (1986) in support of his argument, but the factual situation in that case is clearly distinguishable from Davis's predicament. In *Dix*, we stated that a circuit court did not have jurisdiction to try an offense committed "elsewhere," but in that case the term "elsewhere" referred to a county outside of the court's judicial district. Unlike the situation in *Dix*, the proceedings against Davis in this case were conducted wholly within the Eleventh Judicial District-West. Davis was accused of crimes occurring in Lincoln County by an information filed in Lincoln County. The order for a plea hearing, the two reports of plea negotiations, and the judgment and commitment order were all filed in Lincoln County. The lone event which occurred outside Lincoln County was the plea proceeding and sentencing which was conducted by the circuit judge in Jefferson County. We hold that Davis was tried before a circuit judge who had jurisdiction over his criminal case.

Davis's last allegation of error is that the circuit court failed to comply with the provisions of Article 2, Section 10 of the Arkansas Constitution because there was no change of venue pursuant to Ark. Code Ann. § 16-88-209 (1987). Section 16-88-209, however, is only apposite when a case is removed from one county to another county due to prejudice on the part of the original county's inhabitants. Ark. Code Ann. § 16-88-201 (1987). That section is not pertinent to this case.

Affirmed.

IBM CREDIT CORPORATION *v.*
PULASKI COUNTY, Arkansas

93-1194 873 S.W.2d 161

Supreme Court of Arkansas
Opinion delivered April 11, 1994

[redacted]

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *James M. McHaney, Jr.*, for appellant.

Nelwyn Davis, for appellee.

ROBERT L. BROWN, Justice. This is an assessment case which concerns the value that the Pulaski County Assessor, B.A. McIntosh, placed on used IBM mainline computers leased to Baptist Medical Center and Dillard Department Stores. The appellant, IBM Credit Corporation, advances the argument that certain trade publications like *Computer Price Watch, Computer Price Guide*, and the *End-User Market Value Report* published by Daley Marketing Corporation are more valid for determining the value of used IBM equipment since they depict the actual market for that equipment. The circuit court agreed with the valuation method used by the assessor's office which was the cost of the computers less straight line depreciation over six years. IBM Credit raises two points on appeal: (1) whether the circuit court erred in ignoring fair market value data as set out in those trade magazines; and (2) whether straight line depreciation for a term of years is a reasonable means of determining fair market value. We find no error in the circuit court's decision, and we affirm.

IBM Credit is in the business of leasing IBM mainline computers. The customer and IBM Corporation, which manufactures the computers, negotiate a price for the equipment. Once the price is established, the customer then assigns the right to purchase the computer equipment to IBM Credit. IBM Credit pur-

chases the computer equipment from IBM Corporation and leases it back to the customer.

In 1992, IBM Credit provided the Pulaski County Assessor with documentation which it claimed established the fair market value of the three leased units based on actual market conditions as of January 1992. This documentation included: (1) IBM Credit's experience as the largest dealer of used IBM computer equipment in the United States; and (2) data contained in published trade journals such as *Computer Price Watch* which list both wholesale and retail prices for used, intermediate-to-large IBM computer systems.

The assessor did not use IBM Credit's "fair market" figures to determine the value of the three used computers. Instead, he chose to use a cost-less-depreciation schedule over a six year period. This valuation method, according to the assessor, had been used to value all computers in Pulaski County since the early 1980's. He valued IBM Credit's two computer systems leased to Dillard's and one computer system leased to Baptist Medical Center at $7.61 million using straight line depreciation and a useful life of six years. IBM Credit's total value for these same three computer systems using its prices garnered from trade publications was $5.85 million.

IBM Credit challenged the assessor's valuation methodology before the Board of Equalization, which affirmed the assessor's figures. It then appealed to the Pulaski County Court which also affirmed the assessor's decision. IBM Credit next appealed to Pulaski County Circuit Court and styled the case with Pulaski County, Arkansas as the sole appellee. Following a hearing, the circuit court issued a letter opinion, stating: "Although IBM's proposed valuation might be accurate, if adopted, every computer in each 'mom and pop' business would have to be valued in the same manner. There is not a 'Computer Watch,' which mainly covers IBM products, for many of the manufacturers." The court concluded that the assessor's valuation figures were reasonable for the three IBM units in question and that the most practical method for arriving at the value of used equipment was the uniform method of cost less depreciation. An order affirming the decision of the county court was subsequently entered.

IBM Credit first claims that the circuit court erred in not requiring the assessor to consider its fair market data pursuant to Ark. Code Ann. § 26-26-1202(c)(Repl. 1992). § 26-26-1202(c) reads:

> (c)(1) Personal property of any description shall be valued at the usual selling price of similar property at the time of listing.
>
> (2) If any personal property shall have no well-fixed or determined value in that locality at that time, then it shall be appraised at such price as in the opinion of the assessor could be obtained at that time and place.

Pulaski County, on the other hand, relies on Article 16, § 5 of the Arkansas Constitution, which provides in part:

> (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. . . .

The standard of review of a tax assessment is whether the assessment is "manifestly excessive or clearly erroneous or confiscatory." *Summers Chevrolet, Inc.* v. *Yell County*, 310 Ark. 1, 832 S.W.2d 486 (1992); *Jim Paws, Inc.* v. *Equalization Bd. of Garland County*, 289 Ark. 113, 710 S.W.2d 197 (1986), citing *St. Louis-San Francisco Ry. Co.* v. *Arkansas Pub. Serv. Comm'n*, 227 Ark. 1066, 304 S.W.2d 297 (1957). The burden of proof is on the protestant assessed. *Summers Chevrolet, Inc.* v. *Yell County, supra; Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 307 Ark. 171, 818 S.W.2d 935 (1991).

It is only in the most exceptional cases that an appellate court will grant a reassessment. *Jim Paws, Inc.* v. *Equalization Bd. of Garland County, supra.* As we stated in *St. Louis-San Francisco Ry. Co.* v. *Arkansas Pub. Serv. Comm'n, supra*, "Ordinarily the Court has no jurisdiction to make a tax assessment, and if it finds error, it should remand the case to the assessing body for further proceedings in accordance with the Court's

findings." 227 Ark. at 1069, 304 S.W.2d at 299, *citing* 84 C.J.S. 1123; *see also Potlatch Corp.* v. *Arkansas City School Dist.*, 311 Ark. 145, 842 S.W.2d 32 (1992); *Tuthill* v. *Arkansas County Equalization Board*, 303 Ark. 387, 797 S.W.2d 439 (1990). Because of the separation of powers doctrine, it is not within the province of state courts to assess property. *Tuthill* v. *Arkansas County Bd. of Equalization, supra.*

[redacted] A review of the evidence reveals that the assessor's decision to value IBM Credit's computers by the cost-less-depreciation method was not clearly erroneous or arbitrary or confiscatory. The publications offered by IBM Credit to establish the true market value of its computers did not list all computers that need to be assessed. The publications, therefore, lacked uniformity and in that respect differed from the "blue book" for automobiles. While arguably the publications more accurately reflect the value of IBM Credit's computers, they do not reflect the value of *all* computers. To use *Consumer Price Watch* data to value IBM Credit's computers would result in IBM Credit's being treated differently than other owners of similar property, which is diametrically opposed to the dictates of Article 16, § 5. *See Doniphan Lumber Co.* v. *Cleburne County*, 138 Ark. 449, 212 S.W. 308 (1919).

Furthermore, IBM Credit's proposed method of determining the value of computers in Pulaski County would be unduly burdensome. The evidence in the *de novo* hearing before the circuit court was that there are literally thousands of computers that must be assessed in Pulaski County. Not all of these computers have trade publications which list their used value; indeed, many do not.

In sum, to use a discrete methodology for valuing IBM computers and then cost less depreciation for many other brands sacrifices the very uniformity that the state constitution demands. Clearly, every other computer wholesaler and retailer assessed would have a meritorious argument of discrimination were the assessor to carve out one brand of computer for disparate treatment as compared to others.

IBM Credit next asserts that even if the assessor was free to disregard the market value data, his adoption of the straight

line depreciation schedule was arbitrary, capricious, and confiscatory. This is so, according to IBM Credit, because the schedule fails to account for computer equipment's functional obsolescence, as opposed to wear and tear, and assumes that all computers depreciate equally over a six year period and then cease to depreciate, which ignores market reality.

We conclude that the assessor's straight line depreciation schedule over six years is a reasonable means for determining fair market value. This court has approved the use of cost-less-depreciation schedules for assessing other forms of personal property. *See, e.g., Potlatch Corp.* v. *Arkansas City School Dist., supra.* In *Potlatch*, we noted that the Assessment Coordination Division of the Arkansas Public Service Commission, which has the power of supervision and control over county assessors and boards of equalization, had published a manual to be used by county assessors which recommended three methods to arrive at market value: (1) comparable sales; (2) capitalization of income; and (3) cost less depreciation. *See also Tuthill* v. *Arkansas County Equalization Board, supra.*

The county assessor, B.A. McIntosh, testified that he attempted to factor in functional obsolescence in computers in the early 1980's by assessing them based on a useful life of six years versus a longer term for other forms of tangible personal property. Moreover, IBM Credit's witness, Mike Costogan, a financial marketing advisor with the company, admitted that if he needed to value a computer not listed, he would use some alternative methodology that rapidly depreciates the value of the asset such as straight line depreciation. We are not prepared to say that straight line depreciation is an arbitrary, capricious, or confiscatory means of determining value for the computers in question. The circuit court did not err in finding that the assessed values were reasonable.

Though the issue was not raised, we observe that IBM Credit failed to join as appellee any party that could have implemented a reassessment of the computer systems in question had we decided that a remand was appropriate. That failure to join the assessor or board of equalization as a party leaves a void as to who would effect the reassessment on remand.

Affirmed.

CORBIN, J., not participating.

Louis IVORY *v.* STATE of Arkansas

CR 94-285 873 S.W.2d 154

Supreme Court of Arkansas
Opinion delivered April 11, 1994

Bill R. Holloway, for appellant.

No response.

PER CURIAM. Appellant seeks a rule on the clerk. The facts are that appellant was convicted of two felonies and one misdemeanor. The judgment of convictions was entered on May 19, 1993. On June 3, 1993, his notice of appeal was filed. The notice of appeal does not mention either his being an indigent or his tendering the funds to the court reporter for the record. On the same day, June 3, 1993, he filed a motion asking to be declared an indigent. On July 13, 1993, the trial court denied the motion, in part, because appellant owns unencumbered real estate having a fair market value of $40,000. On July 14, the trial court granted an extension of seven months for the docketing of the record on appeal. Appellant tendered the record to the clerk on March 10, 1994. Thus, the record was not tendered within seven months from the date of the entry of the judgment of convictions, and the clerk correctly refused to file the record.

We will grant a motion for rule on the clerk when

appellant's attorney admits that the record was not timely filed due to an error on his part. *See, e.g., Tarry* v. *State*, 288 Ark. 172, 702 S.W.2d 804 (1986). Here, appellant's attorney does not admit fault, but states that there was a misunderstanding. A statement that it was someone else's fault will not suffice. *Clark* v. *State*, 289 Ark. 382, 711 S.W.2d 162 (1986). Therefore, we deny the petition.

If appellant's attorney files a motion and affidavit, within thirty days of the date of this order, accepting full responsibility for not timely filing the record the motion will be granted and a copy of the opinion will be forwarded to the Committee on Professional Conduct.

Leon ROBINSON *v.* STATE of Arkansas

CR 93-1273 873 S.W.2d 514

Supreme Court of Arkansas
Opinion delivered April 11, 1994

Jan Thornton, for appellant.

No response.

PER CURIAM. Leon Robinson was convicted of a felony and filed a timely appeal with this Court. His brief was due January 11, 1994, but his counsel, Jan Thornton, failed to file the brief on time. She contends she did not receive notice from the Office of the Clerk of this Court setting the briefing schedule, but she acknowledges it was her responsibility to file the brief on time.

While we deem the explanation for the failure to present the brief to this Court inadequate, we grant the motion to file a belated brief because this is a criminal case and we cannot allow failure of counsel to deprive a criminal defendant of his appeal. The matter is referred to the Committee on Professional Conduct for whatever investigation and possible action it may deem proper. *Stone* v. *State*, 288 Ark. 472, 705 S.W.2d 441 (1986).

James NEAL, as Executive Director of the Supreme Court Committee on Professional Conduct *v.* Jimmie L. WILSON

93-691 873 S.W.2d 552

Supreme Court of Arkansas
Opinion delivered April 18, 1994
[Rehearing denied May 23, 1994.*]

*Newbern, J., not participating.

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

Friday, Eldredge & Clark, by: *Jerry L. Malone*, for appellee.

JACK HOLT, JR., Chief Justice. The appellant, James A. Neal, in his capacity as Executive Director of the Arkansas Supreme Court Committee on Professional Conduct, brings an appeal from the circuit court's order granting appellee Jimmie L. Wilson's motion to dismiss disbarment proceedings on the basis of the running of the statute of limitations. Mr. Neal has raised five points for reversal, arguing that (1) the trial court erred in finding that the disbarment proceeding was barred by the statute of limitations because no statute of limitations is applicable to disbarment proceedings; (2) alternatively, the trial court erred in finding that the disbarment proceeding was barred by the statute of limitations because any applicable statute of limitations had not run; (3) the trial court erred in finding that Mr. Wilson may have altered his position by agreeing to plead guilty to misdemeanor charges on the assumption that the Committee would take no further action; (4) the trial court erred in finding that rules of professional conduct were being applied that did not exist at the time the misconduct occurred; and (5) this court should hear the case *de novo* and pronounce such judgment as we may determine should have been pronounced below.

We agree with Executive Director Neal's contention that the trial court erred in finding that the effective rules were those in force at the time of Mr. Wilson's misconduct in 1982 rather than at the time of his guilty plea in 1990 and that the proceeding was therefore barred by the statute of limitations. For this reason, we reverse the trial court and remand this matter for further proceedings. We do not address the remaining issues relating to the circuit court's decision because its order was predicated on the running of the statute of limitations and is consequently limited in this regard. We further decline to pronounce judgment as requested by the Executive Director in his fifth point on appeal.

Facts

In 1981 and 1982, appellee Jimmie L. Wilson, an attorney and farmer, borrowed approximately $775,230 from the Farmers Home Administration, a federal entity, for farm-operating expenses. The loan was secured by an FmHA lien on Mr. Wilson's crops. A federal grand jury subsequently indicted him on various criminal charges relating to the disposition of proceeds from crop sales and the transfer of funds maintained in a joint bank account estab-

lished in the names of the FmHA, Mr. Wilson, and his wife.

Following a jury trial in 1985 in the United States District Court for the Eastern District of Arkansas, Mr. Wilson was found guilty of one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, forty counts of knowingly disposing of property mortgaged to a government agency in violation of 18 U.S.C. § 658, and seven counts of unlawfully converting to his own use money belonging to the United States in violation of 18 U.S.C. § 641. He was sentenced to imprisonment for thirty months on the first count and to lesser concurrent terms on the others. The sentence was stayed pending appeal. On May 15, 1985, District Judge G. Thomas Eisele suspended Mr. Wilson from the practice of law in federal court "until final disposition of any disciplinary proceedings commenced in connection with the conviction."

Meanwhile, on May 2, 1985, Darrell F. Brown, attorney for Mr. Wilson, sent the following request to Joe Phillips, Executive Secretary of the Supreme Court Committee on Professional Conduct:

> In order that Mr. Jimmy Wilson will be aware of the policy of the Committee resulting from our discussion, I would appreciate you forwarding to me a "To Whom It May Concern" type letter advising that at this time it is the position of the Committee not to revoke the license until the appellate process has been exhausted. . . .

On May 8, 1985, Mr. Phillips responded with the following statement:

> It is presently the policy of the Committee on Professional Conduct not to take any action against a licensed attorney who has been convicted of a crime until the appeal process for that attorney is completed.

Mr. Wilson appealed his conviction, which was affirmed by the Eighth Circuit Court of Appeals in *U.S.* v. *Wilson*, 806 F.2d 171 (8th Cir. 1986).

One of the issues raised in that appeal, based on *Batson* v. *Kentucky*, 476 U.S. 79 (1986), was whether Mr. Wilson, who is black, had been denied his due process and Sixth Amendment

rights due to the government's use of peremptory challenges to strike six of seven black venirepersons. While the Eighth Circuit found no basis for reversal in *Batson* at that point, the United States Supreme Court opinion in *Griffith* v. *Kentucky*, 479 U.S. 314 (1987) caused the Court of Appeals to vacate its earlier decision and to remand Mr. Wilson's case for a *Batson* hearing. *U.S.* v. *Wilson*, 815 F.2d 52 (8th Cir. 1987).

The District Court held a *Batson* hearing in July 1987 and concluded that race was not a factor in the government's exercise of its peremptory challenges. In *U.S.* v. *Wilson*, 884 F.2d 1121 (8th Cir. 1989), the Eighth Circuit, ruling that the prima facie case of discrimination had not been overcome, reversed and remanded the matter for a new trial.

Rather than being subjected to a new trial on the existing felony charges, Mr. Wilson was charged on August 20, 1990, in a five-count misdemeanor information with three counts of converting property mortgaged or pledged to a farm credit agency to his own use in violation of 18 U.S.C. § 658 and two counts of converting public money, property, or records to his own use in violation of 18 U.S.C. § 641. Mr. Wilson appeared before federal District Judge Stephen Reasoner on August 22, 1990, and pled guilty to each misdemeanor count. The plea and its acceptance were conditioned upon the dismissal of all pending felony charges of which Mr. Wilson had previously been convicted. Judgment was entered on December 26, 1990, and Mr. Wilson was sentenced to four-and-one-half months' imprisonment on the first count (§ 658). With respect to the remaining counts, he was placed on probation for a three-year period which was to run consecutively to the jail term. Immediately following entry of the 1990 state conviction, District Judge Eisele issued an order again suspending Mr. Wilson from federal practice "until the final disposition of any disciplinary proceedings commenced in connection with the conviction."

On March 29, 1991, the appellant, James A. Neal, notified Mr. Wilson of a pending complaint before the Arkansas Supreme Court Committee on Professional Conduct ("the Committee"), "predicated on your entry of a plea of guilty to certain criminal offenses on August 22, 1990, in the United States District Court for the Eastern District of Arkansas." Mr. Neal noted that "It

appears the allegations of this complaint come under Rules 8.4(b) and 8.4(c) of the [amended] Model Rules."

Mr. Wilson's attorney, Darrell F. Brown, in a letter dated April 15, 1991, sought an extension of time for filing a response from April 23, 1991, the twentieth day following notification, until August 30, 1991. Responding by a letter dated April 19, 1991, Mr. Neal granted an extension to May 20, 1991. Mr. Brown mailed another request for an extension on May 16, 1991, which was not received by the Committee until May 20, the final day of the extended period. On June 10, 1991, Mr. Neal advised Mr. Brown that "the request for an additional extension is denied." Moreover, the Executive Director declared, "the complaint is being processed to the Committee for its determination."

By a certified letter dated and mailed on July 22, 1991, Mr. Neal informed Mr. Wilson of the following:

> It is the unanimous decision of the Committee that your conduct in this matter violated the Model Rules of Professional Conduct, as amended. It is the further decision of the Committee to institute disbarment proceedings against you on the basis of that conduct.
>
> In lieu of the filing of a disbarment suit, the Committee will give you the opportunity to voluntarily surrender your Arkansas attorney's license. . . .

Mr. Brown responded on behalf of his client in a letter dated July 24, 1991, informing the Executive Director that Mr. Wilson "disagrees with the decision of the committee to institute disbarment proceeding and at this time does not wish to voluntarily surrender." In addition, the appellee's attorney advised the Committee that the matter was still on appeal in the Eighth Circuit Court of Appeals. (The record, however, does not support the attorney's contention.)

On October 9, 1991, Mr. Neal, as Executive Director of the Committee on Professional Conduct, filed a complaint for disbarment in the Phillips County Circuit Court pursuant to Section 6B(1) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, which were adopted on a trial basis by per curiam order on July 16, 1990. Sec-

tion 6B(1) requires the Committee to institute a disbarment action when the complaint against an attorney is based on a conviction of a felony or a criminal act that, under the terms of Rule 8.4(b) of the Model Rules of Professional Conduct, reflects adversely on the attorney's "honesty, trustworthiness or fitness as a lawyer in other respects."

Mr. Wilson filed a motion to dismiss for failure to state a cause of action. In the motion, Mr. Wilson asserted that he had not, under the terms of Section 6B(1) of the Procedures, been convicted of a felony and that, within the meaning of the language of Rule 8.4(b), he had not committed a criminal act that reflects adversely on his honesty, trustworthiness, or general fitness as a lawyer. He characterized the conduct to which he had pled guilty as nothing more — apart from the involvement of an agency of the federal government — "than a simple breach of contract."

On December 18, 1991, the Committee filed a motion for summary judgment. Mr. Wilson filed a supplement to his motion to dismiss on February 21, 1992, in which he stated:

> 6. Rule 8.4(b), the rule which Defendant is accused of violating, was adopted by per curiam order of the Arkansas Supreme Court on December 16, 1985, and became effective on January 1, 1986. These rules apparently replaced the then-existing Code of Professional Responsibility adopted by per curiam order of June 21, 1976 (*See* 260 Ark. 910), which became effective on July 1, 1976. Consequently, the Model Rule which the defendant is accused of violating was not in existence at the time of the alleged conduct which provides the basis for these disbarment proceedings. (Further, the Procedures, including Sections 5.6 and 6.B.(1), were not adopted until the Arkansas Supreme Court did so on a trial basis by per curiam order of July 16, 1990.)

In addition, Mr. Wilson asserted that disbarment proceedings are civil in nature and are subject to the rules of civil procedure, which entail application of a five-year statute of limitations to offenses which occurred nine to eleven years earlier.

A hearing was held on April 6, 1992. In a letter opinion

dated February 16, 1993, the trial court reiterated its finding at the hearing that the statute of limitations applied. The circuit judge also commented that Mr. Wilson's due process rights would be violated by adherence to rules of professional conduct not in effect at the time the misconduct occurred. He further stated:

> The Court is convinced that Mr. Wilson conducted himself in a manner, because of which the committee, had it acted in a more timely fashion, could have disciplined him under an appropriate rule. . . . [I]t appears that the State Committee ill advisedly waited for the Federal Committee to perform. However, the Federal Committee did suspend Mr. Wilson's privilege of practicing law in the Federal Courts in 1985. Yet, the State Committee still took no position.
>
> Whether it comes under statute of limitations, laches, waiver or some other legal theory, Mr. Wilson may well have agreed to the misdemeanor charge, after two felony conviction reversals, on the premise that the state was going to do nothing and thus altered his position for several possible reasons.
>
> The State Committee chose to wait too long, and the defendant's motion to dismiss is granted and the State's complaint for suspension is dismissed.

On March 3, 1993, the trial court's formal order of dismissal was filed, along with its letter opinion; based on the reasons set forth in the opinion, and primarily on the application of the statute of limitation, Mr. Wilson's motion to dismiss was granted, and the Committee's complaint was dismissed with prejudice, as well as its motion for summary judgment upon its complaint, which was denied for mootness. A notice of appeal was filed on March 15, 1993.

Standard of review

The present appeal arises from the judgment of the circuit court dismissing the complaint for disbarment filed by Mr. Neal on behalf of the Committee. In reviewing a trial court's decision on a motion to dismiss under Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them

in the light most favorable to the party who filed the complaint. *Gordon* v. *Planters & Merchants Bancshares, Inc.*, 310 Ark. 11, 832 S.W.2d 492 (1992); *Battle* v. *Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989). In deciding such motions, the trial court must look only to the allegations in the complaint. *Wiseman* v. *Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993); *Deitsch* v. *Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992).

Here, the complaint, filed on October 9, 1991, provided pertinent information about Mr. Wilson's pleas of guilty on the misdemeanor charges as well as considerable detail about the conduct that ultimately led to those pleas. Included were the dates 1981 and 1982 for the illegal grain sales and fund transfers as well as the August 1990 plea proceedings. Accepting those dates as true, the circuit court determined that the statute of limitations was applicable and prohibited the Committee from pursuing the disbarment proceeding.

Judicial authority to regulate practice of law

The power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government. *Weems* v. *Supreme Ct. Comm. on Prof. Conduct*, 257 Ark. 673, 523 S.W.2d 900 (1975), *reh'g denied*, 257 Ark. 685-A, 523 S.W.2d 900 (1975). Our responsibility is set forth explicitly in Amendment 28 of the Arkansas Constitution: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law."

Statute of limitations and rules of professional conduct

The issues involving the applicability of the statute of limitations and the rules of professional conduct promulgated by this court are closely intertwined. It is, however, unnecessary for us to address the questions raised concerning the applicability and running of the statute of limitations because the operative Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, adopted (prior to Mr. Wilson's guilty plea) by per curiam order on July 16, 1990, focus upon the fact of conviction rather than the allegation of misconduct. The entire question of the statute of limitations is, therefore, a non-issue. The Committee's action for disbarment, filed on October 9, 1991, was by any definition timely, having fol-

lowed Mr. Wilson's plea of guilty on August 22, 1990, by approximately thirteen and one-half months.

This consideration brings us to the Executive Director's fourth point for reversal, in which he asserted that the trial court erred in finding that the rules of professional conduct that were invoked by the Committee in its disbarment action did not exist at the time of the misconduct and, as a result, that Mr. Wilson was denied due process of law.

Implicit in the trial court's letter opinion is the view that the operative rule at the time of Mr. Wilson's misconduct was Rule X of the *Rules of the Court Regulating Professional Conduct of Attorneys at Law*, 260 Ark. 910 (1976), adopted by per curiam order on June 21, 1976, and made effective July 1, 1976. That rule provided, in relevant part:

> If an attorney has been convicted of a felony or infamous crime under the laws of any State or the United States, a charge *may be made* by complaint filed with the Committee with the Clerk of a Court of proper venue under these Rules. . . . The sole issue to be determined shall be whether the crime warrants discipline and, if so, the extent thereof. . . .

(Emphasis added.) Rule X afforded the Committee greater discretion in filing a complaint than is now the case, and the conduct in question, consisting of either a "felony" or an "infamous crime," was narrower in scope than at present.

Section 6A of the current Procedures states that:

All prosecuting attorneys and judges participating in or presiding over a hearing in which an attorney is *convicted of, pleads guilty to, or pleads nolo contendere to a crime which is a Class A misdemeanor or greater offense, shall have the duty to report such conviction or plea* to the Executive Director.

(Emphasis added.) Section 6B(1), under which the Executive Director filed his complaint on October 9, 1991, states, as quoted earlier, that:

> When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule

> 8.4(b) of the Model Rules of Professional Conduct, the Committee *shall* institute an action of disbarment.

(Emphasis added.)

As Section 6 clearly indicates, it is the conviction, or, as in this instance, the guilty plea, that triggers the mandatory disbarment action against an attorney. Prior to conviction, no such action is required. As a practical matter, the present Procedures emphasize taking action upon actual conviction or pleas of guilty or *nolo contendere* more so than conducting proceedings independently prior to trial for alleged violations of the Model Rules of Professional Conduct.

In sum, the cause of action did not accrue until August 22, 1990, the date on which Mr. Wilson entered his guilty plea. As for the 1985 felony conviction, the Committee decided, as a matter of policy stated in its letter of May 8, 1985, "not to take any action . . . until the appeal process . . . is completed." Granted, the Committee had the option of proceeding at the time the misconduct occurred, but it chose not to do so. Rather, it deferred to the pending federal court matter, as it had a right to do. This deferment inured to Mr. Wilson's benefit, for he was permitted to continue his practice of law in the state courts while his case meandered in its course for some ten years of trial, appeal, and rehearings in the federal system. In any event, Mr. Wilson's 1985 federal felony conviction was overturned and is irrelevant for purposes of this appeal; we look, instead, to his 1990 conviction as the basis for the Committee's charge.

Rule 8.4(b), which defines "professional misconduct" in part as the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," and which comprehends the misdemeanor charges to which Mr. Wilson pled guilty, was effective as part of the Model Rules of Professional Conduct on January 1, 1986, having been adopted by per curiam order on December 16, 1985. *In the Matter of the Arkansas Bar Association: Petition for the Adoption of Model Rules of Professional Conduct*, 287 Ark. 495, 702 S.W.2d 326 (1985). The supplemental Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, under which the Executive Director filed the

complaint for disbarment, were effective on July 16, 1990, the date of our per curiam. *In the Matter of Procedures of the Arkansas Supreme Court Committee Regulating Professional Conduct of Attorneys at Law*, 303 Ark. 725, 792 S.W.2d 323 (1990). Both were controlling when Mr. Wilson pled guilty on August 22, 1990.

In passing, we note that Mr. Wilson's reliance on *Sexton* v. *Supreme Ct. Comm. on Prof. Conduct*, 295 Ark. 141, 747 S.W.2d 94 (1988), is misplaced. In that case, attorney Sam Sexton, Jr., was charged with misconduct under the Model Rules that became effective at the beginning of 1986. We held, however, that because the acts in question occurred in 1983, it was a violation of due process to charge Mr. Sexton under a rule that was not in effect at the time of the alleged misconduct. "Due process," we said, "requires notice that an act is punishable at the time it is committed. . . . It might not matter if the rules were substantively the same, but we find a significant difference between the old rule . . . and the new rule . . . ." 295 Ark. at 144, 747 S.W.2d at 96. Still, we held it permissible for the Committee to proceed under the Code of Professional Responsibility, the now-superseded body of rules that was in effect in 1983.

Two factors distinguish the *Sexton* case from the present appeal. There, attorney Sexton was appealing a one-year suspension, while here the Executive Director of the Committee on Professional Conduct is appealing the dismissal of a complaint for disbarment. Further, since the *Sexton* decision was handed down in 1988, this court has adopted the supplementary Procedures that contain the language of Section 6B(1) making a mandatory disbarment action contingent upon "*conviction* of a felony or a crime which also violates Rule 8.4(b) of the Model Rules of Professional Conduct." (Emphasis added.) We hold that the *Sexton* case is not controlling under the circumstances.

Wilson's reliance on Committee policy

Mr. Neal maintains, in his third point for reversal, that the trial court also erred in commenting that Mr. Wilson may have altered his position by agreeing to misdemeanor charges in the belief that the Committee would take no action. As noted earlier, we do not reach this issue because the trial court's order focused

on the running of the supposedly applicable statute of limitations, and our inquiry is consequently limited in scope to that question. Any speculation by the trial court regarding Mr. Wilson's motivation in entering a guilty plea amounted to unverifiable dicta.

Requested pronouncement of judgment

Relying on Section 5H(3) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, Mr. Neal requests that this Court, in its *de novo* review, "pronounce such judgment as in its opinion should have been pronounced below." He has, however, overlooked a crucial phrase in the section:

> *Appeals from any action by the Committee after hearing shall be heard de novo on the record* and the Arkansas Supreme Court shall pronounce such judgment as in its opinion should have been pronounced below[.]

This appeal arises from a decision of a circuit court and is not governed by Section 5H(3).

The applicable provision, Section 5H(4) follows:

> Appeals from any judgment of a Circuit Court in a disbarment proceeding shall be heard in accordance with the rules governing appeals of civil cases.

Although disbarment proceedings are heard *de novo* on appeal, *Weems* v. *Supreme Court Committee on Professional Conduct, supra*, it would be inappropriate for this Court to render judgment in this case because the appeal is from a motion to dismiss. The matter must be remanded to the circuit court.

Long ago, United States Supreme Court Chief Justice John Marshall, in a disbarment case involving former Vice-President Aaron Burr, observed:

> On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the

> bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the Court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the Court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.

Ex parte Burr, 22 U.S. (9 Wheat.) 529, 530 (1824). *See also Hurst* v. *Bar Rules Committee of the State of Arkansas*, 202 Ark. 1101, 155 S.W.2d 697 (1941); *Maloney* v. *State*, 182 Ark. 510, 32 S.W.2d 423 (1930); *Beene* v. *State*, 22 Ark. 149 (1860). This, as any other disbarment proceeding, is a difficult case for consideration. Yet because the matter was dismissed by the circuit court, we have no basis for "interposing [our] authority" at this point.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

NEWBERN, J., not participating.

Jeff RICKS *v.* STATE of Arkansas

CR 94-109 873 S.W.2d 808

Supreme Court of Arkansas
Opinion delivered April 18, 1994
[Rehearing denied May 23, 1994.*]

*Newbern, J., not participating.

Phyllis B. Worley, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, Jeff Ricks, raises two issues in this appeal from his conviction on a class A misdemeanor charge of theft by receiving. He challenges the sufficiency of the evidence and questions the trial court's interpretation of Ark. Code Ann. § 5-4-403 (Repl. 1993), the statute governing the imposition of concurrent or consecutive sentences. Neither point has merit, and we affirm the trial court's judgment.

Ricks was charged by information on April 27, 1993, with theft by receiving, a class C felony, in violation of Ark. Code Ann. § 5-36-106(a) and (e)(2) (Repl. 1993), and with being a habitual offender in violation of Ark. Code Ann. § 5-4-501 (Repl. 1993). According to the affidavit for the arrest warrant, Joy Goodman notified the White County Sheriff's Department on April 26, 1993, that Ricks had wanted to trade an RCA color television set, which she believed might have been stolen, for her father's truck. That day, the affidavit noted, Sgt. Kyle Stokes of the sheriff's office examined the television set and determined, by checking the serial number, that it had been stolen from the residence of Mary Lee on April 20, 1993. The information report estimated the value of the set to be $2,500.

At the time of his arrest, on April 26, 1993, Ricks was on parole from the Arkansas Department of Correction ("ADC") for

a previous felony conviction. Fifteen days later, his parole was revoked, and he was transferred to the ADC to serve the balance of his sentence. There he remained until his trial on the theft by receiving charge.

A bench trial was held on September 30, 1993. From photos presented by the state, Ms. Lee identified an RCA television set and a remote control as items that had been taken from her house. She testified that her brother had purchased the set the year before and had paid $600 for it. The defense presented an appraisal from the RCA dealer who had sold the television set to Ms. Lee's brother. In the dealer's opinion, the model, which had been discontinued, was worth $175. On that basis, the trial court reduced the theft-by-receiving charge against Ricks to a class A misdemeanor under Ark. Code Ann. § 5-36-106(e)(3) (Repl. 1993).

The trial court found Ricks guilty of the charge and sentenced him to one year in the county jail, crediting him with fifteen days which he had served between his arrest on April 27, 1993, and his return to the Arkansas Department of Correction on May 11, 1993, on the felony parole revocation based on the arrest. The court ordered that if Ricks were released from the Department of Correction prior to the expiration of his 350 days, he should be delivered into the custody of the White County Detention Center to complete the misdemeanor sentence.

In a motion to correct sentence, the defense contended that, pursuant to Ark. Code Ann. § 5-4-403(b) (Repl. 1993), the misdemeanor sentence should be discharged by the felony sentence and that Ricks should not be required to serve any additional time after his release from the Department of Correction. The trial court denied the motion, and this appeal followed.

I. Sufficiency of the evidence

We first address Ricks's challenge to the sufficiency of the evidence, as it must be considered prior to a review of any other asserted trial error. *Coleman* v. *State*, 315 Ark. 610, 869 S.W.2d 713 (1994); *Clark* v. *State*, 315 Ark. 602, 870 S.W.2d 372 (1994).

Ricks contends that neither the Arkansas test for substan-

tial evidence as set forth in *Jones* v. *State*, 269 Ark. 119, 589 S.W.2d 748 (1980), nor the federal test as set forth in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), have been met in the present case. The federal standard is of no particular relevance, but this court has often held that, on appeal, the evidence is reviewed in the light most favorable to the appellee (in this instance, the state) and that the judgment will be affirmed if there is any substantial evidence to support the jury's verdict. *Green* v. *State*, 313 Ark. 87, 852 S.W.2d 110 (1993).

Evidence is substantial when it is forceful enough to compel a conclusion one way or the other, beyond suspicion and conjecture. *Owens* v. *State*, 313 Ark. 520, 856 S.W.2d 288 (1993). This court need consider only that testimony which supports the verdict of guilty. *Thomas* v. *State*, 312 Ark. 158, 847 S.W.2d 695 (1993).

The offense of theft by receiving is defined at Ark. Code Ann. § 5-36-106 (Repl. 1993):

> (a) A person commits the offense of theft by receiving if he *receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen.*
>
> (b) For purposes of this section, "receiving" means *acquiring possession, control*, or title or lending on the security of the property.

(Emphasis added.)

According to Ricks, the state failed to prove that he was ever in possession of the television set. He asserts that the only evidence that linked him with the stolen property was the testimony of Joy Goodman, who had previously been convicted of theft of property. Ms. Goodman stated that on April 26, 1993, Ricks came to her father's residence in Judsonia and offered to trade a television set for a 1970s-vintage pickup truck belonging to Ms. Goodman's father. Acting on behalf of her father, who was intoxicated, Ms. Goodman accompanied Ricks to a trailer where the appellant had stored the set in a bathroom. She described the televison as being "cable ready" and appearing to be of greater value than her father's truck. She also saw a disassembled water

bed in the bathroom. Ricks and Ms. Goodman then transported the set to her father's residence. Because Ms. Goodman's father had no cable hookup, Ms. Goodman and Ricks were unable to get a picture when they tested the televison.

Ms. Goodman testified that Ricks spent the night with her niece in one of the rooms in her father's house. The next morning, Ms. Goodman took the remote control to the Auto Zone, a store where her friend, Mary Lee, worked, as Ms. Goodman was aware that Ms. Lee's residence had been burglarized recently. Ms. Lee phoned her mother, who came to the store and, agreeing that the remote control was the one that was stolen, phoned the police.

After giving a statement, Ms. Goodman returned to her father's house. Ricks was still present. Subsequently, a sheriff's deputy arrived, and, Ms. Goodman said, when Ricks saw the patrol car, he "walked to the back of, you know, behind the house and then ran." Ms. Goodman turned the television set over to the Sheriff's Department.

[redacted] On appeal, Ricks objects that the trial court "took Goodman's word that the television got into her home because appellant brought it there to trade it for a truck that she testified was a junker." As this court has long held, however, where witness credibility is involved, wide discretion is accorded the fact-finder, who has the opportunity to observe the witnesses. *Gunter* v. *State*, 313 Ark. 504, 857 S.W.2d 156 (1993); *Hollamon* v. *State*, 312 Ark. 48, 846 S.W.2d 663 (1993). Further, in instances where the only issue for determination on appeal is the trial court's assessment of a witness's credibility, we defer to the trial court's factual findings. *Weger* v. *State*, 315 Ark. 555, 869 S.W.2d 688 (1994); *Shaw* v. *State*, 299 Ark. 474, 773 S.W.2d 827 (1989).

The trial court also had testimony before it from Ms. Lee, who identified the television set in question as the one taken from her residence. Moreover, she also stated that a water bed, a jewelry box, and money had been taken in the burglary. Ms. Goodman, as mentioned earlier, testified to having seen a disassembled water bed in Ricks's bathroom when she went with Ricks to pick up the television set.

[redacted] Sergeant Kyle Stokes of the White County Sheriff's

Department testified that on April 26, 1993, he met with Ms. Goodman and Ms. Lee at the Auto Zone in Searcy, where Ms. Lee worked. Ms. Lee had identified an RCA remote control device that Ms. Goodman showed her as one that had recently been stolen from her house. Sergeant Stokes then went to the sheriff's office, where he took a statement from Ms. Goodman. When he arrived at Ms. Goodman's father's house, Sergeant Stokes testified, he saw Ricks "standing at the front portion of the house in the driveway. He said something or mouthed something to Ms. Goodman, turned, saw me, and started walking toward the back of the house." The deputy went into the house, checked the serial number on the television set, and then went outside to locate Ricks. "Approximately fifteen seconds between the time I checked the t.v. and the time I went outside passed," Sergeant Stokes recalled, "and he was nowhere in sight. The backyard was approximately seventy-five yards long, and it was completely mud soaked." A person's flight to avoid arrest can be considered as corroboration of evidence tending to establish his guilt. *Davis* v. *State*, 314 Ark. 257, 863 S.W.2d 259 (1993).

Suffice it to say, there was substantial evidence from which the trial court, as finder of fact, was able to determine that Ricks was guilty of theft by receiving.

II. Interpretation of Ark. Code Ann. § 5-4-403

The present appeal also questions the trial court's interpretation of Ark. Code Ann. § 5-4-403 (Repl. 1993), as applied to the circumstances of Ricks's sentencing. That statute provides:

> (a) When multiple sentences of imprisonment are imposed on a defendant convicted of more than one (1) offense, including an offense for which a previous suspension or probation has been revoked, the sentences shall run concurrently unless the court orders the sentences to run consecutively.
>
> (b) When a sentence of imprisonment is imposed on a defendant who has *previously been sentenced to imprisonment*, whether by a court of this state, a court of another state, or a federal court, the subsequent sentence shall run concurrently with any undischarged portion of the previous sentence unless the court imposing the subsequent sen-

tence orders it to run consecutively with the previous sentence.

(c) The power of the court to order that sentences run consecutively shall be subject to the following limitations:

(1) A sentence of imprisonment for a misdemeanor and a sentence of imprisonment for a felony shall run concurrently, and *both sentences shall be satisfied by service of sentence for a felony*; and

(2) The aggregate of consecutive terms for misdemeanors shall not exceed one (1) year.

(Emphasis added.) Ricks relies on subsections (b) and (c)(1) for his contention that his felony parole-violation sentence should discharge the subsequent misdemeanor. He argues that the sentence imposed by the trial court amounts to a consecutive sentence, with jail-credit time being given for time served in the Department of Correction on the felony parole violation. Assuming this to be the case, he asserts that the misdemeanor sentence would be satisfied, under § 5-4-403(c)(1), by the time served on the felony parole violation.

[redacted] However, § 5-4-403(b) provides that a subsequent sentence "shall run concurrently with any *undischarged* portion of the previous sentence." The statute says absolutely nothing about the subsequent sentence being discharged by the completion of the earlier sentence when the subsequent sentence extends beyond the earlier sentence. The statute takes as a given the probability that a misdemeanor sentence will be shorter in duration than a felony sentence and thus contemplates that the former's terminal date will fall within the latter's actual span.

[redacted] As for § 5-4-403(c)(1), that subsection pertains to the power of the court to order consecutive as opposed to concurrent sentences and is inapplicable here. In any event, it, too, is silent on the question of a felony sentence being completed prior to a concurrent misdemeanor sentence. In *Howard* v. *State*, 289 Ark. 587, 715 S.W.2d 440 (1986), we held that, under Ark. Stat. Ann. § 41-903(3) (Repl. 1977), the identical predecessor to § 5-4-403(c)(1), a trial court lacked the authority to impose simultaneously a consecutive misdemeanor theft-by-receiving

sentence upon a felony failure-to-appear sentence. Nothing in the *Howard* decision, however, affects the authority of a trial court to require a defendant to serve an entire misdemeanor sentence when he or she is already serving a sentence for a prior, unrelated felony.

In the present case, Ricks's suspended sentence had already been revoked when he was sentenced on the misdemeanor theft-by-receiving charge. There is, therefore, nothing inconsistent with the intent of Ark. Code Ann. § 5-4-403 in the trial court's decision to order Ricks to be remanded to the custody of the White County authorities to serve the rest of his misdemeanor sentence upon the completion of his felony term at the Department of Correction.

Affirmed.

UNION PACIFIC RAILROAD COMPANY and C.T. Frederking *v.* STATE of Arkansas EX REL. FAULKNER COUNTY, Arkansas and City of Mayflower, Arkansas

93-838 873 S.W.2d 805

Supreme Court of Arkansas
Opinion delivered April 18, 1994
[Rehearing denied May 23, 1994.*]

*Hays, J., not participating.

Friday, Eldredge & Clark, by: *Herschel H. Friday, Elizabeth J. Robben*, and *M. Gayle Corley*, for appellant.

Wright, Lindsey & Jennings, by: *Gregory T. Jones*; and *H.G. Foster*, Prosecutor; and *Larry E. Graddy*, Special Prosecuting Attorney.

ROBERT H. DUDLEY, Justice. The City of Mayflower filed this suit in chancery court against Union Pacific Railroad Company and one of its employees, C. T. Frederking. The complaint asked the chancery court to issue an order directing the railroad to construct a crossing so that Scenic Hill Road could be connected to Highway 365, asked that the railroad be enjoined from obstructing the road, and asked for a penalty in the amount of $2,000, plus $5.00 per day, for every day the railroad fails to construct the crossing. The railroad answered and also filed a counterclaim asking damages for inverse condemnation. The railroad filed a motion to dismiss because the chancery court did not have subject matter jurisdiction. The trial court denied the motion to dismiss, heard the case, dismissed the action against the railroad employee, ordered the railroad to construct the crossing, dismissed the complaint for inverse condemnation, and assessed a penalty of $2,000, plus $5.00 per day, from the date the complaint was filed until the railroad completes the crossing. The railroad appeals and the City cross-appeals. The railroad contends that, by ruling that it must pay both a fine and construct a crossing, and by refusing to require damages for condemnation of this roadway, the Chancellor erred in his interpretation of section 23-12-305 of the Arkansas Code Annotated of 1987. The City cross-appeals and contends that the Chancellor did not assess a sufficient penalty and should have awarded attorney's fees. We reverse because the chancery court was wholly without subject matter jurisdiction.

Article 7, section 11 of the Constitution of Arkansas provides: "The circuit court shall have jurisdiction in all civil and criminal cases the exclusive jurisdiction of which may not

be vested in some other court provided for by this Constitution." *Id.* This provision means that, unless a cause of action is confided by the Constitution exclusively to another court, it belongs exclusively, or concurrently, to the circuit court. *State* v. *Deavers*, 34 Ark. 188 (1879). "All unassigned jurisdiction under the Constitution is vested in the circuit court. . . ." *Patterson* v. *Adcock*, 157 Ark. 186, 193, 248 S.W. 904, 906-07 (1923).

Subject matter jurisdiction is determined from the pleadings. *McKinney* v. *City of El Dorado*, 308 Ark. 284, 824 S.W.2d 826 (1992). The complaint in this case states that the railroad "is the owner of a railroad line that passes through the City of Mayflower." The answer and counterclaim admit the existence of the railroad's property, and the counterclaim asks the chancery court to award "between one and two million dollars . . . based on the value of the main track which is condemned and the cost to replace the condemned side track." The City answered the counterclaim and denied "that the cost of locating a suitable tract of land and constructing a replacement facility is estimated at between one and two million dollars." The quoted pleadings state that the City asks for an order authorizing it to open a street across the railroad's right of way. There is no allegation that the City owns an easement, or presently has any right, to cross the railroad's right of way. Before the City has the right to require the railroad to construct the crossing, it must condemn the right of way for the street to cross the railroad. *St. Louis & San Francisco R.R. Co.* v. *Fayetteville*, 75 Ark. 534, 87 S.W. 1174 (1905). It can acquire that right by agreement with the railroad or by filing a condemnation suit in circuit court. *Id.* at 539-40, 87 S.W. at 1175. The circuit court has subject matter jurisdiction of condemnation suits unless equitable defenses are raised. *Arkansas Power & Light Co.* v. *Potlatch Forest, Inc.*, 288 Ark. 525, 707 S.W.2d 317 (1986); Ark. Code Ann. § 18-15-303 (1987). No equitable defenses were raised by the railroad. Subject matter jurisdiction of the railroad's counterclaim for inverse condemnation is also in circuit court. *Robinson* v. *City of Ashdown*, 301 Ark. 226, 783 S.W.2d 53 (1990). In sum, the quoted pleadings do not provide any basis for subject matter jurisdiction in chancery court.

In addition, the City's complaint alleges that the chancery court "has subject matter jurisdiction pursuant to Ark. Code Ann. § 23-12-305 (1987)." In oral argument before this

court, one of the City's attorneys was asked about the basis of chancery court jurisdiction, and he responded that jurisdiction was conferred on the chancery court by the cited statute. There is no basis for this assertion. The statute, which was repealed in 1993, makes no mention of subject matter jurisdiction. *See* Ark. Code Ann. § 23-12-305 (1987). There have been many cases involving this statute, but they were all tried in circuit court. *See, e.g., Missouri Pac. R.R.* v. *Howell*, 198 Ark. 956, 132 S.W.2d 176 (1939); *Missouri Pac. R.R.* v. *Meyer*, 186 Ark. 810, 56 S.W.2d 169 (1933); *St. Louis-San Francisco Ry.* v. *State*, 182 Ark. 409, 31 S.W.2d 739 (1930); *Kansas City S. Ry.* v. *City of Mena*, 123 Ark. 323, 185 S.W. 290 (1916); *St. Louis Southwest Ry.* v. *Royall*, 75 Ark. 530, 88 S.W. 555 (1905). No case holds that the statute gives subject matter jurisdiction to the chancery court.

The statute provides that, when a city constructs a street across a railroad, the railroad must maintain the crossing "at no greater elevation or depression than one (1) perpendicular foot for every five (5) feet of horizontal distance," and, when the railroad refuses to so maintain the crossing, the city street overseer is authorized to give notice to the railroad that it is not properly maintaining the crossing. *See* Ark. Code Ann. § 23-12-305(a) and (b) (1987). A copy of the notice is to be filed in the county clerk's office. *Id.* § 23-12-305(d)(1). If the railroad then refuses to maintain the crossing in conformity with the statute, the county clerk "shall" give the notice to the prosecuting attorney and he "shall institute suit against the railroad company," and the railroad company "shall forfeit and pay . . . not less than one hundred dollars ($100) nor more than two thousand dollars ($2000), and five dollars ($5.00) per day for every day such refusal or neglect shall continue. . . ." *Id.* § 23-12-305(d).

The original version of the statute was enacted in 1887. It provided that the notice should be filed in the office of the county clerk because, at that time, all cases involving public roads were heard in county court. Appeals from county court are to circuit court, and not to chancery court. In *Kansas City Southern Railway Co.* v. *Sevier County*, 171 Ark. 900, 286 S.W. 1035 (1926), a case involving the same statute, we outlined the procedure in that case as follows: "The suit was first tried in the county court, then on appeal in the circuit court, where it was adjudged upon the testimony and law that the highway should be opened across appellant's

right of way at a point where its land had been acquired exclusively for railroad yards." *Id.* at 901, 287 S.W. at 1036. At the time the case at bar was filed, the statute still provided that the notice must be given to the county clerk. The complaint alleges that notice was given by the City to the county clerk. This notice provision in the statute strongly implies that the General Assembly contemplated the remedy being at law, and not in chancery court.

In *St. Louis Southwestern Railway Co.* v. *Royall*, 75 Ark. 530, 88 S.W. 555 (1905), we held that the statute does not contemplate compensating the railroad either for constructing the crossing or keeping it in repair, but it does contemplate compensating the railroad for appropriating a part of its right of way. The opinion provides:

> The public does not seek to deprive the railroad of its right of way. It only seeks to condemn the mere right to cross, which would leave the company free still to use its right of way and track as it had used it before. A right affecting the use of its property by the company to so slight an extent as this country crossing would affect it would not call for any great amount of damages, but whether large or small the company has a right to be compensated to that extent.

Id. at 533, 88 S.W. at 556.

We then reversed the case to the county court for a determination of the amount of damages the railroad suffered because of its loss of part of its right of way. We said the determination of damages for loss of part of the right of way was a fact question. Appeal from the county court's determination of damages would be to circuit court. Again, there was no suggestion of subject matter jurisdiction in chancery court.

In addition, we have held that violation of the statute by the railroad can be evidence of negligence in a tort action. In *Missouri Pacific Railroad Co.* v. *Howell*, 198 Ark. 956, 132 S.W.2d 176 (1939), we said the statute makes it the duty of every railroad company to properly construct and maintain crossings over public roads so that they will be safe for motorists crossing the railroad, and whether the railroad so maintained the crossing is a fact question for a jury to determine in a tort suit by a motorist who became stuck on a crossing. Again, the remedy was at law.

The statute, in addition to tort liability, provides for a penalty against the railroad if it fails to maintain the crossing as specified. Penal statutes will neither give nor oust jurisdiction in chancery. *Hickinbotham* v. *Corder*, 227 Ark. 713, 301 S.W.2d 30 (1957). Chancery court may invoke jurisdiction where the enforcement of a penal statute does not afford adequate protection against injury to property. *Id.* at 717, 301 S.W.2d at 33. However, here no pleadings allege facts sufficient to show that the remedy at law is inadequate. In addition, we have said it is a general rule that courts of equity will not aid in the enforcement of penalties when the case originates in chancery court. *Sigmon Forest Prods.* v. *Scroggins*, 250 Ark. 385, 465 S.W.2d 673 (1971).

The City asked for an injunction to prohibit the railroad from allowing it to open the road, but merely asking for an injunction will not confer subject matter jurisdiction when, under the pleadings, the chancery court does not otherwise have subject matter jurisdiction. *McIntosh* v. *Southwestern Truck Sales*, 304 Ark. 224, 800 S.W.2d 431 (1990). It is not enough just to name an equity theory cognizable in chancery court and then state facts which would not support the equity theory, but which might support a claim at law. *See Martin* v. *Couey Chrysler Plymouth, Inc.*, 308 Ark. 325, 824 S.W.2d 832 (1992).

The railroad moved to dismiss for lack of subject matter jurisdiction, but only argued that the chancery court lacked subject matter jurisdiction because the notice was not timely filed with the county clerk. The chancellor correctly denied the motion on that ground. The railroad did not object on the ground that subject matter jurisdiction was wholly lacking. Even so, when subject matter jurisdiction is wholly lacking, it cannot be induced simply because there was no valid objection. *J. W. Reynolds Lumber Co.* v. *Smackover State Bank*, 310 Ark. 342, 836 S.W.2d 853 (1992). In such cases, we have a duty to raise the issue on our own. *Arkansas Sav. & Loan Ass'n Bd.* v. *Corning Sav. & Loan Ass'n*, 252 Ark. 264, 478 S.W.2d 431 (1972). The City sought two things: first, it sought a railroad crossing which would require the taking of some part of the railroad's property; second, it sought to have the railroad penalized for refusing to allow it to cross the railroad's property. No matter what the two types of action are labeled, the remedy at law in both actions is fully adequate, and the chancery court is wholly without subject matter juris-

diction in both actions. We have a duty to raise the issue. We do so and, accordingly, reverse.

Reversed and remanded on both direct and cross-appeal.

HAYS, J., not participating.

Gary WALKER *v.* Jenoddin "J.K." KAZI

93-1084 875 S.W.2d 47

Supreme Court of Arkansas
Opinion delivered April 18, 1994

David Hodges, for appellant.

B. Richard Allen, for appellee.

ROBERT H. DUDLEY, Justice. Because of traffic, plaintiff Jenoddin Kazi stopped his pickup truck on State Highway 14. His truck was hit from behind by a second car. A third vehicle, another pickup truck, struck the second car from behind and pushed it into plaintiff's pickup truck. Plaintiff alleges he suffered injury in the accident. The police report shows that the third vehicle was driven by Gary Walker, Route 2, Weiner, Arkansas 72479. Plaintiff filed suit and caused summons to be served on Gary Walker, Route 2, Weiner, Arkansas 72479. Gary L. Walker of Route 2, Weiner was served. Gary L. Walker filed an answer denying that he was the driver of the third vehicle, and averred that his son, Gary D. Walker, also of Route 2, Weiner, was the driver of the vehicle at the time of the accident.

Gary L. Walker then filed a motion for summary judgment. Plaintiff responded with a motion asking that he be allowed to amend his complaint to name Gary D. Walker as the defendant and that the amendment relate back to the filing of the complaint. The trial court granted Gary L. Walker's motion for summary judgment. At the same time, the trial court granted plaintiff's motion to amend his complaint to name Gary D. Walker as the defendant and allowed the amendment to relate back to the date of filing the complaint. The notice of appeal and appellant's brief are both in the name of "Gary Walker" only. We dismiss the appeal.

The trial court *granted* Gary L. Walker's motion for summary judgment. If Gary L. Walker is the appellant, we dismiss the appeal because he was the prevailing party, and a prevailing party cannot appeal. *Bynum* v. *Savage*, 312 Ark. 137, 847 S.W.2d 705 (1993). Further, Gary L. Walker has no standing to appeal for Gary D. Walker. *See Insurance from CNA* v. *Keene Corp.*, 310 Ark. 605, 839 S.W.2d 199 (1992).

If Gary D. Walker is the appellant, the order allowing the amendment to relate back to the date of filing is not a final order and is not an appealable order. Ark. R. App. P. 2. This is not an attempt to appeal under ARCP Rule 54(b). The issue of a final order is a jurisdictional issue which the appellate court has the duty to determine. *In Re Subpoena of Badami*, 309 Ark. 511, 831 S.W.2d 905 (1992). We raise the issue, and dismiss the appeal regardless of which Gary Walker is attempting to appeal.

Appeal dismissed.

Jeanne V. CARLTON *v.* Terry A. CARLTON

93-1135 873 S.W.2d 801

Supreme Court of Arkansas
Opinion delivered April 18, 1994
[Rehearing denied May 23, 1994.*]

Southern, Allen & James, by: *Henry A. Allen*, for appellant.

Melinda R. Gilbert, P.A., and *James W. Wyatt*, for appellee.

STEELE HAYS, Justice. Terry Carlton (appellee) and Jeanne

*Brown, J., would grant rehearing.

Carlton (appellant) divorced in 1991 and Mr. Carlton was ordered to pay child support of $425 per month for their minor daughter, Carrie. Carlton then remarried, separated, and is paying $70 per week for another child.

Based on a change of circumstances Carlton petitioned for a reduction of child support paid to Jeanne Carlton. Mrs. Carlton counter claimed asking that visitation be made specific and if Mr. Carlton failed to exercise visitation he be required to pay $40 per day because of child care and other costs incurred by Mrs. Carlton. Her pleading alleged that because Mr. Carlton had indicated an intention not to exercise visitation in the future, child support should be increased by $250 per month.

Following a hearing the chancellor denied the requested increase and set child support in accordance with the child support chart at $352 per month. The chancellor found that Mr. Carlton was unable to exercise visitation because of his work schedule and that she lacked authority to order him to exercise visitation or to increase child support on that basis. Mrs. Carlton brings this appeal on two points of error: That the trial court erred in ruling it did not have authority to increase child support above the chart because of Mr. Carlton's failure to exercise any visitation and in not increasing child support obligation above the chart amount. Finding no error, we affirm.

Citing only this court's Per Curiam order of May 13, 1991, 305 Ark. 613, 804 S.W.2d XXIV (1991), Mrs. Carlton notes the following provision:

> The Child Support Chart assumes that the non-custodial parent will have visitation every other weekend and for several weeks during the summer. Excluding weekend visitation with the custodial parent, in those situations where a child spends in excess of 14 consecutive days with the non-custodial parent, the court should consider whether an adjustment in child support is appropriate, giving consideration to the fixed obligations of the custodial parent which are attributable to the child, to the increased costs of the non-custodial parent associated with the child's visit, and to the relative incomes of both parents. Any partial abatement or reduction of child support should not exceed 50% of the child support obligation during the extended visitation period of more than 14 consecutive days.

Mrs. Carlton interprets that provision as contemplating that a non-custodial parent would have custody between sixty-six and eighty-two days per year, that because of Mr. Carlton's failure to exercise visitation she will have increased costs not covered by the chart for that additional time.

There is no contention that the amount ordered is not in keeping with the chart based on Mr. Carlton's earnings, but the following segment of the Per Curiam is cited for the proposition that the trial court is not without the authority to order an amount other than reflected by the chart:

> It shall be sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to the Family Support Chart is correct, if the court enters in the case a written finding or specific finding on the record that the amounts so calculated, *after consideration of all relevant factors is unjust or inappropriate.* The court may grant less or more support if the evidence shows that the needs of the dependents require a different level of support. [Our emphasis.]

Clearly the chancellor may take "all relevant factors" into account in determining the appropriate amount. But we are not persuaded that on general, non-specific proof of costs of child care ordinarily and routinely incurred by the custodial parent, the chancellor was duty bound to modify the chart amount. Mrs. Carlton concedes there is no applicable case law. She relies entirely on the language quoted from the Per Curiam.

Mr. Carlton testified that he did maintenance work for a printing company and was on call twenty-four hours a day, seven days a week. He had exercised visitation regularly but had not seen his daughter in about two months; that he was now working longer hours and had difficulty finding a baby sitter on short notice, particularly when called to report for work in the middle of the night. He said Mrs. Carlton insisted on knowing the whereabouts of their daughter at all times, which made it difficult for him to exercise visitation; that he did not presently intend to exercise visitation while at his current job, that if he quit his job he would see Carrie if that were possible. He expressed his willingness to give up his rights as a parent.

The trial court found that no special needs existed, that she

lacked authority to force Mr. Carlton to exercise visitation, stating that assessing an economic penalty for not exercising visitation would be an indirect means of ordering visitation. She set child support in the amount reflected on the child support chart.

The chancellor declined to adopt Mrs. Carlton's theory that when a noncustodial parent fails to exercise visitation under the provisions of the Per Curiam order, the custodial parent is entitled to be compensated accordingly. Without suggesting that a hard and fast rule applies, we do not read the Per Curiam order as implying that when such visitation is not exercised, whether sporadically or consistently, the custodial parent may total the number of days visitation did not occur and claim additional child support per diem.

It seems clear that the quoted language is intended to apply to those situations in which the non-custodial parent has temporary custody for more than a few days at a time, i.e., for intervals "in excess of 14 consecutive days. . ." and we said as much quite recently in *Arkansas Department of Human Services* v. *Hardy*, 316 Ark. 119, 871 S.W.2d 352 (1994). We find nothing in that provision suggesting that the converse is true, that is, if the non-custodial parent does not exercise visitation, an increase is called for.

Moreover, we note, as did the chancellor, that Mr. Carlton's intentions were not unequivocal. He stated a willingness to forego parental rights, but such rights were not terminated. It appears he had exercised visitation regularly up until two months preceding the hearing, that the underlying reason was the demands of his work and Mrs. Carlton's understandable concerns about their daughter's care. He indicated if his work changed, visitation might resume. It is clear the chancellor was influenced by that testimony:

> MR. ALLEN: I understand. But it is your finding that he is not and will not in the future exercise visitation with the minor child.
>
> THE COURT: I am saying as of his testimony today, he says he is not and in the foreseeable future as long as he has this job he cannot. That's all I'm finding. I'm not saying he never will because that's not what he said. He said based upon his present job —

MR. ALLEN: Depending upon what testimony you —

THE COURT: Well — but he said, "I don't know that I'll ever have a different job, it's never going to happen." But I'm just telling you that he's not terminated his parental rights. He's not requested termination of his parental rights, and so I'm not going to sit here and say it's never. But I'm also not going to sit here — I wish he would visit with his child but I can't sit here and order it.

We have recognized that factors affecting child support and its modification do not lend themselves to hard and fast rules and the discretion of the chancellor plays a significant role in these determinations. *See*, e.g. *Black* v. *Black*, 306 Ark. 209, 812 S.W.2d 480 (1991); *Eubanks* v. *Eubanks*, 5 Ark. App. 50, 632 S.W.2d 242 (1982); *Collie* v. *Collie*, 242 Ark. 297, 413 S.W.2d 42 (1967); *Robbins* v. *Robbins* 231 Ark. 184, 328 S.W.2d 498 (1959).

Mrs. Carlton's second point is not an alternative argument that the chancellor should have deviated from the chart amount based on other factors, but is dependent upon a finding of merit in the first point. For the reasons already stated, we find no error and, accordingly, the order appealed from is

Affirmed.

BROWN, J., dissents.

CORBIN, J., not participating.

ROBERT L. BROWN, Justice, dissenting. This case involves a non-custodial parent, a father in this instance, who has advised the chancery court that he no longer will exercise visitation rights regarding his minor child, Carrie, due to job constraints. Under the divorce decree, he was entitled to "reasonable visitation privileges." Because of a second marriage, a second divorce, and additional child support that he must now pay, the father petitioned for a reduction in child support pertaining to Carrie. The mother counterclaimed for an increase in child support owing to the increase in her food, child care, and recreational expenses caused by Carrie's additional presence at home on *all* weekends.

While I agree with the majority that sporadically missing visitation cannot be grounds for an increase in child support, here we have something different. The father has stated that he

is halting visitation on a permanent basis. Our child support chart in *In Re: Guidelines For Child Support Enforcement*, 305 Ark. 613, 804 S.W.2d XXIV (1991) (per curiam) contemplates visitation with the non-custodial parent every other weekend for two days. To remove that factor from the equation represents a major change in the financial arrangement. The mother points out that this can mean between 66 and 82 days of additional care.

The chancellor stated that she had no authority to consider an increase in child support under the logic of our 1991 *Guidelines* when the non-custodial parent stops visitation altogether. I disagree. Our *Guidelines* entertain such deviations from child support chart amounts when the circumstances warrant it and where justice requires it.

Let me reiterate that here we are talking about expenses to the mother that are not fixed — expenses for food, child care, and recreation, to be exact. We are further talking about a permanent termination in visitation which represents a dramatic shift in the parents' arrangement and one which will clearly result in more expense to the mother. I respectfully dissent and would hold that the chancellor has the authority to weigh an adjustment in child support based on this significant new development.

SHELTER MUTUAL INSURANCE CO. *v.*
Richard William PAGE and Brenda Gilbert

93-1141 873 S.W.2d 534

Supreme Court of Arkansas
Opinion delivered April 18, 1994

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellant.

Robert L. Depper, Jr., for appellee.

STEELE HAYS, Justice. This appeal involves the "cooperation clause" of a motor vehicle liability policy. The trial court held the clause was not breached by the failure of the insured to cooperate with the insurer. We agree with the trial court.

Shelter Mutual Insurance Company is the appellant. Richard Page and Brenda Gilbert are the appellees. On August 8, 1988, Brenda Gilbert was injured in a collision with a car driven by Richard Page. The accident occurred in Columbia County, Arkansas. Page was insured by Shelter. Page contacted Shelter promptly after the accident and provided the details.

Brenda Gilbert filed suit against Page on August 7, 1991. Gilbert was unable to obtain personal service on Page so a warning order was published and Page was notified by constructive service. There is no dispute as to the method of service. Page never answered the complaint and he was not subsequently located.

Shelter moved to intervene, the motion was granted and subsequently the trial court found that Page was in default and was liable for the injuries sustained by Mrs. Gilbert. Shelter defended by claiming Page had breached the policy's cooperation clause by failing to keep Shelter informed of his whereabouts.

The trial court found that Page had not breached the cooperation clause and that Shelter had suffered no prejudice. Mrs. Gilbert was awarded damages of $15,000. Shelter appeals from the judgment, contending the trial court erred in finding that Page had not breached the cooperation clause.

Shelter argues Gilbert was not diligent in pursuing her claim against Page because she did not file her suit until one day prior to the running of the statute of limitations, and "the record is entirely bereft of any attempts" by Gilbert to inform Shelter she had been injured and expected compensation. Shelter insists it made reasonable attempts to locate Page after the suit was filed and it should be released due to Page's breach of the cooperation clause.

In response, Gilbert argues the burden was on Shelter to present evidence that Page's absence was for "no good reason." Further, since the hearing was on the issue of damages only, Shelter was not prejudiced by Page's absence at trial, and, even if it were, Shelter invited the prejudice by not investigating the accident thoroughly at the time it occurred and by failing to act upon publication of the warning notice. Finally, Gilbert argues Shelter was not prejudiced since it participated fully at the hearing and cross-examined all witnesses on the issue of damages.

As to Shelter's argument that Gilbert did not act diligently in filing her suit against Page, Gilbert points out that Shelter did not raise this issue below. We will not consider an argument made for the first time on appeal. *Dotson* v. *Madison County, Arkansas*, 311 Ark. 395, 844 S.W.2d 371 (1993).

Shelter cites *Fireman's Ins. Co. of Newark, New Jersey* v. *Cadillac Ins. Co.*, 13 Ark. App. 89, 679 S.W.2d 821 (1984), as supporting its position. There, the Court of Appeals affirmed a lower court's finding that the insured's failure to appear and defend a suit in negligence before a jury constituted a material breach of the policy. That case is distinguishable from the case at bar in that in *Fireman's* the negligence suit was tried on both liability and damages, and before a jury rather than a judge with the jury awarding both compensatory and punitive damages. There the insurer had located the insured, provided

him with transportation to the trial and compensation for time off from his job but the insured failed to appear at trial. The court noted that the insured's attitude was one of "reluctant cooperation" throughout and held the insured "lacked good reason for his absence from trial." Finally, the court noted that the failure of the insured to appear undoubtedly had an "intangible effect upon the jury."

Shelter also cites *Indemnity Ins. Co. of North America* v. *Smith*, 197 Md. 160, 78 A.2d 461 (1951). It, too, is distinguishable. In that case the insured was informed that a suit had been filed and the insured disappeared. The insurer employed the services of an investigator in an unsuccessful attempt to locate the insured prior to trial. The cooperation clause in *Smith* was similar to this one. In finding that the insured breached the clause, the court stated:

> It is thus a well settled rule that to relieve an insurer of liability on the ground of lack of cooperation, discrepancies in statements made by the insured must be made in bad faith and must be material in nature and prejudicial in effect.
>
> ****
>
> The insured under a liability policy containing a cooperation clause is obligated to assist in good faith in making every legitimate defense to a suit for damages. If he refused to give the information which the insurer needs to make the defense, or absents himself so that his testimony cannot be obtained, recovery on the policy should be denied, if the insurer acts with good faith and diligence.
>
> ****
>
> We recognize that two questions may arise when the insured has left the State: (1) Was the insured guilty of bad faith in leaving? and (2) Did the insurer use reasonable diligence in trying to locate the insured to procure his attendance at the trial?

Id. at 463.

Shelter also cites *Peters* v. *Saulinier*, 351 Mass. 609, 222 N.E.2d 871 (1967). There, the insured was not the owner of the

policy but one who was an insured under the terms of the policy. The insured did not report the accident to the insurer as required. After the insurer was informed of the accident later by the policyholder, its investigators found the insured, but he disappeared again. In an attempt to relocate him, the investigators found the insured's mother but she was unaware of his whereabouts. Finding that the insurer had exercised diligence and good faith in attempting to obtain the insured's appearance at trial, the court stated:

> An insurer is not bound to keep in touch with each insured while waiting for a case to be reached on a trial list. It is for the named insured and other insured who have benefited from the policy's protection to keep themselves reasonably accessible after an accident in which they have participated.

Id. at 874.

In *U.S. Fidelity & Guaranty Co.* v. *Brandon*, 186 Ark. 311, 53 S.W.2d 422 (1932), this court first addressed an alleged breach of a cooperation clause. The insured told the insurer four days before trial that he would be present but he failed to appear. Finding the insurer had presented "no good reason" why the insured did not make an appearance, we held "it was the duty of the insurance company in this action to go further than showing [the insured's] mere absence from the trial in order to show lack of cooperation, and to show the reason for such absence." *Id.* at 315.

In the case at bar, Shelter's cooperation clause reads in part as follows:

> In the event of an accident or loss, notice must be given to us promptly. The notice must give the time, place and circumstances of the accident or loss, including the names and addresses of injured persons and witnesses.
>
> ****
>
> A person claiming coverage under this policy must also:
>
> (1) Cooperate with us and assist us in any matter concerning a claim or suit;

> (2) Send us promptly any legal papers received relating to any claim or suit[.]

[redacted] We regard the holding in *Brandon* as consistent with the majority of jurisdictions on this issue. First, the burden of proof is on the insurer to show a breach of the cooperation clause. 14 Rhodes, *Couch on Insurance*, § 194 (Second ed. 1982); *Pennsylvania Threshermen and Farmer's Mutual Casualty Insurance Company* v. *Owens*, 238 F.2d 549 (4th Cir. 1956). Second, there is a two-step approach under the law in determining a breach of the cooperation clause when it involves the absence of the insured at trial. The law requires due diligence on the part of the insurer to locate the insured or to find the reason for their absence. *Couch, supra*, § 192; *Pennsylvania Threshermen, supra.* An excerpt from the opinion in *Pennsylvania Threshermen* is often quoted:

> The problem of non-cooperation has a dual aspect: not only what the insured failed to do, but what the insurer on its part did to secure cooperation from an apathetic, inattentive or vanished policy holder, must be considered. Liability insurance is intended not only to protect the insured, but also to protect members of the public who may be injured through negligence. Indeed, such insurance is made mandatory in many states. It would greatly weaken the practical usefulness of policies designed to afford public protection if it were enough to show mere disappearance of the insured without proof of proper efforts by the insurer to locate him.

[redacted] Here, the evidence shows that Page reported the accident in a timely manner and there is no allegation that Page failed to disclose the required information fully and accurately. Paul Whitley, Shelter's agent in Columbia County, testified he issued the policy for Page in 1987 and 1988, and that Page contacted him about the accident. Whitley testified he asked Page to "always keep me informed of where he was." After Page reported the accident, Whitley's next and last contact with the family was January 18, 1989, when Page's wife wanted changes in their policies. Thereafter, Page's policy lapsed. Following the lapse of the policy, a postcard informing Page of that fact was sent to Page's last address and the postcard was not returned to Whitley. Whitley testified that he drove by the Page residence frequently. At

one point in time the house was empty and then other people were living there. Whitley said he was first aware of Gilbert's suit in January 1991 or 1992 when he received a call from Shelter's attorney. Whitley knew Page worked for Bradham Oil Company while he lived in Columbia County. Finally, Whitley testified that while he usually looked at the classified ads in the *Banner News*, he could not say whether he noticed the warning order to Page.

There is no evidence that Shelter investigated the accident at the time it occurred, or that it attempted to locate Page through his employer after it was informed of the suit. There is no evidence that Shelter did anything other than try to call Page at his previous address or drive by his former house.

Contrary to Shelter's argument, the evidence is it merely called its agent and asked if he knew where Page was. From January of 1992, when Shelter first became aware of Gilbert's suit, until the hearing on May 4, 1993, the record as abstracted is devoid of any efforts by Shelter to locate Page. Because Shelter failed in its burden to show that it made diligent and good faith efforts to locate Page and failed to show that Page's absence was attributable to an effort to avoid trial, the trial court was correct in finding that Page did not breach the cooperation clause. We need not reach the question of prejudice.

Affirmed.

LIFE OF AMERICA INSURANCE COMPANY *v.*
BAKER-LOWE-FOX INSURANCE MARKETING, INC.

93-1210 873 S.W.2d 537

Supreme Court of Arkansas
Opinion delivered April 18, 1994

Davidson, Horne & Hollingsworth, by: *Allen W. Horne* and *Mark H. Allison*, for appellant.

William F. Sherman, for appellee.

DAVID NEWBERN, Justice. The issue in this appeal is whether the Trial Court erred in dismissing a complaint on the basis of *forum non conveniens*. We affirm based on our conclusion that the Trial Court did not abuse his discretion in making that decision.

The dispute involves two Texas companies. One of them, the appellee, Baker-Lowe-Fox Insurance Marketing, Inc. (BLF), entered an agreement with Union Life Insurance Co., an Arkansas-based company, by which BLF was given the exclusive right to market a health insurance policy known as the "Champion" policy. Union Life Insurance Co. subsequently assigned its rights in the marketing agreement to the appellant, Life of America Insurance Company (LOA), the other Texas company, which then became responsible to BLF under the marketing agreement.

The agreement included these provisions:

> B. Arbitration
>
> Except as provided in Article IX, those disputes and differences in respect of this Agreement which cannot be satisfactorily resolved shall be submitted to binding arbitration in accordance with the procedures of the American Arbitration Association. The allocation of the cost of arbitration, including attorney fees, shall be made by the arbitrators.

***

E. Enforcement

> This Agreement is made subject to the laws of the State of Arkansas and jurisdiction for the enforcement of this Agreement shall be in the courts of Pulaski County, Arkansas.

Article IX, referred to in the arbitration clause, concerns various aspects of compensation to be paid to BLF and insurance agents marketing the policy.

BLF contends that, shortly after the assignment of the agreement, the number of Champion policyholders decreased dramatically due to intentional acts on the part of LOA designed to avoid its obligations under the marketing agreement. BLF sued LOA in a Texas court where LOA asserted the arbitration and enforcement clauses. The Texas court refused to dismiss on the basis of the arbitration clause and assumed jurisdiction of the case.

LOA then brought this action in the Pulaski Circuit Court seeking an order compelling arbitration of the dispute. The Trial Court dismissed the claim on the basis of *forum non conveniens*. LOA contends the arbitration clause in the marketing agreement deprives the Trial Court of authority to make a *forum non conveniens* determination.

According to LOA, the mere presence of personal and subject matter jurisdiction is sufficient to require that the Trial Court not dismiss on the basis of *forum non conveniens*. It relies on *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), for the proposition that the factors which determine the most convenient forum are the forum selection and arbitration clauses, as that is what was bargained for by the original parties.

At issue in the *Scherk* case was a sales agreement between an American company and Mr. Scherk, a German citizen. The agreement was negotiated in three countries, signed in another and closed in yet another. It contained an arbitration clause which provided that any controversy would be referred to arbitration before the International Chamber of Commerce in Paris, France. A dispute arose and Alberto-Culver filed an action for damages in a Federal District Court in Illinois, alleging a violation of the

Securities Exchange Act of 1934. Mr. Scherk's motion to dismiss the complaint for lack of personal and subject matter jurisdiction, and *forum non conveniens*, was denied. The District Court also denied his motion to stay the action pending arbitration in Paris.

The Supreme Court reversed and found that the provisions of the United States Arbitration Act controlled and the dispute should be arbitrated under the terms of the agreement.

LOA's reliance on this case is misguided. Neither the District Court nor the Supreme Court based its decision on *forum non conveniens*. The focus was on the competing interests between enforcement of the United States Securities Act which protected the interests of United States citizens and the desirability of use of arbitration under the United States Arbitration Act. The Supreme Court held that, as between these two interests, the Arbitration Act should control due to the potentially hostile forum which one of the international participants could face if the arbitration clause were not upheld. The Court made no ruling as to Mr. Scherk's claim of *forum non conveniens*.

LOA also cites *Spring Hope Rockwool* v. *Industrial Clean Air, Inc.*, 504 F.Supp. 1385 (E.D.N.C. 1981), for its proposal that where the arbitration clause provides the situs for arbitration, such arbitration cannot be avoided under the doctrine of *forum non conveniens*.

In that case one of the litigants was incorporated and had its principal place of business in California. The other litigant was located in North Carolina. The agreement between the parties contained an arbitration clause which specifically provided that the place of arbitration would be Berkeley, California. A dispute arose. Among its other claims, the North Carolina company attempted to change the situs of the arbitration on the basis of *forum non conveniens*. The Trial Court held that the doctrine of *forum non conveniens* could not be used to change the situs of arbitration when it was specifically provided in the arbitration clause.

The *Spring Hope Rockwool* case does not relate to the issue before us. Rather, it stands for the proposition that the doctrine of *forum non conveniens* may not be used to defeat enforcement

of a situs provision within an arbitration clause. It has no bearing on the use of the doctrine to determine which court should enforce the agreement as a whole, *i.e.*, the agreement containing the arbitration clause.

[redacted] According to Ark. Code Ann. Sec. 16-4-101 (Supp. 1993), "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any condition that may be just." The application of *forum non conveniens* lies within the sound discretion of the Trial Court. *See Country Pride Foods Ltd.* v. *Medina & Medina*, 279 Ark. 75, 648 S.W.2d 485 (1983). Only if this discretion is abused will the reviewing court reverse. *Id.*

[redacted] The factors to be considered in applying the doctrine are the convenience to each party in obtaining documents or witnesses, the expense involved to each party, the condition of the trial court's docket, and any other facts or circumstances affecting a just determination. *Harvey* v. *Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981). We have been cited to no authority which holds that forum selection and arbitration clauses control the *forum non conveniens* doctrine.

In his order the Trial Court found the following with respect to the enforcement clause in the agreement:

> 7. The original drafting and signing of the contract between Union Life Insurance Company and the Defendant herein placed the facts squarely in Arkansas and there was justification for placing paragraph E concerning the forum and law to be applied in the event of a dispute. However, with the substitution of the Plaintiff herein Life of America into the contract the situation encountered an important turn. No longer was a party to the agreement in the State of Arkansas. Indeed both were now residents of the State of Texas, and further most of the policyholders concerned in this dispute resided in Texas. There still remains some semblance of contact with Arkansas in that if the case went to trial, at least one representative of Union Life Insurance would be compelled to testify, but other than that, Union Life Insurance Company's involvement

was limited. The controversy basically is between two Texas companies concerning Texas policy holders. Thus the question is whether Paragraph E can override these strong reasons to allow the case to proceed in the Texas courts. This Court does not believe so.

8. In examining the evidence in this case the Court finds the following factors reflecting the convenience of trying the case in Texas:

a. Both parties reside in Texas.

b. The vast majority of the insurance policies in question were sold in Texas.

c. Union Life Insurance Company, the original party to the agreement, is not involved in the liability portion of the case.

* * *

e. All damages were suffered in Texas.

f. The majority of witnesses would apparently be Texas residents.

All of these facts weigh heavily in deciding the issue of forum non conveniens.

9. Enforcement of a forum provision such as is contained in the present contract will be enforced if found to be "fair and reasonable." *SD Leasing* v. *Spain*, 277 Ark. 178, 640 S.W.2d 451 (1982). At the time the contract was entered into, no doubt it was "fair and reasonable." If Union Life Insurance Company were here instead of Life of America, a Texas corporation, a reason for keeping the case in Arkansas would be strongly enhanced. However, Union Life Insurance Company for all practical purposes is out of this cause of action. The successor to Union Life Insurance Company resides in Texas and the initial contact with Arkansas has lost all relevance to the dispute.

With respect to the arbitration clause, the Trial Court stated:

11. In regard to Paragraph B pertaining to arbitration it appears, at best, to be ambiguous in referring to Article

> IX. It appears as is argued by the Defendant that Paragraph B would not apply to issues of compensation as contained in Article IX. However, giving the Plaintiff herein the benefit of the doubt, it is still ambiguous, and must be construed against the drafter, Union Life Insurance Company and its successor, the Plaintiff herein. Thus, even if the case were to be tried in Arkansas, it is doubtful the arbitration provision would apply.

While we might or might not agree with the Trial Court's assessment of the arbitration clause, we need not reach it because our decision is that the Trial Court properly applied the doctrine of *forum non conveniens*, and it will thus be the responsibility of the court in Texas to rule on all aspects of LOA's rights under the agreement.

Affirmed.

Troy REDMAN, Administrator of the Estate of Lovina Jean Redman, Deceased and Administrator of the Estate of Christopher Troy Redman *v.* ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

93-1246 873 S.W.2d 542

Supreme Court of Arkansas
Opinion delivered April 18, 1994

Marc I. Baretz, for appellant.

Barrett & Deacon, by: *J.C. Deacon and D.P. Marshall, Jr.*, for appellee.

DAVID NEWBERN, Justice. This is a wrongful death case. The wife and child of Troy Redman were killed in a collision with a St. Louis Southwestern Railway Co. train at a railroad crossing in Greenway. Mr. Redman, administrator of the estates of his wife and child, appeals from a judgment based on a jury verdict in favor of the railway company. Mr. Redman contends a state trooper should not have been allowed to testify as an expert to the normal reaction time of a motorist. We hold there was no error in the circumstances presented. He also urges a state highway official should not have been allowed to testify about a list in which he categorizes railroad crossings in terms of their need

for safety upgrades. We hold the testimony did not amount to a witness instructing the jury on the law. In his final point, Mr. Redman says it was error for the Trial Court to give an instruction on expert witnesses not contained in Arkansas Model Jury Instructions — Civil. We hold there was no error because it has not been demonstrated that the instruction was in any way incorrect or prejudicial. The judgment is thus affirmed.

Mr. Redman sued the railway company, alleging it was negligent in failing to recognize and correct an unusually hazardous crossing. Specifically, Mr. Redman contended the railroad right of way could not be seen due to trees and heavy brush near the crossing at which the collision occurred. Mr. Redman contends the railway company should have provided crossing lights at the intersection or should have requested their installation by the proper authorities. The railway company answered that the accident was the result of Mrs. Redman's negligence.

A jury found neither Mrs. Redman nor the railway company negligent, and judgment was entered in favor of the railway company.

1. Testimony of State Trooper Kirk

Mr. Redman presented the testimony of Dr. Larry Williams, an accident reconstructionist, who was questioned at length about the accident. After Dr. Williams answered questions about his qualifications, Mr. Redman's counsel submitted that Dr. Williams was an expert. Counsel for the railway company did not conduct voir dire at that time, and no ruling on whether Dr. Williams was an expert ensued. Dr. Williams gave considerable testimony which, had he not been considered an expert would have been inadmissible as hearsay or opinion testimony. Dr. Williams testified that "one and a half seconds is the average reaction time."

In partial rebuttal, the railway company presented the testimony of State Trooper Larry Kirk who investigated the accident. Trooper Kirk testified that the normal reaction time for a driver is three-quarters of a second. He went on to explain that factors such as fatigue, distraction, stress, or inattention could affect reaction time.

The significance of the reaction time question lay in Mr.

Redman's allegations that his wife could not have had time to react to perception of the oncoming train due to a tree which obstructed her vision as she approached the crossing. The contention was that the tree and brush should have been removed by the railway company.

Mr. Redman objected to Trooper Kirk's testimony on the ground that Trooper Kirk was not qualified as an expert. The objection was sustained. Counsel for the railway company then asked Trooper Kirk several questions concerning his training and experience. Trooper Kirk testified that he had attended the Law Enforcement Academy, Troop School, and several seminars concerning accidents. He had investigated numerous accidents, including at least ten wrecks involving trains.

Counsel for the railway company then repeated its question to Trooper Kirk about the reaction time for a motorist. The Trial Court again sustained Mr. Redman's objection on the ground that Trooper Kirk was not qualified as an expert. During re-direct examination of Trooper Kirk, a bench conference was held between the Trial Court and counsel. The Trial Court asked counsel for the railway company to present any authority that indicated Kirk was an expert. The response was that the trooper's training as a law enforcement officer gave him knowledge unavailable to the average layman. The next portion of this conference is noted in the record as "unintelligible." The record resumes with the following:

> THE COURT: I am going to let him answer that question, just that one question, and see where it goes.
>
> [ATTORNEY FOR MR. REDMAN]: Judge, I think . . .
>
> THE COURT: I am going to let him answer if he knows.
>
> [ATTORNEY FOR MR. REDMAN]: Judge, this is going to open up . . .
>
> THE COURT: I am not going to open it very wide.

[redacted] Arkansas Rule of Evidence 702 allows expert witnesses to testify concerning scientific, technical, or other specialized knowledge that will assist the jury to determine a fact in issue. Rule 702 further requires that in order for a witness to

testify as an expert, he or she must be qualified by knowledge, skill, experience or education. The qualification of a person to testify as an expert witness lies within the discretion of the Trial Court. *See* Ark. R. Evid. 104(a); *B. & J. Byers Trucking, Inc.* v. *Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984).

Mr. Redman's argument is two-fold, *i.e.*, the Trial Court erred in allowing Trooper Kirk to testify because he was not formally qualified, meaning pronounced, by the court to be an expert, and Trooper Kirk's education and understanding concerning reaction times indicated that he had insufficient knowledge to testify as an expert.

a. Education and understanding

Both this Court and the Arkansas Court of Appeals have consistently allowed law enforcement officers to testify based on their education and experience. *See Ferrell* v. *Southern Bureau Casualty Ins. Co.*, 291 Ark. 322, 724 S.W.2d 465 (1987); *B. & J. Byers Trucking, supra; Smith* v. *Davis*, 281 Ark. 122, 663 S.W.2d 165 (1983); *Higgs* v. *Hodges*, 16 Ark. App. 146, 697 S.W.2d 943 (1985). Some cases have addressed whether these officers can testify as experts concerning the point of impact in traffic accidents, but we have affirmed decisions recognizing law enforcement officers as experts with respect to other issues. For example, in *B. & J. Byers Trucking, supra*, we affirmed the Trial Court's decision to qualify a state trooper as an expert concerning the speed of a truck at the time its driver attempted to stop.

While recognizing Trooper Kirk's education and background is distinguishable from the extensive credentials of the trooper who testified in *B. & J. Byers Trucking, supra*, given the range of expert testimony elicited from law enforcement officers in the cited cases, we do not feel it was an abuse of the Trial Court's discretion to allow Trooper Kirk to testify concerning the reaction time of motorists.

Mr. Redman further argues that Trooper Kirk did not have sufficient knowledge to qualify as an expert concerning driver reaction time. The basis of this argument is that on cross examination Trooper Kirk could not readily explain the difference between "reaction time" and "perception time." While Trooper Kirk may not have been able to provide a concise answer explain-

ing the relationship of these concepts, that goes to the weight and credibility of an expert's testimony, and not its admissibility. *See Arkansas State Hwy. Comm'n* v. *Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985)(*citing Polk* v. *Ford Motor Co.*, 529 F.2d 259 (8th Cir. 1976)).

b. Formal qualification

While Mr. Redman is correct that the Trial Court did not state formally that Trooper Kirk was qualified as an expert, that omission does not constitute error. The Trial Court twice sustained the objection that Trooper Kirk was not qualified as an expert. Following the bench conference, the Trial Court agreed to let Trooper Kirk testify concerning the reaction time of motorists. The recorded portion of this conference, as abstracted, indicates the focus of this discussion was whether Trooper Kirk was qualified to testify as an expert. When Trooper Kirk was finally allowed to answer the question, Mr. Redman's attorney stated "[j]ust for the record, note our objections . . . three, he's not qualified. Just note our objections." The Trial Court responded "[a]ll right, let's move on."

In these circumstances, it is apparent that the Trial Court understood the issue to be whether Trooper Kirk was sufficiently expert to answer the question about reaction time. Given the prior refusal to allow the testimony, it is apparent that, as Mr. Redman's brief states, the Trial Court changed his mind. While there was no formal statement that the Court was recognizing Trooper Kirk as an expert for the purpose of answering the question, no other conclusion is feasible.

2. Testimony of engineer

Mr. Redman next argues the Trial Court erred in allowing the testimony of Mike Selig, the supervisor of the traffic safety section of the Arkansas Highway Transportation Department.

Mr. Selig testified that the federal government allocates matching funds to each state annually to upgrade safety devices at railroad crossings. Mr. Selig testified it is his responsibility to compile information on every railroad crossing in Arkansas to determine annually the ones most in need of an upgrade. Mr. Selig testified that, based on the information he had collected, the

crossing in question had a low priority for upgrade.

Mr. Redman objected on the basis that this testimony amounted to instructing the jury on the law, which is the duty of the court. The objection was overruled. Mr. Redman asserts that AMI 1805 indicates it is a railroad company's duty to provide warnings if a railroad crossing is abnormally dangerous, while Mr. Selig's testimony indicated it is the state's duty.

Mr. Redman is correct in stating there is a common law duty in Arkansas for railroad companies to provide adequate warnings at abnormally dangerous railroad crossings. See *Northland Ins. Co.* v. *Union Pacific R. R.*, 309 Ark. 287, 830 S.W.2d 850 (1992), where we stated AMI 1805 should be given to the jury in cases where evidence is presented that a railroad crossing is abnormally dangerous. That instruction was given in this case. The jury was properly instructed.

We note Mr. Redman's citation of *Lusby* v. *Union Pacific R. R. Co.*, 4 F.3d 639 (8th Cir. 1993), as authority for his argument that Mr. Selig's testimony instructed the jury on the law. That opinion, however, was founded not upon any general proposition that a court has the sole responsibility to instruct on the law but upon 23 U.S.C. § 409 which prohibits the admission of any information compiled for purposes of federally funded upgrades of railroad crossings in any action for damages in any federal or state court. *See also, Robertson* v. *Union Pacific R. R. Co.*, 954 F.2d 1433 (8th Cir. 1992). Mr. Redman does not cite the statute or make that argument in his appeal. He did not cite that statute in any objection to the Trial Court. For those reasons, we need not address this statute in this appeal.

While Mr. Selig's testimony did refer to the federal law, it was obviously presented for the purpose of indicating his opinion of the dangerousness of the railroad crossing at issue in comparison with other crossings. We cannot agree that it amounted to an instruction to the jury on the law to be applied to resolve the case.

3. Expert witness instruction

The Trial Court gave a non-AMI jury instruction concerning expert witnesses. Mr. Redman contends the Trial Court

should have used Arkansas Model Jury Instructions — Criminal 105 to instruct the jury on this issue. AMCI 105 is a jury instruction on expert witnesses at criminal trials. Further, there is little, if any, difference between the instruction given by the Trial Court and AMCI 105. Other than saying the instruction given was not found in the AMI, Mr. Redman does not tell us why the instruction was erroneous.

We have held that when an AMI instruction does not accurately state the law applicable to a case, the use of a non-AMI instruction is proper. *Blakenship* v. *Burnett*, 304 Ark. 469, 803 S.W.2d 539 (1991). That must surely be the case when there is no relevant AMI instruction. We hold it was not error to give a non-AMI instruction in these circumstances.

Affirmed.

Ann RODGERS v. LA QUINTA MOTOR INN

93-1338 873 S.W.2d 551

Supreme Court of Arkansas
Opinion delivered April 18, 1994

Ogles Law Firm, P.A., by: *John Ogles*, for appellant.

Friday, Eldredge & Clark, by: *William M. Griffin III* and *Betty J. Demory*, for appellee.

TOM GLAZE, Justice. On May 6, 1991, the appellant, Ann Rodgers, was a business invitee of the appellee's La Quinta Motor Inn located on Shackleford Road in Little Rock. During the night and while in bed, Rodgers felt pain in her lower leg. Rodgers was treated and later underwent surgery for her injury which she was told was probably due to a bite from a brown recluse spider. No spider was ever found.

On August 10, 1992, Rodgers filed suit against La Quinta, alleging the motel breached its duty of ordinary care in properly treating "the hotel rooms for possible spiders that could injure overnight patrons." On April 19, 1993, La Quinta filed a motion for summary judgment, alleging that it used reasonable care and no duty to Rodgers was breached. In addition to a supporting brief, La Quinta's motion was accompanied by invoices from Jim Jamison Pest Control showing bimonthly spraying and "specimen labels" for several insecticides used by Jamison's pest control company. To support her position against the motion for sum-

mary judgment, Rodgers submitted an affidavit from Thomas Rasul, owner of M & N Pest Control, stating that the information submitted by La Quinta did not indicate adequate applications of insecticide to control spiders.

Following a hearing on La Quinta's motion for summary judgment on July 23, 1993, the trial court granted the motion and dismissed the case with prejudice. Rodgers appeals from that order.

On appeal, Rodgers argues the trial court erred in granting the summary judgment because a disputed fact existed concerning whether her room was sprayed by the pest control company. Rodgers points out that none of the invoices indicated what rooms were sprayed and none indicated that her room was specifically sprayed. Thus, Rodgers argues this omission raises a question of fact as to whether La Quinta breached its duty of care to her as an invitee to keep her room in a reasonably safe condition.

On the other hand, La Quinta argues that Rodgers failed to prove that it had the required knowledge that brown recluse spiders were present on the premises. For support, La Quinta cites *Kay* v. *Kay*, 306 Ark. 322, 812 S.W.2d 685 (1991), wherein this court adopted a California rule that the owner or occupier of a private residence does not have a duty to protect or prevent bites from harmful insects where (1) it is not generally known that the specific insect is indigenous to the area; (2) the homeowner has no knowledge a specific harmful insect is prevalent in the area where his residence is located; (3) the homeowner has never seen the specific type of harmful insect either outside or inside his home; and (4) neither the homeowner nor the injured guest has seen the specific insect that bit the guest either before or after the bite occurred.

Rodgers attempts to distinguish our holding in *Kay* by arguing that a private residence was involved there, but that here her case involves a business. We find this distinction without merit since in both cases, the plaintiffs were business invitees, and the duty of care owed was the same in each case.

Under summary judgment, it is appropriate to sustain such a grant if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law. *Tullock* v. *Eck*, 311 Ark. 564, 785 S.W.2d 31 (1993). Our holding in *Kay* is controlling here, and in applying those elements to the case at bar, the trial court did not err in granting summary judgment.

Here, Rodgers failed to present evidence that La Quinta knew the brown recluse spider was prevalent in the area where the motor inn is located, and that La Quinta or its employees had ever seen a brown recluse spider on the premises. Further, Rodgers failed to show that either she or La Quinta employees ever saw the spider that bit her. In addition, as was the case in *Kay*, Rodgers was unable to show that the spider which bit her was in her motel room as the result of La Quinta's negligence or whether it was brought into the room by her. For the foregoing reasons, we affirm.

Claude R. JONES, Trustee for Bull Shoals Community Hospital *v.* Robert R. HEMPEL

93-1216 873 S.W.2d 540

Supreme Court of Arkansas
Opinion delivered April 18, 1994

Josh E. McHughes, for appellant.

Christopher O'Hara Carter, P. A., by: *Christopher O'Hara Carter*, for appellee.

DONALD L. CORBIN, Justice. Appellant, Bull Shoals Community Hospital, through its trustee Claude R. Jones, appeals the judgment of Marion Circuit Court which determined that the suit against appellee, Robert R. Hempel, was barred by the two-year statute of limitations. Jurisdiction is proper in this court as it requires the interpretation of a statute, Ark. Code Ann. § 16-56-106 (1987). Appellee admittedly received medical services from appellant in May of 1987 and made no payment until March 6, 1992, in the amount of five dollars. Suit was filed on the balance owed, $1,097.50, on June 9, 1992, within two years of the date of the five-dollar payment. The Marion Circuit Court considered the above stipulated facts and determined the action was time-barred from the date of the services. This appeal resulted, and we reverse and remand.

Appellant argues that the trial court erred in determining that the five-dollar payment did not revive the debt and reactivate the two-year statute of limitations. Though this is a misstatement of the correct argument, we still hold for appellant because the trial court did err in its application of the statute of limitations. The applicable statute of limitations, § 16-56-106, states:

> (a) No action shall be brought to recover charges for medical services performed or provided prior to April 1, 1985, by a physician or other medical service provider after the expiration of a period of eighteen (18) months from the date the services were performed or provided.
>
> (b) No action shall be brought to recover charges for medical services performed or provided after March 31, 1985, by a physician or other medical service provider after the expiration of a period of *two (2) years from the*

> *date* the services were performed or provided or from the date *of the most recent partial payment for the services, whichever is later.*

(emphasis added). This clearly means that a partial payment begins the running of the statute of limitations which was the date of the five-dollar payment, given the stipulated facts of the instant case.

Appellant cites *Rogers* v. *University Servs.*, 4 Ark. App. 264, 629 S.W.2d 319 (1982) for the proposition that partial payment starts the running of the statute of limitations anew. However, we need not reach the reasoning of that case, though recognizing that the *Rogers* case arrested and reactivated the statute of limitations before it had run. The instant case involves the initial period in which the statute runs, not revival after expiration.

Appellee argues that public policy and the purpose of the statutes of limitation would be violated if this action were allowed to go forward. However, it is said in 54 C.J.S. *Limitations of Actions* § 264 (1987) that a voluntary part payment is an acknowledgement or admission of the existence of indebtedness which raises an implied promise to pay. Statutes should be given their plain meaning, and the plain reading of this statute makes it clear that the date from which to begin the two-year statute running in this case is the date of the voluntary five-dollar payment. Section (b) of the statute is clear. For this reason, we reverse and remand.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. I concur. It has long been settled law in Arkansas that a partial payment will revive a debt barred by limitations, or form a new point from which the statute will begin to run. *Johnson* v. *Spangler*, 176 Ark. 328, 2 S.W.2d 1089 (1928) (this court held that a payment made after a note was barred revived the indebtedness and a new [limitations] period of five years began to run from the date of payment). In *McNeil* v. *Rowland*, 198 Ark. 1094, 132 S.W.2d 370 (1939), this court further stated that, where it has been established that sums of money were paid by a debtor to a creditor, the presumption is that the money so paid was intended as payment on the debt and not as gifts or donations. *Id.*

Here, appellee Robert R. Hempel received medical services from the appellant Bull Shoals Community Hospital during the month of May of 1987, but Hempel made no payments on his bill for services. After more than four years had passed from his receipt of medical services, Hempel volunteered a five-dollar payment to the hospital on his past services. Although the applicable two-year statute of limitations had run pertaining to Hempel's past medical services, his 1992 five-dollar payment revived the previously barred indebtedness. Ark. Code Ann. § 16-56-106 (1987).

For the above reasons, I agree with the majority to reverse.

Harold MINGS *v.* STATE of Arkansas

CR 93-1295 873 S.W.2d 559

Supreme Court of Arkansas
Opinion delivered April 18, 1994

William A. McKean, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Harold Mings appeals his judgment of conviction for driving while intoxicated, second offense. He raises one issue: whether the trial court erred in denying his motion to suppress on grounds that the arresting officer who originally stopped and detained Mings did so outside of the officer's territorial jurisdiction which, according to Mings, was limited to the city of Jacksonville. At the hearing before the trial court, the prosecuting attorney submitted proof that the officer was a special investigator for the Sixth Judicial District who had authority to stop and detain persons anywhere within the district. The trial court agreed and denied the motion to suppress. We affirm the trial court's decision.

In 1990, Officer Thomas Reshel began working as a police officer for the city of Jacksonville. Also in 1990, Officer Reshel was appointed by the prosecuting attorney for the Sixth Judicial District, Mark Stodola, to be an investigator for the district. Circuit Judge Chris Piazza swore in Officer Reshel as a special investigator, and he carried a card evidencing this appointment which was signed by both the prosecutor and the circuit judge.

On March 14, 1992, Officer Reshel picked up a prisoner at the Pine Bluff Department of Correction pursuant to a warrant issued through the Jacksonville Police Department. He was transporting this prisoner back to Jacksonville around midnight on March 15, 1992, and was near the intersection of I-30 and I-40 in North Little Rock, when he observed a car being driven

erratically. He watched the car, whose driver was later identified as Mings, almost hit another vehicle near the Lakewood overpass.

Officer Reshel contacted his dispatcher and requested that an Arkansas State trooper or a North Little Rock police unit be dispatched to stop Mings. He was told that there was no police unit available and that he should contact the Sherwood Police Department as Mings was traveling toward the Sherwood city limits. Officer Reshel continued to follow Mings. As the vehicles entered the Sherwood city limits, Mings crossed the center line of the road. He then exited at Rixie Road and partially ran off the road. At that point, Officer Reshel made the decision to stop Mings. He did so and informed Mings that he was being stopped because of his erratic driving and that an officer from the Sherwood Police Department was on the way. At that time, the police officer could see the Sherwood police car in transit.

After Officer Lane Goff of the Sherwood Police Department arrived, Officer Reshel gave him Mings's driver's license and explained what had happened. Officer Goff then administered a series of field sobriety tests to Mings, who did not perform satisfactorily. Mings was arrested for DWI and taken to the Sherwood Police Department where he was tested on a breathalyzer machine and registered a blood/alcohol content of .229 percent. He was ticketed for DWI and for driving left of center.

Mings was convicted of DWI, second offense, which is a misdemeanor, in Sherwood Municipal Court. He appealed to Pulaski County Circuit Court and filed a motion to suppress the evidence obtained due to Officer Reshel's stop. He premised his motion on the fact that Officer Reshel did not have a warrant at the time he stopped him and was acting outside of his territorial jurisdiction of Jacksonville. The circuit court conducted a trial *de novo*, following which it ruled that Officer Reshel was authorized to stop Mings in Sherwood under the authority granted Reshel by virtue of Act 997 of 1993, codified at Ark. Code Ann. § 16-21-1102(a)(2)(B) and (C) (Supp. 1993). That statute provides in pertinent part:

> (B) In addition to the above investigators listed by salary, the prosecuting attorney shall have the authority to appoint

other investigators as necessary for the administration of justice who shall serve without pay;

(C) All investigators so appointed shall have the authority to issue process and possess all law enforcement officer powers;

The motion to suppress was denied, and the trial court ordered Mings to pay a fine of $1,000.00, suspended his driver's license for one year, and sentenced him to seven days in jail.

For his sole point on appeal, Mings claims that a police officer may only act outside of his jurisdiction in four circumstances: (1) when in fresh pursuit; (2) when he has a warrant for arrest; (3) when the local law enforcement agency requests that he act; and (4) when a county sheriff requests that a peace officer from a contiguous county come into the sheriff's county. *Perry* v. *State*, 303 Ark. 100, 794 S.W.2d 141 (1990). Mings argues that none of these four circumstances pertained to this case. He further argues that Officer Reshel was clearly not on business for the prosecuting attorney when he made the stop.

We turn then to § 16-21-1102(a)(2)(B) and (C). The beginning point in interpreting a statute is to construe the words just as they read and to give them their ordinary and accepted meaning. *Farnsworth* v. *White County*, 312 Ark. 574, 851 S.W.2d 451 (1993); *Brimer* v. *Arkansas Contractors Licensing Bd.*, 312 Ark. 401, 849 S.W.2d 948 (1993); *Kyle* v. *State*, 312 Ark. 274, 849 S.W.2d 935 (1993). When the language of the statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Arkansas Dep't of Human Serv.* v. *State*, 312 Ark. 481, 850 S.W.2d 847 (1993).

Applying the above principles to Ark. Code Ann. § 16-21-1102(a)(2)(C), the plain and ordinary meaning of the language "all law enforcement officer powers" includes without question the power to stop an individual suspected of DWI and to detain him. The question then becomes whether the legislature intended that investigators have these powers throughout the entire Sixth Judicial District, which is comprised of Pulaski and Perry counties (Ark. Code Ann. § 16-13-1401 (1987)), or only within the city's boundaries where the police officer is employed.

The manifest purpose of Act 997 is to establish salaries of the staff of the prosecuting attorney for the Sixth Judicial District. Common sense dictates that an investigator appointed to act for the prosecutor in the Sixth Judicial District must be authorized to act throughout that district. To give the prosecutor the authority to appoint an investigator for the district and then limit that investigator's territory to the city of Jacksonville would render the appointment meaningless. This court has stated that it will not interpret a statute so as to reach an absurd conclusion. *Cox* v. *State*, 313 Ark. 184, 853 S.W.2d 266 (1993); *Cothran* v. *State*, 291 Ark. 401, 725 S.W.2d 548 (1987).

Mings cites us to the case of *Perry* v. *State, supra*, on his behalf, but we do not view that case as helpful to his cause. In *Perry*, we held that a Searcy police officer acting outside of his jurisdiction only had the authority of a private citizen and could not effect an arrest for DWI, second offense. Those circumstances are distinguishable from the case at bar where the police officer involved was endowed with law enforcement powers throughout the judicial district. Indeed, the facts of the present case more closely approximate those in *Gritts* v. *State*, 315 Ark. 1, 864 S.W.2d 859 (1993). In *Gritts*, we concluded that a police officer for a planned community who also was a duly appointed deputy sheriff for the county had the authority to make a DWI arrest outside of the boundaries of the community but within the county.

In truth, the powers afforded to these special investigators of the Sixth Judicial District who operate without pay under § 16-21-1102(a)(2)(C) appear to be significant. The precise reason for this special unit of volunteer investigators is not clearly defined by the General Assembly under the 1993 Act, and we will not engage in speculation to arrive at it. Nevertheless, we repeat that the statutory section in question is clear in its terms and embraces the power to stop and detain which is what Officer Reshel did in the case before us. We find no error.

Affirmed.

Donald YOUNG *v.* Gerald PAXTON

93-1334 873 S.W.2d 546

Supreme Court of Arkansas
Opinion delivered April 18, 1994

Grisham A. Phillips, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *John E. Moore* and *Valerie Denton*, for appellee.

ROBERT L. BROWN, Justice. The appellant, Donald Young, brought a negligence action against his father-in-law, appellee Gerald Paxton, for injuries which he sustained on Paxton's land as a result of trimming limbs from a tree. Paxton moved for summary judgment and was successful. Young now appeals and maintains that material issues of fact remain to be decided, including whether he held the status of a licensee or invitee on Paxton's property, and whether Paxton's negligence was the proximate cause of his injuries. Young also argues that the order granting the motion for summary judgment was premature because discovery had not been completed. We find no error in the circuit court's decision, and we affirm.

The following facts are not disputed in the record before us and are derived primarily from Young's testimony at deposition. On Saturday, June 13, 1992, at approximately three or four o'clock in the afternoon, Young walked over to his father-in-law's house in Saline County. There, he found Paxton trimming the limb of a hardwood tree with a chain saw while standing on a 20-foot extension ladder. The tree was over 15 feet tall with limbs drooping to the ground. Paxton had previously cut three to four limbs which were lying on the ground. The ladder rested against the limb which Paxton was attempting to trim. As he began to cut the limb which the ladder was leaning against, the limb began to rise as the weight from the severed part fell away. Paxton asked Young to get a rope from his shop. Young located a rope and returned to the tree, and at Paxton's request he threw him the rope which Paxton then wrapped around the limb. Young held the rope while standing on the ground to prevent it from "bucking" and dislodging the ladder when the cut part of the limb fell away. As Young held the limb securely with the rope, Paxton successfully cut the end of the limb and climbed down the ladder.

Paxton then showed Young where to place the ladder in order to cut another limb. The ladder was placed against the designated limb, and Young climbed to the appropriate level with the chain saw and proceeded to cut it. This occurred some

five minutes after Paxton cut the limb with Young's help. When the weight of the cut part fell away, the limb rose abruptly, and the ladder lost its support, causing Young to fall to the ground. Because of the fall, he sustained serious injuries to both wrists.

On March 29, 1993, Young filed a complaint against Paxton for damages totalling $25,000. The complaint alleged that Young was a licensee on Paxton's property and that his injuries were proximately caused by Paxton's negligence, which included:

(1) failure to supply proper tools, implements and materials for use to perform the task which he asked Young to perform;

(2) failure to properly supervise the cutting; and

(3) failure to secure the limb.

Interrogatories were next propounded by each party, and Young was deposed by Paxton.

On July 12, 1993, Paxton filed a motion for summary judgment and attached the complaint and portions of Young's deposition in support of the motion. The motion stated that Young had admitted that he was a licensee on Paxton's property and that there was no proof that Paxton had violated any duty owed Young by acting wilfully or wantonly towards him. It further stated that the danger posed by cutting branches from the tree was known or should have been known to Young. In the alternative, the motion stated that as a matter of law Young had failed in his deposition to present any proof that Paxton's conduct proximately caused his injury. Young responded to the motion but did not state in his response that he required additional time to complete discovery. Following Young's response to the summary judgment motion, Paxton's attorney wrote that answers to interrogatories would be forthcoming within a week.

The case was set for trial on August 2, 1993, but Young requested that the trial be continued pending completion of discovery. Young then filed an amended complaint and answers to the interrogatories propounded by Paxton. The amended complaint alleged that Young came on Paxton's property at Paxton's express or implied invitation and acted for the parties' mutual benefit by cutting the branches. Young further

alleged that as an invitee Paxton failed to use ordinary care to avoid injury to him because Paxton knew or reasonably should have known that danger existed. In his answers to interrogatories, Young maintained that it was a jury question whether his status was that of invitee or licensee. He added that the question of comparative fault was also a matter for a jury to decide.

The circuit court granted Paxton's motion for summary judgment due to the absence of a material issue of fact, and an order to that effect was entered on August 17, 1993. On August 18, 1993, Young moved for reconsideration on the basis that discovery was not yet completed. At the ensuing hearing, the circuit court observed that Young failed to argue that necessary discovery was outstanding in response to the motion for summary judgment and that even had they been answered, the answers would not have produced sufficient evidence to affect the ruling. The court then denied the motion.

Young first argues on appeal that summary judgment was inappropriate because material issues of fact remain to be decided. Young is correct that summary judgment is only appropriate when no issue of material fact exists and that the movant is entitled to judgment as a matter of law. Ark. R. Civ. P. 56(c); *Bellanca* v. *Arkansas Power & Light Company*, 316 Ark. 80, 870 S.W.2d 735 (1994); *Forrest City Machine Works* v. *Mosbacher*, 312 Ark. 578, 851 S.W.2d 443 (1993). Here, Paxton, as the moving party, bore the burden of showing that there were no genuine issues of material fact. *Cox* v. *McLaughlin*, 315 Ark. 338, 867 S.W.2d 460 (1993). Once the movant makes a *prima facie* showing of entitlement to judgment, it is incumbent upon the respondent to demonstrate that an issue of material fact remains. *South County, Inc.* v. *First Western Loan Co.*, 315 Ark. 722, 871 S.W.2d 325 (1994).

On appeal, this court must decide if summary judgment was proper based on whether the proof presented by Paxton left a material question of fact unanswered. *Id.* At this stage, we view the evidence in the light most favorable to Young, and all doubts and inferences are resolved in his favor. *Gann* v. *Parker*, 315 Ark. 107, 865 S.W.2d 282 (1993).

[redacted] Young initially raises his status as an invitee or licensee as a material issue of fact that must be decided by the trier of fact. This court has recognized that an invitee may be a public invitee or a business invitee. *Lively* v. *Libbey Memorial Physical Medicine Ctr., Inc.*, 311 Ark. 41, 841 S.W.2d 609 (1992). A business visitor is one who enters or remains on land for a purpose connected with the business dealings of the owner. *Id.* 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. *Id.* Conversely, one who goes upon the premises of another with the consent of the owner for his own purposes and not for the mutual benefit of himself and the owner is not an invitee but a licensee. *Id.* This court has declined to extend the invitee status to persons on the premises of another primarily for social reasons. *Tucker* v. *Sullivan*, 307 Ark. 440, 821 S.W.2d 470 (1991).

[redacted] The pleadings and deposition of Young more than suggest that he was not an invitee of any stripe, but rather a licensee. There was no evidence that he was invited onto Paxton's property. Furthermore, Young was not visiting his father-in-law for any stated business purpose and expected no pay for his assistance. He was essentially visiting an in-law at his home. Under such circumstances, we conclude that reasonable minds could not find otherwise and that, accordingly, no material issue of fact exists on this point. *See Skinner* v. *R.J. Griffin & Co.*, 313 Ark. 430, 855 S.W.2d 913 (1993); *Diebold* v. *Vanderstek*, 304 Ark. 78, 799 S.W.2d 804 (1990); *McKay* v. *St. Paul Ins. Co.*, 289 Ark. 467, 711 S.W.2d 834 (1986).

[redacted] There is a second reason for affirmance in this case. The law of negligence requires as essential elements that the plaintiff show that a duty was owed and that the duty was breached. *Earnest* v. *Joe Works Chevrolet, Inc.*, 295 Ark. 90, 746 S.W.2d 554 (1988); *Keck* v. *American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983); *Union Securities Co.* v. *Taylor*, 185 Ark. 737, 48 S.W.2d 1100 (1932); *Prosser and Keaton on the Law of Torts*, § 30, p. 164 (5th Ed. 1984). Irrespective of Young's status as invitee or licensee, there is nothing in the proof submitted to indicate that Paxton breached a duty of care owed to Young. A property owner owes a licensee the duty to refrain from causing him injury by willful or wanton conduct, and a duty

to warn of hidden dangers or risks. *Lively* v. *Libbey Memorial Physical Machine Ctr., Inc., supra.*; *King* v. *Jackson*, 302 Ark. 540, 790 S.W.2d 904 (1990). To constitute willful or wanton conduct, there must be a deliberate intention to harm or an 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). This court has stated, however, that the duty to warn does not extend to obvious dangers or risks that the licensee should have been expected to recognize. *Dorton* v. *Francisco*, 309 Ark. 472, 833 S.W.2d 362 (1992); *King* v. *Jackson, supra.*

In this case, there is no evidence that Paxton acted willfully or wantonly to cause Young injury. In fact, the evidence shows that Paxton fully advised Young that the limb had a tendency to rise as the weight from a severed branch fell away. Young even assisted Paxton when Paxton was faced with the same risk that five minutes later injured Young. To the extent that the risk had been unknown to Young when he first arrived on the property, that risk was brought to Young's full attention before his accident. The extent of Young's knowledge is evidenced by this colloquy at Young's deposition:

> DEFENSE ATTORNEY: Did you know a limb would do this? I mean did you know a limb hanging like in Exhibit 1, if you cut the end of it off, the heavy foliage on the end, that it would pop up like that?
>
> YOUNG: I did after he [Paxton] put that rope on there, yes. I didn't know it previously.
>
> DEFENSE ATTORNEY: But I mean you knew it five minutes before this accident happened?
>
> YOUNG: Yes. I knew that his limb did that.

Thus, Young was well apprised of the risk involved in cutting the tree's limbs and even participated in safeguarding against that risk when Paxton was doing the cutting.

Even assuming that Young was an invitee, Paxton's duty would be to use ordinary care to maintain the premises in a reasonably safe condition for him. *Derrick* v. *Mexico Chiquito, Inc.*, 307 Ark. 217, 819 S.W.2d 4 (1991). That duty owed to an invitee usually is satisfied when the danger is either known or obvi-

ous to the invitee. *Carton* v. *Missouri Pac. R.R.*, 303 Ark. 568, 798 S.W.2d 674 (1990); *Kuykendall* v. *Newgent*, 255 Ark. 945, 504 S.W.2d 344 (1974); *Ramsey* v. *American Automobile Ins. Co.*, 234 Ark. 1031, 356 S.W.2d 236 (1962). As we said in *Ramsey*:

> [T]here is no obligation to protect the invitee against dangers which are known to him, or which are so apparent that he may reasonably be expected to discover them and be fully able to look out for himself.

234 Ark. at 1034, 356 S.W.2d at 238 (citation omitted).

This court has held that a question of fact exists where the visitor is unaware of the risk. *Kuykendall* v. *Newgent, supra.* But, again, in the case at hand Young knew the risk he was taking, and there was simply no evidence that Paxton failed to exercise ordinary care for the reasons already stated. Reasonable minds could not conclude otherwise.

We hold that regardless of Young's status, that is, whether he was a licensee or invitee, Paxton did not breach the duty of care owed. He perpetrated no wilful or wanton injuries upon Young, and Young was well aware of the danger involved in the limb cutting. Because breach of a duty owed is an essential element to a cause of action for negligence and that element was lacking, summary judgment was appropriate. Because we so hold, it is not necessary for us to address the issue of proximate cause.

For his final point, Young asserts that the circuit court erred by granting summary judgment before discovery was complete. Although he raised this argument in his motion to reconsider after the order for summary judgment was entered, he did not request additional time for discovery in his response to the appellee's motion for summary judgment. As a consequence, the issue was not timely raised to the circuit court and is not preserved for appeal. *See Burge* v. *Pack*, 301 Ark. 534, 785 S.W.2d 207 (1990); *Sharp County* v. *Northeast Arkansas Planning and Consulting Co.*, 269 Ark. 336, 602 S.W.2d 627 (1980).

Affirmed.

BB & B CONSTRUCTION CO., INC. *v.* F.D.I.C.,
Successor to Northwest Bank of Dallas, Texas

93-1203 875 S.W.2d 48

Supreme Court of Arkansas
Opinion delivered April 25, 1994

Theodore C. Lamb, for appellant.

Wood, Smith, Schnipper & Clay, by: *Ray S. Smith, Jr.* and *Lynn Williams*, for appellee.

JACK HOLT, JR., Chief Justice. This is a case involving a materialman's lien versus a prior encumbrance and the trial court's finding that the appellant BB & B Construction Company, Inc.'s (BB&B) lien for improvements to certain lands was subordinate to the encumbrances on the property held by the appellee, F.D.I.C., and that F.D.I.C. was entitled to all of the proceeds of sale after foreclosure proceedings. We agree with the trial court and affirm.

This dispute arose due to numerous sales transactions involving a tract of land in Hot Springs, Arkansas. The facts are not in dispute and have been stipulated to by the litigants:

April 15, 1986	James and Stella Hodges borrowed $600,000 from Dallas International Bank (later renamed Northwest Bank of Dallas, Texas) in exchange for a security interest on the property at issue. This mortgage was to secure the price of the land.
October 8, 1986	The Hodgeses sell land to Charles Elliott, and he assumes their mortgage. A document extending the note & lien of the mortgage is executed by Elliott and filed March 6, 1987.
December 1986	BB & B Construction performs work & expends material and labor on land: racetrack improvements & construction of a lake.
March 16, 1987	BB & B files notice of its materialman's lien in the amount of $38,529.50.
March 20, 1987	BB & B files a complaint against Elliott for recovery on the lien.
April 15, 1987	Elliott conveys land to Lowry Investments by warranty deed which assumes the mortgage. Lowry borrows an additional sum from Northwest Bank bringing total debt to $950,000.
August 28, 1987	Lowry executes a mortgage and secu-

	rity agreement to secure the $950,000 from Northwest Bank.
January 20, 1988	F.D.I.C., as successor to Northwest Bank, obtained a judgment against Lowry for $950,000 and obtains a decree of foreclosure on the land. The land was subsequently purchased by F.D.I.C. for $278,000.
June 23, 1989	A court order was entered finding that BB & B had a viable claim against the proceeds of sale and directed that $53,000 be bonded and held by the court clerk pending a determination of BB & B's priority.
August 10, 1989	BB & B received judgment of $38,529.50 plus ten percent interest from 3/16/86 against Charles Elliott.

Thereafter, BB & B filed a motion for judgment upon the lien, asserting that the court had already found that Mr. Elliott was liable to it for $38,529.50 and that the judgment was due in the amount of approximately $65,650 from May 16, 1986 through October 16, 1991. BB & B asked that the $53,000 held in the registry of the court be awarded to it as judgment based upon the materialman's lien.

F.D.I.C. in turn filed a motion for summary judgment claiming a priority right to the proceeds of the foreclosure sale and an award of all sums from the sale of the land, the proceeds being insufficient to satisfy both the mortgages and BB & B's lien. In claiming that its mortgage had preference over BB & B's lien, F.D.I.C. contended that a materialman's lien is superior to a prior mortgage only if the improvement is separate and distinct from the existing improvements or can be removed from the property without injury to the property, and since the improvements made by BB & B were not removable, the maxim "first in time, first in right" governed.

F.D.I.C. further insists that its mortgage, perfected April 15, 1986, was superior to BB & B's perfected materialman's lien

dated December of 1986, the date construction began. (Once a materialman properly files, his lien relates back to the date of the beginning of construction. *Planters Lumber Co.* v. *Jack Collier East Co.*, 234 Ark. 1091, 356 S.W.2d 631 (1962).)

The chancery court agreed with the F.D.I.C. and awarded it the $53,000 held in the registry. It is from this finding that BB & B appeals. For its sole argument for reversal of the court's decision, BB & B contends that the chancellor erred in her interpretation of Ark. Code Ann. § 18-44-101 and 110 and relevant case law. Section 18-44-101 provides in pertinent part:

> (a) Every mechanic, builder, artisan, workman, laborer, or other person who shall do or perform any work to or upon, or furnish any material, fixtures, engine, boiler, or machinery for any building, erection, improvement *to or upon land*, or upon any boat or vessel of any kind, or for repairing them, under or by virtue of any contract with the owner or proprietor thereof or his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this subchapter, shall have, for his work or labor done, or materials, fixtures, engine, boiler or machinery furnished, a lien upon the building, erection, or improvement and upon the land belonging to the owner or proprietor on which they are situated to the extent of one (1) acre or the extent of any number of acres of land upon which work has been done or improvements erected.

(Emphasis added.) The legislature made clear that the "entire land. . .upon which any building, erection, or other improvement is situated, including that part of the land which is not covered with the . . . improvement . . . shall be subject to all liens created by this subchapter. "Ark. Code Ann. § 18-44-402 (1987). Also provided for is preference over prior liens, with some exceptions. In this regard, Arkansas Code Annotated § 18-44-110 provides:

> The lien for the things or work specified in this subchapter *shall attach to the buildings, erections or other improvements for which they were furnished or work was done in preference to any prior lien, encumbrance, or mortgage existing upon the land before the buildings, erections,*

> *improvements or machinery were erected or put thereon.* However, in all cases where the prior lien, encumbrance, or mortgage was given or executed for the purpose of raising money or funds with which to make the erections, improvements, or buildings, then that lien shall be prior to the lien given by this subchapter.

(Emphasis added.)

Resolution of this appeal depends upon how § § 18-44-110 and 101 are interpreted. However, since the litigants stipulated that the Hodgeses' mortgage was to secure the purchase price of the land and neither party questions whether increases in the debt change the status of the mortgage to a construction money mortgage, we do not need to address this aspect of section 18-44-110.

Instead, we address BB & B's contention that because its lien is a materialman's lien, it has priority even over a mortgage filed of record prior to the time BB & B commenced work. BB & B does not have any authority to support its position in this regard, and the majority of its argument consists of distinguishing cases cited by the chancery court in reaching its decision.

In further support of its position, BB & B cites a change made in Ark. Stat. Ann. § 51-601 (now Ark. Code Ann. § 18-44-101) by Act 112 of 1969. Prior to Act 112, Ark. Stat. Ann. § 51-601 provided:

> Every mechanic, builder, artisan, workman laborer or other person who shall do or perform any work upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection, improvement *upon land* . . . shall have for his work or labor done, or materials, fixtures, engine boiler or machinery furnished a lien . . . .

(Emphasis added.)

The language which BB & B stresses is "upon land," for in Act 112, the language was changed to read, "to or upon land. "BB & B claims that this alteration may only be interpreted to mean that the materialman's lien attaches to the land regardless of whether the improvement is removable, and this interpretation of Act 112, standing alone, seems to be true. However,

BB & B strains this interpretation by insisting that this alteration, read in conjunction with § 18-44-110, gives materialmen's liens for improvements to lands priority over all liens, even those perfected prior to the materialmen's lien.

[redacted] BB & B is misguided in this respect. Lien statutes are a derogation to the common law and must be strictly construed. *Mehaffy & Asso., Inc.* v. *Brophy*, 249 Ark. 884, 462 S.W.2d 226 (1971); *Dix* v. *Olds*, 242 Ark. 850, 415 S.W.2d 567 (1967); *Lambert* v. *Newman*, 245 Ark. 125, 421 S.W.2d 480 (1968).

We have considered the difference in the meanings of "upon" and "to" as the language was used in Ark. Stat. Ann. § 51-601 (now § 18-44-101), noting that the legislature, by stating "improvements upon land" rather than "improvement to land" did not intend a lien to attach to the land so improved but confined it to the land "upon which the same are situated." *Lambert* v. *Newman*, 245 Ark. 125, 431 S.W.2d 480 (1968); *Dix* v. *Olds*, 242 Ark. 850, 415 S.W.2d 567 (1967).

Reviewing the foreword to Act 112 of 1969 (which amended § 18-44-101), we see that the legislature's purpose in changing the wording to "to or upon" was to include certain contractors under the umbrella of creditor protection. There is no suggestion in this language that the legislature, by making this change, intended, in the absence of removable improvements, to give materialmen priority over all liens:

> WHEREAS, recent court decisions have disclosed that certain contractors performing clearing, excavating, or ditching services in the process of constructing home sites were not heretofore granted the same lien as mechanics, materialmen, builders, and laborers; and
>
> WHEREAS, the contractors performing these vital and indispensable services should receive the same protection as others herein named.

Thus, this amendment makes improvements to land lienable. *Skipper* v. *Hoskins*, 247 Ark. 235, 444 S.W.2d 875 (1969).

[redacted] We further observe that although § 18-44-101 provides which materialman shall receive protection by this lien as well as the nature and the extent of the lien, § 18-44-110 still

sets forth the priority of these liens to other encumbrances and the nature of the lien's attachment. Specifically, § 18-44-110 provides that the materialman's lien shall attach to the "building, erection or other improvements for which they were furnished or work was done *in preference to* any prior lien, encumbrance, or mortgage existing upon the land before the buildings, erections, improvements or machinery were erected or put thereon. "Since the preference attaches to the improvement, it follows that in order to take advantage of the priority, the improvement must be removable:

> Under the first in time, first in right rule . . . the . . . materialmen's lien will be subordinate to any encumbrance on the land and improvement thereon that attached prior to commencement of construction or repair for which the lien is claimed. The priority of the prior encumbrances extends not only to advances pursuant to which the mortgage was executed as security, but also to any future advances which the mortgagee was obligated to make under his agreement with the mortgagor. There is one exception to this rule. Where the . . . lien arises out of the construction of an improvement that is separate and distinct from any existing improvements, or if connected to an existing improvement, is so connected as to be removable without injury to the existing structure, the lien of the mechanic or materialman has priority over the prior mortgage lienholder as to the new improvement. However, the only remedy of the lienholder is removal of the improvement. The lienholder could, of course, pay off the prior encumbrance, be subrogated to the rights of the encumbrancer, and foreclose the lien against the entire property. Such mechanic's or materialmen's lien will be subordinate, even as to the improvement, to a prior mortgage executed for the purpose of financing the construction of the improvement.

Glenn E. Pasvogel, *Arkansas Debtor-Creditor Relations Handbook*, 2.3.1.6 (d) (1988)(citations omitted).

To support its position, F.D.I.C., as well as the chancellor, cite a number of pre-Act 112 of 1969 decisions. BB & B contends that these cases are not persuasive because they were decided prior to the change in § 18-44-110. We disagree. The

law remains that as between the lien of a mechanic or the furnisher of material and the lien of a prior mortgage, the lien of the former is superior only upon a separate building constructed on the land with the labor and material furnished, or to such an addition as is separable from the original building. *Page* v. *John E. Bryant & Sons Lumber Co.*, 232 Ark. 313, 335 S.W.2d 809 (1960); *see Morrilton Lumber Co.* v. *Groom*, 176 Ark. 520, 3 S.W.2d 293 (1928).

As mentioned, lien statutes are in derogation of the common law. Thus, the rights of a materialman and the enforcement of his liens are a matter of grace provided by legislative enactment. Although our General Assembly has expanded its umbrella of coverage to certain contractors who make improvements to the land lienable, such provisions are specific, narrow exceptions and extend only to the limits and conditions prescribed by legislation. It still remains that as between a materialman and a prior mortgagor, "first-in-time, first in right" is the law in Arkansas unless the materialman can remove the improvements from the land. See Glenn E. Pasvogel, Jr., *Construction Mechanics' & Materialmen's Liens: The Law in Arkansas* § 10-5 (1982).

Affirmed.

BROWN, J., concurs.

ROBERT L. BROWN, Justice, concurring. I cannot disagree with the result of the majority opinion. The priority statute (Ark. Code Ann. § 18-44-110 (1987)) only contemplates a priority lien for improvements *upon* the land. The sale-under-execution statute (Ark. Code Ann. § 18-44-130 (1987)) then refers to "removal" of the improvement after sale. Neither statute refers to improvements *to* the land like a pond or racetrack.

I do not believe that the General Assembly intended after 1969 that the lien status of those who have improved land by means other than buildings should be so limited. The apparent intent of the General Assembly in enacting Act 112 of 1969 (now part of Ark. Code Ann. § 18-44-101 (1987)) was to make improvements to the land lienable for all purposes under the subchapter. Yet, § 18-44-110 still refers only to materialmen's liens attaching to improvements "erected or put" on the land and, again, the execution statute contemplates physical removal of the improvement after sale.

The priority status of improvements to the land for work like permanent excavation work needs legislative clarification. Otherwise, the priority status of a lienholder who has improved land but not erected a structure on it will continue to be nil if the land has a preexisting mortgage lien.

Gary Keith TOLBERT *v.* STATE of Arkansas

CR 93-976 874 S.W.2d 371

Supreme Court of Arkansas
Opinion delivered April 25, 1994

Harold W. Madden, for appellant.

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

JACK HOLT, JR., Chief Justice. The appellant, Gary Keith Tolbert, raises two points for reversal in this appeal from his rape conviction and life sentence. He argues that the trial court erred (1) in failing to direct a verdict in his favor and (2) in permitting the introduction of evidence of other offenses. Since Tolbert neglected both to renew his motion for directed verdict at the conclusion of all evidence and to object to the introduction of evidence of other offenses, the judgment must be affirmed.

Gary and Gina Tolbert were married in 1980. Ms. Tolbert had a son by a previous marriage, who, at that time, was about four or five years old.[1] The boy lived with his mother and Gary Tolbert, whose relation to him was that of stepfather. During the course of the Tolberts' marriage, two daughters were born.

In March 1991, the couple divorced. Ms. Tolbert's son, now a teenager, lived with his stepfather Gary for approximately four months after the divorce, through the end of a term of summer school in July. On returning to his mother, he informed her that "Gary had been messing with him" and that he had "done had more sex with Gary than any way that I could think of."

Subsequently, the victim delivered statements to the Department of Human Services and the Arkansas State Police. A probable cause affidavit signed by Detective Sergeant David Smith of the Saline County Sheriff's Department, dated November 5, 1991, stated that the victim had been interviewed by Investigator Brenda Hale of the Arkansas State Police and that he had reported that he had been sexually abused by Gary Tolbert since the age of five. The affidavit recited instances of masturbation, oral sex, anal sex, and the use of a vibrator. On November 13, 1991, Dr. Mary Jewell Atkins examined the victim and found damage to the rectal area suggestive of sexual abuse.

Tolbert was charged by information on November 15, 1991,

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[1]Testimony concerning the boy's age at the time Gary and Gina Tolbert were married was inexact, but he was eighteen at the time of the October 1992 trial.

with the class Y felony of rape under Ark. Code Ann. § 5-14-103 for acts occurring between 1980 and 1991. A jury trial was held on October 22, 1992, at which Tolbert took the stand in his own behalf, denying the allegations against him. However, in addition to the testimony of the victim and other witnesses, the state produced two letters written by Tolbert to his stepson that provided evidence of the sexual character of the relationship. Tolbert was found guilty and was sentenced to life imprisonment. This appeal followed.

I. Sufficiency of the evidence

On appeal, we first address Tolbert's challenge to the sufficiency of the evidence before reviewing any other asserted trial error. *Coleman* v. *State*, 315 Ark. 610, 869 S.W.2d 713 (1994); *Clark* v. *State*, 315 Ark. 602, 870 S.W.2d 372 (1994).

During trial, at the close of the state's case, Tolbert moved for a directed verdict. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Moore* v. *State*, 315 Ark. 131, 864 S.W.2d 863 (1993). Although Tolbert made a motion for a directed verdict at the conclusion of the presentation of the state's evidence, he neglected to do so at the close of all the evidence.

Under Ark. R. Crim. P. 36.21, a failure to challenge the sufficiency of the evidence by a renewed motion for a directed verdict at the end of the case constitutes a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict. *Cummings* v. *State*, 315 Ark. 541, 869 S.W.2d 17 (1994); *Cole* v. *State*, 307 Ark. 41, 818 S.W.2d 573 (1991). Therefore, this court is precluded from considering the issue of the sufficiency of the evidence.

II. Evidence of other offenses

Tolbert also argues that the trial court committed reversible error in admitting evidence of his sexual advances toward another adolescent male, Joe Spear. He asserts that the witness's testimony, which was unrelated to the crime with which he was charged, was presented solely for the purpose of persuading the jury that he must therefore have "acted in conformity" in raping his stepson, in violation of Ark. R. Evid. 404(b).

However, the record reveals that the defense made no motion in limine to exclude Joe Spear's testimony prior to trial. Moreover, no objection based on Rule 404(b) was lodged at trial.

A motion in limine was in fact made concerning the youth's testimony, but it was made by the prosecution and concerned a potential defense probe of a burglary charge against Spear and his commitment to a hospital for mental-health care. Indeed, the prosecutor commented at the time of the discussion in chambers that "I don't believe that after reviewing the case law the Defense counsel has any objection to his testimony." Defense counsel was silent. And, as mentioned above, no objection was raised at trial on the basis of Ark. R. Evid. 404(b) when Joe Spear testified.

Simply put, Tolbert has failed to preserve this issue for appeal. An argument for reversal will not be considered in the absence of an objection. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

III. Rule 4-3(h)

Pursuant to Rule 4-3(h) of the Rules of the Supreme Court and Court of Appeals, the state has undertaken a review of the record and has abstracted additional rulings decided adversely to Tolbert. None of these involves prejudicial error.

Affirmed.

ESTATE OF Mary Jean OTTO *v.*
ESTATE OF Ada V. FAIR, Deceased

93-1182 875 S.W.2d 487

Supreme Court of Arkansas
Opinion delivered April 25, 1994
[Rehearing denied June 6, 1994.]

Coffelt, Burrow & Sawyer, by: *Stephen P. Sawyer*, for appellant.

Clark & Clark, by: *Jim Clark*, for appellee.

STEELE HAYS, Justice. This appeal involves an interpretation of Ark. Code Ann. § 16-65-114 (1987), providing that interest on any judgment entered by any court shall draw interest at a specified rate. The sole point on appeal is whether the probate court erred in refusing to award interest pursuant to an order entered in 1987 finding that Mrs. Betty Fletcher and Mrs. Mary Jean Otto were entitled to the sum of $14,429.88 from the estate of Ada V. Fair, deceased.

In 1986 an order appointing a guardian of the person and estate of Ada V. Fair was filed in the Probate Court of Benton County. Later, on December 24, 1987, an order was entered awarding a judgment of $14,429.88 to Mrs. Fletcher and Mrs. Otto, daughters of Mrs. Fair, against the estate. The order reads in part:

> That the petitioners, Betty Fletcher and Mary Jean Otto, are entitled to a judgment against the Estate in the full amount of $14,429.88, for their attorneys' fees, with the proviso that the judgment will be of record but is not to be exercised or executed by the petitioners so long as Ada Fair lives and has a continuing need for assets in her estate to provide for her health and welfare. If at some later date it is determined by the Court that sufficient funds exist in the Estate in excess of the needs of Ada Fair, then and only then will the judgment be paid during her lifetime. Otherwise, judgment will remain of record and have such precedence as provided by law but without being exercised by the petitioners.

Mrs. Fair died in February 1993 and the guardianship was converted to an administration of a decedent's estate.

Mrs. Otto had also died and in May 1993 her administrator filed a claim against the estate of Mrs. Fair to enforce the 1987 order with interest at the legal rate from December 2, 1987. The probate court held the estate of Mrs. Otto was entitled to one-half of the amount stated in the 1987 order, with the remaining one-half to Mrs. Fletcher. Noting that the 1987 order was entered by agreement, the court refused to order interest on the judgment and the estate of Mrs. Otto has appealed. We affirm.

[redacted] Appellant maintains that unless a judgment expressly excludes the payment of interest, interest accrues. *Shofner* v. *Jones*, 201 Ark. 540, 145 S.W.2d 350 (1940); *Sharum* v. *Dodson*, 264 Ark. 57, 568 S.W.2d 503 (1978). We take no exception to that premise, except to note that the purpose of awarding post judgment interest is to compensate judgment creditors for the loss of the use of money adjudged to be due them. *Hopper* v. *Denham* 381 Ark. 84, 661 S.W.2d 379 (1983). This order, however, makes it clear that the "judgment" was not due and owing, but was subject to a determination "at some later date" that sufficient funds existed, "then and only then will the judgment be paid. . . ." The order also purported to prohibit any "exercise or execution" of the judgment.

This order by its own terms was not a final determination of an amount payable from the estate of Mrs. Fair. It did noth-

ing more than fix an amount earned as attorneys' fees, payment of which was subject to such later determination as circumstances warranted. It is clear that that determination was to be made by the probate court, depending on the resources of the estate.

In *Lawrence* v. *Ford Motor Credit Co.*, 247 Ark. 1125, 449 S.W.2d 695 (1970), we said:

> A judgment for money must be a final determination of rights of the parties in an action, must specify the amount the defendant is required to pay and must be *capable of enforcement by execution or other appropriate means.*" [Emphasis supplied.]

In *Thomas* v. *McElroy*, 243 Ark. 465, 420 S.W.2d 530 (1967), we examined the law at home and abroad as to the constituents of judgments and orders for purposes of finality. The opinion notes that a 'judgment' will be tested by its substance, not its form, and summarized several relevant cases:

> A finding by a court in a divorce case that there was due and owing by a plaintiff to a defendant the sum of $275.00 per month for a period commencing January 1, 1947 and ending January 1, 1950, was held not to have the force and effect of an adjudication disposing of the subject matter in a manner sufficient to constitute a judgment. *Taliferro* v. *Taliferro*, 178 Cal.App.2d 146, 2 Cal.Rptr. 719 (1960). A final judgment or decision is one that finally adjudicates the rights of the parties, putting it beyond the power of the court which made it to place the parties in their original positions. *Crowe* v. *DeSoto Consolidated School Dist.*, 246 Iowa 38, 66 N.W.2d 859 (1954). It must be such a final determination as may be enforced by execution or in some other appropriate manner. *Wilson* v. *Corbin*, 241 Iowa 226, 40 N.W.2d 472 (1950); *Crowe* v. *DeSoto Consolidated School Dist., supra.*

In the case at bar, we conclude that the failure to award interest was not inadvertent, but a further indication that the 1987 order was not final, except as to the amount. Payment was conditional according to the future needs of Mrs. Fair and subject to a determination "*by the court*" that sufficient funds existed.

The dissenting opinion would reverse on the ground that the trial court had no power to withhold execution. *Sharum* v. *Dodson, supra*. However, whether execution could issue under the order is not the question either the trial court or this court was asked to decide, but whether interest should accrue under the unique provisions of the 1987 order. For the reasons stated, we hold that interest should not accrue.

Affirmed.

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

DAVID NEWBERN, Justice, dissenting. The order entered on December 24, 1987, awarding attorney's fees in the amount of $14,429.88 to Betty Fletcher and Mary Jean Otto against the estate of Ada V. Fair was a final judgment. A judgment is final if it determines the rights of the parties to an action, specifies the amount the defendant is required to pay, and is capable of enforcement by execution or other appropriate means. *Lawrence* v. *Ford Motor Co.*, 247 Ark. 1125, 449 S.W.2d 695 (1970). The Trial Court specified in dollars and cents the amount awarded. The issue of attorney's fees was decided. The debt was adjudicated. There was no need for further court action. Interest accrued and should have been awarded.

Although whether the judgment was capable of execution is not the ultimate issue, we must decide that question to determine the finality of the judgment. A judgment is final only if it is capable of enforcement by execution or other appropriate means. *Lawrence* v. *Ford Motor Co., supra.*

The Court rendering the judgment has no power to withhold execution. *Sharum* v. *Dodson*, 264 Ark. 57, 568 S.W.2d 503 (1978); *Taylor* v. *O'Kane*, 185 Ark. 782, 49 S.W.2d 400 (1932). Therefore, the language in the judgment purporting to prevent execution until the death of Ada V. Fair or until the Court determined that sufficient funds existed had no effect on the finality of the judgment. The judgment could have been executed at any time following the date of rendition.

The majority opinion seeks to avoid the rule of the *Sharum* and *Taylor* cases by referring to this judgment as "unique." The only thing "unique" about the judgment is its attempt to provide

that it is not to be executed, and that is directly contrary to the rule expressed in the *Sharum* and *Taylor* cases. The fact that the 1987 order was entered "by agreement" is irrelevant. The record shows only the Trial Court's recitation that Ms. Fletcher "chose to forego her right to make a claim or anything at that time," and Ms. Fletcher said, "I'm not going to ask for any money." Nothing in the Trial Court's recitation suggests that either party agreed not to pursue her entitlement to interest upon execution of the judgment.

In the *Sharum* case, a judgment in the amount of $3096 was awarded against an ex-husband for three years arrearages of child support. The order provided that execution on the judgment was to be held in abeyance as long as the ex-husband made payments of $5 per month on the judgment. We reversed and stated:

> An execution may issue on any final judgment of any court of record for a liquidated sum of money. Ark. Stat. Ann. § 30-101 (Repl. 1962) [Ark. Code Ann. § 16-66-101 (1987)]. The court rendering the judgment has no power, in the absence of a stay or supersedeas pending appeal, to withhold execution beyond the ten day period fixed by Ark. Stat. Ann § 30-102 (Repl. 1962). *Taylor, State Bank Commissioner* v. *O'Kane*, 185 Ark. 782, 49 S.W.2d 400 [1932], *International Shoe Co.* v. *Waggoner, Judge*, 188 Ark. 59, 64 S.W.2d 82 [1933].

The statute requiring a ten-day waiting period before execution has been repealed. The law now permits execution anytime following the date of the judgment until the collection of it is barred by the statute of limitations. Ark. Code Ann. § 16-66-103 (1987). The rule that a court rendering a judgment has no authority to withhold execution, remains unchanged. We stated the reason for the rule to be that a judgment becomes a lien on real estate owned by the defendant in the county where the judgment was rendered from the date of the judgment. If the Court could stay or postpone execution, the judgment debtor could make away with all chattels owned by him and all real estate outside the county, free from the judgment lien, because no execution could be issued until the period of the stay had elapsed. That rationale, which remains sound today, was originally stated in *Taylor* v. *O'Kane, supra.*

The Trial Court had no authority to withhold execution until the death of Ada V. Fair or until it was determined that sufficient funds existed. The judgment was final as it could have been executed at any time following the date of the judgment; therefore, interest accrued at the rate of 10% per annum from the date of the judgment.

I respectfully dissent.

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

Don SIDES *v.* Marvin M. KIRCHOFF

93-1308 874 S.W.2d 373

Supreme Court of Arkansas
Opinion delivered April 25, 1994

Leslie R. Ablondi, for appellant.

Donald M. Spears, for appellee.

STEELE HAYS, Justice. Donald Sides filed this cause of action in the Hot Spring Circuit Court seeking damages of $30,000 against Marvin Kirchoff for breach of a lease agreement affecting real property in Mississippi.

Marvin Kirchoff moved for summary judgment and, alternatively, for dismissal upon allegations that any cause of action was barred on grounds of *res judicata* and election of remedies. The motion stated the "complaint has been previously tried and reduced to judgment" in Mississippi and the filing in Mississippi "constitutes *res judicata* even if personal service was not perfected."

Donald Sides responded to the motion, conceding the subject matter of the complaint was originally tried in Mississippi and a judgment rendered but stating that when Sides attempted to have the foreign judgment registered against Marvin Kirchoff in Arkansas, Kirchoff convinced the court that he never received actual service and, consequently, the cause has never been tried in Arkansas or Mississippi.

The circuit court dismissed the complaint upon a finding that the issues could have been litigated in the previous proceeding in Mississippi "by a court which would have had both personal as well as subject matter jurisdiction, had personal jurisdiction been properly obtained." Donald Sides brings this appeal. He maintains the trial court erred in that lack of personal jurisdiction defeats either the doctrine of *res judicata* or election of remedies. Finding merit in the argument, we reverse and remand.

Arkansas Code Ann. § 16-65-108 (1987) reads:

> All judgments, orders, sentences, and decrees made, rendered or pronounced by any of the courts of the state against anyone without notice, actual or constructive, and all proceedings had under judgments, orders, sentences, or decrees shall be absolutely null and void.

A judgment rendered without notice to the parties is void. *Woolfolk* v. *Davis*, 225 Ark. 722, 285 S.W.2d 321 (1965). When there has been no proper service and, therefore, no personal jurisdiction over the defendants in a case, any judgment is void *ab initio*. *Edmonson* v. *Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978); *Halliman* v. *Stiles*, 250 Ark. 249, 464 S.W.2d 573 (1972). In *Forrest* v. *Forrest*, 208 Ark. 48, 184 S.W.2d 902 (1945), we wrote:

> Appellee was not a party plaintiff in the action. She

> was made a party defendant, it is true, but the record reflects neither appearance by her nor service upon her in the suit. She could not, therefore, be bound by this order of dismissal, and appellants' plea of *res judicata* cannot be sustained.

Once the judgment in Mississippi was found to have been rendered without jurisdiction over the defendants, such judgment was void. It was as though suit had never been brought and there was no impediment to bringing the suit where personal jurisdiction over the defendants could be had. "A void judgment amounts to nothing and has no force as *res judicata*." *Arkansas State Highway Commission* v. *Coffelt*, 301 Ark. 112, 782 S.W.2d 45 (1990).

This principle of law has universal acceptance. Restatement of Judgments, § 5.

> If a state has no jurisdiction over the parties, a personal judgment rendered by a court of the state is subject to collateral attack in other states. Thus, if an action is brought in another state upon the judgment, the defendant can defeat the action by showing the lack of jurisdiction over him in the action in which the judgment was rendered. *Similarly, if the plaintiff brings an action in another state upon the original cause of action, the action cannot be defeated by setting up the prior judgment.*

Id. Comment (d).

Reversed and remanded.

WATKINS MOTOR LINES. INC. *v.* Bobby HEDRICK and Cindy Hedrick, His Wife

93-915 873 S.W.2d 814

Supreme Court of Arkansas
Opinion delivered April 25, 1994

Daggett, Van Dover & Donovan, by: *Robert J. Donovan* and *J. Shane Baker*, for appellant.

Easley, Hicky & Cline, for appellees.

STEELE HAYS, Justice. The appellees, Bobby Hedrick and Cindy Hedrick, were injured in a collision with a tractor-trailer owned by the appellant, Watkins Motor Lines, Inc. (Watkins). On May 25, 1991 Mr. and Ms. Hedrick were crossing the Hernando-Desoto Bridge between Memphis, Tennessee, and West Memphis, Arkansas. The Hedricks were travelling in a westerly direction and were struck from the rear while on the bridge. Watkins appeals a jury award of $125,000 to appellee Cindy Hedrick and $10,000 to appellee Bobby Hedrick.

On appeal, Watkins raises five points of error: (1) the circuit court erred in failing to grant a mistrial after the Hedricks' attorney questioned the jury during voir dire regarding liability insurance; (2) the circuit court erred in refusing to set aside the judgment under ARCP Rule 60(b) because of the Hedricks' misrepresentation of their marital status; (3) the verdict is excessive; (4) the circuit court erred in permitting the Hedricks' counsel to question Watkins's driver regarding the issuance of a traffic ticket after the accident; and, (5) the circuit court erred in ruling that it had *in personam* jurisdiction. We reverse and remand for a new trial.

Jurisdiction

Because the situs of the collision was subject to doubt, much of the argument before the trial court focused on whether Arkansas had *in personam* jurisdiction over Watkins under the Uniform Interstate and International Procedures Act, Ark. Code Ann. § 16-4-101 (Supp. 1993). In their complaint, the Hedricks alleged the accident occurred in Arkansas and, alternatively, that Watkins was authorized to do business in Arkansas and its tractor-trailer was in the process of actually entering Arkansas.

At a hearing on Watkins's ARCP Rule 12(b)(2) motion the proof revolved on whether Watkins transacted any business in Arkansas. It was undisputed that Watkins was authorized to do business in Arkansas, maintained a trucking terminal in Little Rock, engaged in business in Arkansas, and that

Watkins's truck was on the Hernando-Desoto Bridge leading into Arkansas.

At trial the proof established that the accident occurred while both vehicles were on the Hernando-Desoto Bridge. Since the parties were driving in a westerly direction (from Memphis towards Arkansas), they had to enter Crittenden County, Arkansas in order to traverse the bridge. Although the Arkansas State Police were initially contacted, it was stipulated that the accident was investigated by the Memphis City Police.

In the order denying Watkins's Rule 12(b)(2) motion, the trial court found the collision arose directly out of Watkins doing business in Arkansas. Ark. Code Ann. § 16-4-101 (1987). However, Watkins contends because the Hedricks failed to prove the accident actually occurred in Arkansas, their claims could not arise from Watkins transacting business in Arkansas. Watkins relies upon *Malone & Hyde, Inc.* v. *Chisley*, 308 Ark. 308, 825 S.W.2d 558 (1992), where we held personal jurisdiction was lacking where no facts were alleged in the pleading as to how an accident occurring in Tennessee arose from transacting business in Arkansas by the defendant corporation. But the decision in *Malone* simply holds that the complaint failed to allege sufficient facts to connect the transaction of business in Arkansas to the accident which occurred in a foreign state.

In this case, however, jurisdiction is not dependent on Ark. Code Ann. § 16-4-101 (Supp. 1993), because at trial the proof was not in dispute as to the point of the collision. Watkins's driver, Larry White, testified the collision occurred on the bridge "about three-quarters of a mile in Arkansas." There was no proof to the contrary. Thus, Arkansas acquired personal jurisdiction over Watkins because the Hedricks's cause of action arose directly from an act committed in this state by the agent of Watkins. Ark. Code Ann. § 16-58-120 (1987).

Liability Insurance

Watkins contends the circuit court erred in failing to grant a mistrial after counsel questioned prospective jurors as to whether they had any interest in any liability insurance company. It is improper to unnecessarily call to the jury's attention the fact that there is insurance in a case. *Superior Forwarding Co.* v.

Sikes, 233 Ark. 932, 349 S.W.2d 818 (1961). The general rule is that if a party's counsel acts in good faith, he may, in one form or another, question prospective jurors during the voir dire with respect to their interest in, or connection with, liability insurance companies. *Fuller* v. *Johnson*, 301 Ark. 14, 781 S.W.2d 463 (1989). Finally, we will not reverse a ruling of the trial judge in permitting inquiries intended to elicit any possible bias or prejudice that might influence a veniremen's verdict in the absence of a manifest abuse of that discretion. *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1979).

Counsel for the Hedricks asked the following questions during voir dire:

> Now, do any of you own stock in a liability insurance company, own any stock? Any of you ever been an employee of a liability insurance company? I know, Mr. Gilly, you're an agent, because you told me before.
>
> Anybody ever been involved in any way in claims adjustment for an insurance company, or a railroad, or manufacturing company, anything like that?

Watkins contends counsel did not act in good faith because he was aware Watkins was not insured. In fact, the Hedricks' counsel stated: "the property damage check which we received in this case was from Waco Fire and Casualty Insurance Company which led me to believe that he was insured, but I just learned yesterday that he was uninsured." Although counsel admitted he knew Watkins was uninsured, he maintained the reason for the questions was to determine "whether there's any bias or prejudice in the mind of the juror that would lean that juror toward a liability insurance carrier which would carry over into the area of a lawsuit, which would cause them theoretically to favor the defendant."

Watkins contends that because counsel knew Watkins was not insured the questions were not asked in good faith. Watkins relies on *Dedmon* v. *Thalheimer*, 226 Ark. 402, 290 S.W.2d 16 (1956), where we outlined the standard for questioning the venire regarding liability insurance. We stated:

> The test of whether counsel may ask questions of veniremen in regard to insurance is whether the questions are

> propounded in good faith. *If counsel, in good faith, thinks that liability insurance is involved, then he may ask questions calculated to bring to light any bias or prejudice a venireman may have for or against insurance companies.* [Our emphasis.]

Spanning several decades, our cases indicate that where liability insurance is involved good faith is satisfied. *See*, e.g. *Hamby* v. *Haskins*, 275 Ark. 385, 630 S.W.2d 37 (1982). *Rambo* v. *Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938); *Ellis & Lewis* v. *Warner*, 182 Ark. 613, 32 S.W.2d 167 (1930); *Pekin Stave & Mfg. Co.* v. *Ramey*, 104 Ark. 1, 147 S.W. 83 (1912). In every case we have located it was clear, or at least assumed, that insurance was involved. However, we have not heretofore addressed the propriety of such questions where the defendant is uninsured. In *King* v. *Westlake*, 264 Ark. 555, 572 S.W.2d 841 (1978), we upheld a trial court's ruling permitting plaintiff's counsel to ask potential jurors whether they believed the size of jury verdicts affected their insurance premiums. Although there was no indication that insurance was involved, we determined that the plaintiff's counsel had acted in good faith. In reaching the decision, we emphasized that good faith was satisfied where for some time preceding the trial date a number of liability insurance companies had advertised in several publications suggesting that jurors themselves were affected by the verdicts they rendered.

This court followed the *King* rationale in the more recent case of *Fuller*, wherein the court found the trial court erred in permitting the plaintiff's counsel to broach the subject of jury verdicts and their effect on insurance premiums without first requiring counsel to establish a proper foundation. *Fuller*, 301 Ark. at 19-A, 781 S.W.2d at 465,466.

Likewise, counsel in the present case failed to lay the proper foundation before asking his questions of the jurors. Based upon this court's holdings in *King* and *Fuller*, we must reverse and remand on this point.

Marital Status

Watkins contends the circuit court erred in refusing to set aside the judgment under ARCP Rule 60(b) because the Hedricks misrepresented their marital status to the jury. When the Hedricks

filed this action they were married and their complaint asserts that they are husband and wife. However, they had separated and divorced by the time the case came to trial, a development which Watkins did not discover until after the trial. Watkins maintains a fraud was practiced on the court by reason of the Hedricks representing themselves as presently married when they were not.

The trial judge recognized that the testimony clearly reflected the existence of a marital relationship between the Hedricks and the jury was deliberately led to believe that was the case. He concluded, however, that they had not commited a fraud upon the jury.

We need not resolve this issue, as the problem is self-correcting, on retrial. As to the matter of the traffic ticket, we would not expect that issue to again arise and the amount of the verdict is no longer relevant.

Reversed and remanded.

CORBIN, J., not participating.

Teresa McCLENDON *v.* STATE of Arkansas

CR 93-1160 875 S.W.2d 55

Supreme Court of Arkansas
Opinion delivered April 25, 1994

Joe Kelly Hardin, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant Teresa McClendon was charged with the capital murder of Bennie Young, and she was tried, convicted and sentenced to life imprisonment without the possibility of parole in the Arkansas Department of Correction. The two following points of error are raised on appeal: (1) the trial court erred in not suppressing the custodial statement of the appellant, and (2) it also erred by refusing to exclude jurors who had participated in the voir dire examination of a co-defendant who was tried and convicted a week prior to McClendon's trial. We affirm.

McClendon and co-defendants, Tyrone Williams and Patricia Young, were charged with murdering Bennie Young, McClendon's father, on November 25, 1992. Williams was McClendon's boyfriend and Patricia Young was McClendon's mother and the wife of the victim. On November 26, 1992, McClendon was interviewed by video tape and confessed to her father's murder. According to McClendon's custodial statement, Williams, her mother and McClendon planned to kill Bennie Young by suffocating him with a pillow after he fell asleep. After Bennie Young fell asleep on a couch, McClendon held his feet while Williams attempted to suffocate him. During an ensuing struggle, Williams repeatedly stabbed Mr. Young with a knife, and McClendon joined in stabbing her father by using a pair of scissors. After the murder, Patricia Young took McClendon and Williams to a Super 8 Motel located on Scott Hamilton Drive in Little Rock.

Dr. William Sturner, the medical examiner for the State of Arkansas, testified that Bennie Young died as a result of multiple stab wounds. A knife, a pair of scissors, t-shirt, bra, and shorts were found in a dumpster behind the Super 8 Motel where McClendon and Williams had stayed. Traces of human blood were found on the t-shirt, bra and shorts.

On appeal, McClendon principally contends that her confession was involuntary because she was intoxicated. She submits the impact of her intoxication combined with the following factors made her confession involuntary: (1) she was a young woman; (2) several police officers were present; and, (3) she was informed that her co-defendants had already told the police what had occurred.

The state has the burden of proving by a preponderance of the evidence that a custodial confession or inculpatory statement was given voluntarily or was knowingly and intelligently made. And while this court makes an independent determination based on the totality of the circumstances, a trial court will not be reversed unless its determination is clearly erroneous. *Midgett* v. *State*, 316 Ark. 553, 873 S.W.2d 165 (1994). Whether an accused had sufficient mental 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 to resolve. *Id.* The fact that an appellant might have been intoxicated at the time of his statement, alone, will not invalidate that statement, but will only go to the weight accorded it. *Id.*

According to McClendon's own testimony, she was interviewed by the police shortly before 9:00 p.m. on November 26, 1993 — the day after Bennie Young's murder. McClendon also testified that she had been drinking alcohol all morning, but had consumed her last drink at about 12.30 p.m. In *Midgett*, we affirmed a trial court's determinations that two hours was a "reasonable time in which [the police] could have expected [Midgett] to have sobered" and that Midgett understood his rights and gave his statement voluntarily and spontaneously. *Id.* Here, the evidence shows that at least nine hours elapsed between the time McClendon had her last drink and the time she was interviewed. Even though McClendon claims that she does not "handle alcohol well," it cannot be said that the trial court clearly erred in finding that McClendon was not intoxicated when she gave her confession.

As previously mentioned, McClendon also claims that she was intimidated by the presence of three police officers at her interrogation, that her youth contributed to the element of coercion and that the officers made false statements which induced

her to testify. First, we point out that McClendon was twenty-two years old and an adult at the time of her interrogation. Even so, we have held that defendants as young as sixteen years of age may voluntarily and knowingly waive their *Miranda* rights. *See Johnson* v. *State*, 307 Ark. 525, 823 S.W.2d 440 (1992); *Porchia* v. *State*, 306 Ark. 443, 815 S.W.2d 926 (1991). We cannot say the trial court was wrong in ruling McClendon's age did not impact her confession so as to make it involuntary. Furthermore, McClendon's account of the officers' statements that they induced her to testify differs from the account given by the officers. All three officers denied having told McClendon that she would be charged with capital murder regardless of what she said. This issue is simply a matter of credibility and was within the trial court's discretion to decide. *Everett* v. *State*, 316 Ark. 213, 871 S.W.2d 568 (1994). And finally, while McClendon claims the three officers' presence at her interview somehow made her confession involuntary, we must disagree. Absent some proof of coercion, the mere presence of the three officers here cannot be said to have rendered McClendon's confession involuntary. *See Moore* v. *State*, 299 Ark. 532, 773 S.W.2d 834 (1989) (where three officers heard the defendant's confession).

McClendon's second argument is that her case was prejudiced by the court's denial of her motion to exclude all jurors from the venire for her trial who had participated in the voir dire of Tyrone Williams's earlier trial. The trial court denied the motion "because [McClendon] ha[s] strikes and strikes for cause." The trial judge indicated that he would be very cautious and do his best in "excluding anyone who may have in any way been tainted by anything they've seen or heard, whether that be by media or street talk or past proceedings." The judge also noted that all jurors and alternate jurors who had actually sat for the Williams trial had already been excused. McClendon now claims that the court's denial of her motion violated Ark. Code Ann. § 16-33-304(b)(2)(B)(iv) (1987), which provides:

> (b) It may be general, that the juror is disqualified in serving in any case, or particularly, that he is disqualified from serving in the case on trial.

* * *

(2) Particular causes of challenge are actual and implied bias.

* * *

(B) A challenge for implied bias may be taken in the case of the juror:

(iv) Having served on a trial jury which had tried another person for the offense charged in the indictment.

The plain language of the foregoing statutory provision permits persons accused of a crime the right to exclude all jurors who have served as jurors in the trial of a co-defendant. McClendon makes no such contention here, since the persons who actually served on the Williams jury were in no way allowed to participate in the McClendon trial. McClendon cites no authority to support her proposition that a defendant's right under § 16-33-304(b)(2)(8)(iv) should be extended to exclude potential jurors who had not actually served as a juror in a prior trial involving the same offense. We do not consider arguments unsupported by convincing authority, unless it is apparent without further research that they are well taken. *Cox* v. *State*, 305 Ark. 244, 808 S.W.2d 306 (1991); *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

Pursuant to Ark. Sup. Ct. R. 4-3(h), the record has been reviewed and no other errors appear which were prejudicial to the appellant.

Based on the foregoing, the trial court's decision should be affirmed.

Tyrone Denoise WILLIAMS *v.* STATE of Arkansas

CR 93-1183 874 S.W.2d 369

Supreme Court of Arkansas
Opinion delivered April 25, 1994

Joe Kelly Hardin, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant, Tyrone Denoise Williams, appeals a judgment of the Saline Circuit Court convicting him of the capital murder of Bennie Young and sentencing him to life imprisonment without parole. Appellant asserts two points for reversal. We find no merit and affirm.

First, appellant argues the trial court erred in allowing the admission of a videotape of the crime scene and autopsy photographs of the victim. Appellant concedes the videotape and photographs are relevant evidence and acknowledges that the trial court has discretion in admitting this type of evidence. However, appellant argues that to allow the admission of both a videotape and still photographs of the same body is to give the trial court unlimited authority to admit photographs in contravention of *Berry* v. *State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

The videotape was admitted into evidence during the testimony of Saline County Sheriff's Deputy Wayne Bean. Deputy Bean testified that he arrived at the scene of Bennie Young's murder at approximately 9:51 p.m. on November 25, 1992. The scene was a two-bedroom trailer in Saline County. He described the

scene as consistent with a struggle — debris lying everywhere with blood spattered on the walls and tracked down the hall. Deputy Bean stated that he videotaped the crime scene within thirty minutes of his arrival. The videotape, as admitted by the trial court, showed the victim as he lay on the floor before his body was moved by the investigating officers. The trial court ruled inadmissible the portion of the tape showing the coroner and the officers rolling the victim's body while investigating the wounds.

The medical examiner testified that the six photographs appellant challenges were taken at the time of the autopsy after the body had been cleaned. Each of the six photographs showed different wounds and areas of the victim's body; even appellant's attempt to abstract the pictures in words describes six different areas of the body. The medical examiner testified there were fourteen separate and distinct stab wounds that were the cause of death, the most serious of which was a wound to left chest which penetrated the heart.

Generally, the same considerations and requirements for admissibility that apply to photographs also apply to videotapes. *Hickson* v. *State*, 312 Ark. 171, 847 S.W.2d 691 (1993). In the recent case of *Weger* v. *State*, 315 Ark. 555, 869 S.W.2d 688 (1994), we held on the facts there presented that no error occurred when the jury was shown both a videotape of the homicide scene and photographs of the victim's wounds. We reiterated our law which is well settled:

> The mere fact that a photograph is inflammatory or is cumulative is not, standing alone, sufficient reason to exclude it. *Walton* v. *State*, 279 Ark. 193, 650 S.W.2d 231 (1983). Even the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: by shedding light on some issue, by proving a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony, or by enabling jurors to better understand the testimony. *Perry* v. *State*, 255 Ark. 378, 500 S.W.2d 387 (1973). Of course, if a photograph serves no valid purpose and could be used only to inflame the jurors' passions, it should be excluded. *Gruzen* v. *State*, 267 Ark. 380, 591 S.W.2d 342 (1979).

Weger, 315 Ark. at 560, 869 S.W.2d at 691.

The medical examiner stated the photographs showed a variety of injuries which he would and did describe. The videotape showed the crime scene and shed light on the violence done to the victim. The tape and the photos showed the nature and extent of the wounds which is relevant to a showing of intent as intent may be inferred from the type of weapon used, the manner of use, and the nature, extent, and location of the wounds. *Weger*, 315 Ark. 555, 869 S.W.2d 688. The videotape and photos also helped the state prove an element of its case against appellant — the requisite level of intent associated with capital murder. Ark. Code Ann. § 5-10-101 (Repl. 1993).

We are well aware of appellant's reliance on *Berry*, 290 Ark. 223, 718 S.W.2d 447. However, while *Berry* holds that a trial court cannot admit photographs carte blanche, it only prohibits the admission of photographs whose prejudicial effect substantially outweigh any probative value. The record reflects that the trial court carefully considered the admissibility of these items on more than one occasion and that it did not admit all the photographs proffered by the state nor all of the videotape. Given the trial court's careful consideration of these issues and the fact that the items were probative of an element of the crime and assisted the medical examiner's testimony, we have no hesitation in concluding there was no manifest abuse of discretion.

Second, appellant contends the trial court erred in refusing to grant a mistrial when the state elicited evidence concerning appellant's drug use. In *Free* v. *State*, 293 Ark. 65, 732 S.W.2d 452 (1987), we wrote:

> Declaring a mistrial is an exceptional remedy to be used only where any possible prejudice cannot be removed by an admonition to the jury. *Cobb* v. *State*, 265 Ark. 527, 579 S.W.2d 612 (1979). The trial court is granted a wide latitude of discretion in granting or denying a motion for mistrial, and the decision of the trial court will not be reversed except for an abuse of that discretion or manifest prejudice to the complaining party. *Brown* v. *State*, 259 Ark. 464, 534 S.W.2d 207 (1976).

Free, 293 Ark. at 73, 732 S.W.2d at 456.

Even assuming without deciding that error occurred

when the trial court allowed the prosecutor to continue with the challenged question, any resulting prejudice could have been cured by an admonition to the jury. A mistrial therefore was not warranted and the trial court did not err in refusing appellant's request for one. Moreover, appellant did not request an admonition. The only request was for a mistrial which was not warranted. We cannot say the trial court erred in this regard. *See Johnson* v. *State*, 298 Ark. 617, 770 S.W.2d 128 (1989).

In accordance with Ark. Sup. Ct. R. 4-3(h), we have examined the transcript for prejudicial rulings made against appellant. We have found no such errors. Accordingly, the judgment of conviction is affirmed.

LaQuanda JACOBS *v.* STATE of Arkansas

CR 93-1269 875 S.W.2d 52

Supreme Court of Arkansas
Opinion delivered April 25, 1994

McArthur & Finkelstein, by: *William C. McArthur*, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This appeal questions (1) the sufficiency of the evidence supporting the judgment of conviction for capital murder, and (2) whether the trial court erred in allowing a police detective to testify about a witness's selection of the photograph of appellant LaQuanda Jacobs at a photographic lineup. Both points raised are without merit, and we affirm.

On February 9, 1992, at approximately 5:30 p.m., Kevin Gaddy and Tony Davis were walking near the intersection of 29th Street and Jefferson in Little Rock. As they entered the intersection, a gray car pulled in front of them, and a man and a woman got out of the vehicle. The woman had a pistol. The couple demanded that Gaddy and Davis give them the Chicago Bulls jackets that they were wearing. Gaddy started to hand over his jacket but then attempted to retrieve his brush from it. A struggle ensued. The woman fired her gun striking Gaddy in the chest. Gaddy ran a few yards from the scene and then collapsed. He was dead by the time that the police arrived.

There were several witnesses to the shooting, including Tony Davis and Sean Riggins. The police questioned the witnesses who gave varying descriptions of the shooter's age (some said she was in her thirties), dress, and hair color. Most agreed that she

was about five feet eight inches tall, heavyset, and had scars under her eyes. Tony Davis told the police that she was wearing pants, a blue-gray coat, and a knit cap.

At about 7:00 p.m. on the same date, Jacobs, who was age 16, was arrested along with several other suspects. When she was taken into custody, she was wearing a two piece white dress. She was questioned and photographed. A gun shot residue test was performed on her hands but proved negative. Tony Davis was shown her photo but was unable to identify her. Jacobs was then released.

Nine days after the shooting, the Little Rock Police Detectives showed Davis a second photo lineup, which included Jacobs. Davis at this later time identified Jacobs as the woman who shot Gaddy. More than two weeks after the shooting, Detective Mike Durham conducted a photospread with Sean Riggins. Riggins identified the photograph of Jacobs. She was then charged with capital murder under Ark. Code Ann. § 5-10-101(a)(1) (Supp. 1991).

Prior to trial, Jacobs filed a motion to suppress in which she alleged generally that the two photo lineups were conducted in a manner that violated her constitutional rights. At the trial that followed, the prosecutor asked Detective Mike Durham whether Sean Riggins had identified Jacobs from a photo lineup. The defense objected, but the objection was overruled. Detective Durham stated that Riggins had identified Jacobs from a photographic display. The court then changed its ruling on the objection and stated that it had been under the mistaken impression that Detective Durham was testifying that Riggins identified Jacobs from a physical lineup. The court admonished the jury to disregard the detective's testimony relating to the photospread identification. At the conclusion of Detective Durham's testimony, the court reversed its ruling once again and stated that there was no difference between Detective Durham's testifying that Riggins identified Jacobs from a photo lineup or from a physical lineup. The court instructed the jury that it could consider all of the detective's testimony, including that relating to Riggins's identification of Jacobs from a photo lineup.

At the end of the State's case, Jacobs moved for a directed

verdict due to insufficient evidence which was denied. Her defense which followed consisted of several alibi witnesses who placed her at a location other than the scene of the crime at the time of the shooting. She renewed her motion for a directed verdict at the close of her case which was also denied. The jury found Jacobs guilty of capital murder and sentenced her to life imprisonment without parole.

Jacobs's first claim of error is that there was insufficient evidence to support the verdict. We disagree. Our analysis for determining whether sufficient evidence exists to support a conviction has been made clear:

> A motion for directed verdict is a challenge to the sufficiency of the evidence. *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas* v. *State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach* v. *State*, 310 Ark. 119, 835 S.W.2d 852 (1992). In determining the sufficiency of the evidence, we review the proof 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).

Moore v. *State*, 315 Ark. 131, 134, 864 S.W.2d 863, 865 (1993); *see also Cleveland* v. *State*, 315 Ark. 91, 865 S.W.2d 285 (1993); *Friar* v. *State*, 313 Ark. 253, 854 S.W.2d 318 (1993); *Smith* v. *State*, 308 Ark. 390, 824 S.W.2d 838 (1992).

In the case at hand, in order to establish that Jacobs committed capital murder the State had the burden of showing that she committed or attempted to commit aggravated robbery, and that during the course of that robbery or attempt she caused the death of Kevin Gaddy. The State did so with the eyewitness testimony of Tony Davis and Sean Riggins as well as with the testimony of Detective Durham, who subsequently conducted the photographic lineup. The unequivocal testimony of Tony Davis, who identified Jacobs as the assailant, is sufficient on its own to sustain this conviction. *See Luckey* v. *State*, 302 Ark. 116, 787

S.W.2d 244 (1990); *Davis* v. *State*, 284 Ark. 557, 683 S.W.2d 926 (1985). Indeed, the testimony of Sean Riggins would be sufficient by itself to sustain this conviction. *Id.* Jacobs denied any participation in the murder and had alibi witnesses placing her in different dress and at a different location, which meant that the real question before the jury was the credibility of all of the witnesses. This was a matter for the jury to resolve, and it did so against Jacobs. *See Smith* v. *State*, 308 Ark. 390, 824 S.W.2d 838 (1992); *Hamm* v. *State*, 296 Ark. 385, 757 S.W.2d 932 (1988); *Urquhart* v. *State*, 273 Ark. 486, 621 S.W.2d 218 (1981). In sum, the evidence supporting conviction was clearly substantial.

Jacobs's other allegation on appeal is that the trial court erred in permitting Detective Durham to testify at trial about Davis's and Riggins's identification of her from a photospread. She claims that this testimony constituted hearsay and that there was no applicable exception to the bar against hearsay.

At the outset, it should be noted that Detective Durham only testified concerning *Riggins's* identification of Jacobs at the photographic lineup which means the potential error raised by Jacobs is limited only to the detective's testimony about Riggins. It is well established that hearsay testimony is generally inadmissible due to lack of trustworthiness. However, Detective Durham's testimony was not hearsay. *See* Ark. R. Evid. 801 (d)(1)(iii). This rule provides in relevant part:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if:
>
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is. . .
>
> (iii) one of identification of a person made after perceiving him.

Detective Durham's testimony was that Riggins identified Jacobs from a photo display. Riggins made this identification after seeing Jacobs shoot Gaddy. Riggins also testified at trial and identified Jacobs at trial. He was then cross-examined.

In *Hilton* v. *State*, 278 Ark. 259, 644 S.W.2d 932 (1983), this court resolved the issue raised by Jacobs. There, the appellant

argued that a police officer should not be allowed to testify that a convenience store clerk picked him out of a physical lineup. We stated:

> These contentions were recently considered and rejected in *Martin* v. *State*, 272 Ark. 376, 614 S.W.2d 512 (1981). In that case we held that under Rule 801(d)(1)(iii), Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979) a police officer could properly testify as to the existence and circumstances of an extrajudicial identification by witnesses if there is no defect in the identification procedure used, and if the person making the extrajudicial identification is present at trial and subject to cross-examination, recall, or is subject to being called as a hostile witness by the defense.

278 Ark. at 260, 644 S.W.2d at 932. The *Hilton* and *Martin* cases control the case before us. Here, Jacobs fails to establish or even to argue at trial that there was a defect in the process itself. As a result, since the witness, Sean Riggins, was present at trial, identified Jacobs at trial, and was subject to cross-examination, Detective Durham's testimony was properly admitted under Ark. R. Evid. 801(d)(1)(iii). The trial court's ruling was correct.

The record has been examined pursuant to Ark. Sup. Ct. R. 4-3(h), and there is no error that has been identified that would warrant reversal.

Affirmed.

CAMPBELL SOUP COMPANY *v.* Kathy Jo GATES

94-340 874 S.W.2d 373

Supreme Court of Arkansas
Opinion delivered April 26, 1994

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

Lightle, Beebe, Raney, Bell & Hudgins, by: *A. Watson Bell*, for appellee.

PER CURIAM. Appellant Campbell Soup Company petitions for a writ of certiorari to the court reporter of the White County Circuit Court, Allen Hill, directing that the transcript of the proceedings in *Kathy Jo Gates* v. *Campbell Soup Company*, et al., No. CIV 92-366, be completed and provided to the White County Circuit Clerk within thirty days. Campbell Soup obtained a court order extending the time to file the record in this cause until April 4, 1994, which date was the maximum length of time to lodge the record with the Supreme Court. Prior to April 4, 1994, Campbell Soup filed its petition for the writ of certiorari in this court to the court reporter, Allen Hill.

The court grants Campbell Soup's petition for writ of certiorari and directs Allen Hill to complete and provide the transcript forthwith to the White County Circuit Clerk.

The court forwards a copy of this per curiam to the Board of Certified Reporter Examiners for any action it may deem necessary under its rules.

Allen Bruce WOODS *v.* STATE of Arkansas

CR 94-311 873 S.W.2d 562

Supreme Court of Arkansas
Opinion delivered April 25, 1994

Paul Johnson, for appellant.

No response.

PER CURIAM. We treat this motion for rule on the clerk as a motion for a belated appeal. Appellant filed his notice of appeal on November 9, 1993, whereas the judgment was not entered until November 10, 1993. Under our rules the notice of appeal was of no effect. Ark. R. App. P. 4; *Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 249 (1991).

We will grant the motion for a belated appeal upon the admission of error by counsel and direct that a copy of this opinion be forwarded to the Committee on Professional Conduct.

Jeffrey GIBSON *v.* STATE of Arkansas

CR 93-686 875 S.W.2d 58

Supreme Court of Arkansas
Opinion delivered May 2, 1994

Stanley D. Rauls, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Acting Deputy Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. Appellant Jeffrey Gibson appeals his conviction of second-degree battery for causing physical injury to a law enforcement officer, arguing, in the main, that he did not know that the victim, Detective Mark Stafford, was a law enforcement officer and that Detective Stafford was not acting in the line of duty as a police officer in attempting to quell a disturbance at the Williamsburg Apartments. He also claims the trial court erred in permitting the testimony of others present as to their belief that Detective Stafford was a police officer and in instructing the jury on the theory of accomplice liability. We affirm.

Facts

In early August 1992, Jeffrey Gibson (Jeffrey), and his twin brother, James Gibson (James), were drinking at the Wrangler, a local bar in Little Rock. Catherine Bunn (Catherine) and Jennifer Gibbs (Jennifer), Jeffrey's former girlfriend, were also at the Wrangler, and when they noticed the Gibson brothers, they left the premises. Catherine drove Jennifer to Williamsburg Apartments. The Gibsons followed in their car. As Catherine pulled up to Jennifer's parked car, James and Jeffrey drove near them. Jennifer walked to her car, and Jeffrey followed her.

The remainder of the facts are disputed in part, but the events leading up to Detective Stafford's injuries appeared to be these. According to Catherine's testimony, she was worried about Jennifer, and, fearing a confrontation, she went to a nearby convenience store and asked Jeff Clark, Harry Janson, Tim Cohen, and Brian Pierce for help. The group went to the Williamsburg parking lot, and the young men waited while Catherine went over to Jennifer's car and asked if she was all right. Jennifer responded that she had asked Jeffrey, whom she thought to be drunk, to leave three times, but he had refused. When Catherine heard Jeffrey call Jennifer a "whore," she told him, "Don't you ever call a girl a whore," and he hit Catherine on the left ear with his fist.

Apparently witnessing Jeffrey's actions, Brian Pierce and the others came forward. James Gibson began to chase them, spraying them with mace. Brian Pierce grabbed a crowbar and began swinging at James Gibson, breaking James's arm.

In the midst of this brawl, Detective Mark Stafford, a Little Rock Police Officer who resided at the Williamsburg complex,[1] received a call to go to Napa Valley Apartments to do surveillance on a case. As he left his apartment, he noticed the group of young men and women fighting near the apartment-complex entrance. Dressed in shorts, t-shirt, and loafers and carrying an officer's flashlight, he approached the group, identified himself as a police officer, showed them his badge, and tried to calm things down. When Jeffrey accused Brian Pierce of breaking his broth-

[1]Although Stafford worked as a policeman, he also worked security for Williamsburg for a reduced rent. As a "courtesy officer" he helped, for example, with lockouts or loud music complaints.

er's arm, the two began to argue again, and Detective Stafford tried to separate them. The argument escalated, resulting in Detective Stafford being hit in the left arm with the crowbar as he grabbed the instrument and held on to it. Detective Stafford then succeeded in separating Brian from the Gibson twins and asked for identification. Someone asked who he was, and Detective Stafford told them again that he was a police officer. Jeffrey responded that he wanted a "real" police officer, an on-duty policeman with a real uniform, and that he wanted certain people arrested.

Still holding Brian up against a car, Detective Stafford asked again for IDs, and one of the men handed him his license. As Stafford returned the license, Jeffrey hit him on the top of the head. Stafford turned and grabbed Jeffrey by his shirt, and the two fell to the ground, with Jeffrey pinned under Stafford. Jeffrey's brother James came up from behind and hit Stafford over the head or back (with a crowbar, according to some witnesses, although this is disputed), and Detective Stafford, who possibly hit his head as he fell, blacked out. Jeffrey got out from underneath the officer, rolled him over, and hit him (also kicking him, according to some witnesses) repeatedly, and James, according to Catherine, started doing the same. Jennifer and Catherine ran to Jennifer's car and called 911 emergency services. As a result of the beating, Detective Stafford sustained a fractured jaw and has experienced some dizziness and trouble with memory.

Both Jeffrey and James Gibson were charged with second-degree battery for causing physical injury to a law enforcement officer while he was acting in the line of duty. James negotiated a plea agreement and entered a guilty plea. Jeffrey was convicted and sentenced to five years imprisonment, and he appeals.

Although Jeffrey specifies six assignments of error by the trial court, we consolidate them into three: (1) the trial court erred in denying Jeffrey's motion for directed verdict due to insufficient evidence to convict; (2) the trial court erred in permitting testimony about the knowledge of persons other than the defendant as to Detective Stafford being a police officer; and (3) the trial court erred in instructing the jury as to accomplice liability.

We first address Jeffrey's challenge to the sufficiency of the evidence prior to a review of any other asserted trial errors.

Ricks v. *State*, 316 Ark. 601, 873 S.W.2d 808 (1994); *Coleman* v. *State*, 315 Ark. 610, 869 S.W.2d 713 (1994); *Clark* v. *State*, 315 Ark. 602, 870 S.W.2d 372 (1994). On appeal, the evidence is reviewed in the light most favorable to the appellee, and the judgment will be affirmed if there is any substantial evidence to support the jury's verdict. *Green* v. *State*, 313 Ark. 87, 852 S.W.2d 110 (1993). Evidence is substantial when it is forceful enough to compel a conclusion one way or the other, beyond suspicion and conjecture. *Ricks, supra*. We need consider only that testimony which supports the verdict of guilty. *Thomas* v. *State*, 312 Ark. 158, 847 S.W.2d 695 (1993).

I. Sufficiency of the evidence

Jeffrey's challenge to the sufficiency of the evidence raises two questions: (1) whether the evidence supports the finding that Detective Stafford was acting as a law enforcement officer in the line of duty when he was injured; and (2) whether the evidence supports the finding that Jeffrey knew that Detective Stafford was a law enforcement officer when he struck and injured him. These issues were appropriately preserved in Jeffrey's motion for directed verdict, which consisted of the following contentions:

> Basically I would like to move for a directed verdict as to Count One, because there has been virtually no proof that Jeff Gibson knew Mark Stafford to be a law enforcement officer. In fact, one of their witnesses testified that he didn't believe him to be a law enforcement officer. All of the witnesses testified they were asking for the real police, not Mark Stafford.
>
> One element they have to prove is that he was acting in the scope of his authority. These witnesses testified that he was working private security, not as a law enforcement officer. They cannot meet those two critical elements in addition to intentionally or knowingly causing physical injury to Mark Stafford.

In order for the jury to have found Jeffrey guilty of second-degree battery in violation of Ark. Code Ann. § 5-13-202(a)(4)(A) (Repl. 1993), the State must have proven:

> (4) He intentionally or knowingly without legal justifi-

> cation causes physical injury to one he knows to be: (A) A law enforcement officer . . . while such officer . . . is acting in the line of duty . . .

In this regard, Jeffrey contends that he neither knew that Detective Stafford was a law enforcement officer nor that Stafford was actually working as such at the time of the affray.

On appeal, Jeffrey urges us to consider these issues as questions of statutory interpretation more so than as challenges to the sufficiency of the evidence. But Ark. Code Ann. § 5-13-202(a)(4)(A) (Repl. 1993) does not require interpretation because it is unambiguous.

Beginning with the question of whether Detective Stafford was acting as a law enforcement officer in the line of duty, we note that, pursuant to Ark. Code Ann. § 5-1-102, law enforcement officer means "any public servant vested by law with a duty to maintain public order or to make arrests for offenses." Police officers are required to "diligently and faithfully enforce at all times all such laws, ordinances, and regulations for the preservation of good order and the public welfare." Ark. Code Ann. § 14-52-203(b)(4) (1987). Officers have a statutory duty to "suppress all riots, disturbances and breaches of the peace." Ark. Code Ann. § 14-52-203(b)(1) (1987).

In accord with these statutes, we have held that a police officer is, "in a sense, on duty 24 hours a day, seven days a week and is not relieved of his obligation to preserve the peace while 'off duty.'" *Meyers* v. *State*, 253 Ark. 38, 46, 484 S.W.2d 334, 339 (1972). *See also Gritts* v. *State*, 315 Ark. 1, 864 S.W.2d 859 (1993); *Dilday* v. *State*, 300 Ark. 249, 778 S.W.2d 618 (1989) (deputy sheriffs hired by planned community are authorized by statute to discharge their duties throughout the county, even if outside the planned community; these duties include the authority to arrest). As the concurring opinion in *Dilday* noted, a police officer "has the official power of the office at all times." 300 Ark. at 255, 778 S.W.2d at 622.

The State put before the jury substantial evidence that the victim, Mark Stafford, was employed by the City of Little Rock as a police officer on August 7, 1992, the date on which Jeffrey Gibson assaulted Detective Stafford during the course of

the parking-lot brawl. Nowhere in his brief does Jeffrey assert that Mark Stafford was not employed as a police officer by the City of Little Rock. As in *Meyers*, Detective Stafford, precisely because of his status as a law enforcement officer, had a statutory duty to maintain public order and to diligently enforce, at all times, such laws as were necessary for the preservation of good order, and to "suppress all riots, disturbances, and breach of the peace" — twenty-four hours a day, seven days a week.

[redacted] Jeffrey claims that even though police officers may be on duty twenty-four hours a day, the State failed to prove that Detective Stafford was acting "in the line of duty." This assertion, however, brings us back to the challenge to the sufficiency of the evidence, and, as stated earlier, the evidence was more than sufficient to support the jury's finding that Stafford was acting in the line of duty. Jeffrey also claims that because Stafford failed to follow police department procedures while quelling the affray, he should not now be considered a "law enforcement officer . . . acting in the line of duty." Because this argument was not raised below, we will not consider it now.

With regard to whether Jeffrey knew that Detective Stafford was a police officer, we consider an Arkansas Court of Appeals decision helpful and instructive. In *Hubbard* v. *State*, 20 Ark. App. 146, 725 S.W.2d 579 (1987), the appellant was convicted of battery in the second degree for knowingly or intentionally causing physical injury to one he knows to be of sixty years of age or older. *See* Ark. Code Ann. § 5-13-202(a)(4)(C) (Repl.1993). In holding that the State did not meet its burden of proof in establishing that the appellant knew the victim's age, the court explained:

> The plain wording of [5-13-202] imparts that knowledge on the part of the defendant must be personal to him. The statute does not provide a substitute or explanatory equivalent. We believe the test is whether from the circumstances in the case at bar, appellant, not some other person or persons, knew that his victim was sixty years of age or older. A different result by this court could have been reached had the General Assembly defined "knows to be" in the above statute to include one who has information that would lead an ordinary, prudent person faced with similar information to believe that the information is fact.

Hubbard, 20 Ark. App. at 148, 725 S.W.2d at 580-581.

In applying the *Hubbard* rationale to the case at hand, we also consider an appropriate test to be whether or not, from the circumstances in the case before us, Jeffrey — and not some other person or persons — knew that his victim, Detective Stafford, was a law enforcement officer.

During his testimony, Detective Stafford explained his working situation and the fact that he was on his way to conduct surveillance in an unrelated case when he ran into the Gibsons and others in the Williamsburg parking lot. The State introduced a photocopy of Stafford's Little Rock detective's badge into evidence. Moreover, most of the group involved in the altercation testified that Stafford had shown them his badge and had told them that he was a police officer. As for whether Jeffrey knew that Detective Stafford was a police officer, the detective explained that he had gone to the site of the altercation and, noticing that it mainly involved three males (one young man with a broken arm, one with a crowbar in his hand, and one with cuts on his face), identified himself as a police officer and showed those present his badge. All of the State's witnesses verified this testimony. Even Jeffrey admitted on cross-examination that he had heard Stafford state that he was a Little Rock police officer, although he claims that he did not believe him. Catherine Bunn testified that before Jeffrey struck Detective Stafford, he looked him in the eye and said, "I don't care who you are mother f_____. I don't care if you are a police officer."

Resolution of these questions requires a determination of who is telling the truth, and credibility of witnesses is a matter for the jury. *Brown* v. *State*, 309 Ark. 503, 832 S.W.2d 477 (1992). Clearly, the evidence was more than sufficient for the jury to find that Jeffrey struck and caused physical injury to Detective Stafford, who was acting as a law enforcement officer in the line of duty, knowing that Stafford was acting as a police officer.

II. Testimony of others as to their belief that Detective Stafford was a police officer

As previously mentioned, the challenge to the sufficiency of the evidence raises a question of whether, at the time of the fight, Jeffrey knew that Mark Stafford was a police officer.

Claiming he did not, he submits that the trial court erred in permitting Harry Janson and Jeff Clark, two prosecution witnesses, to testify that they believed Detective Stafford to be a police officer on the night in question. This aspect of his argument is of no moment because his objection to Harry Janson's testimony was sustained, and he did not ask for an admonition to the jury. *See Hall* v. *State*, 314 Ark. 402, 862 S.W.2d 268 (1993). In addition, Jeffrey failed to state grounds or to obtain a specific ruling on his objection to Jeff Clark's testimony. In order to preserve an issue, the objection below must be specific enough to apprise the trial court of the particular error about which appellant complains. *Hooper* v. *State*, 311 Ark. 154, 842 S.W.2d 850 (1992).

The objections were also untimely. Prior to Janson's and Clark's testimony, Catherine Bunn gave her opinion, without objection, as to Stafford's status: "I believed he was a police officer and I treated him like one." Failure to object at the first opportunity waives any right to raise the point on appeal. *Laymon* v. *State*, 306 Ark. 377, 814 S.W.2d 901 (1991). An objection to inadmissible testimony should be made promptly. *Logan* v. *State*, 299 Ark. 266, 773 S.W.2d 413 (1989). Jeffrey claims that there was no need to object to Catherine's testimony because she saw Stafford identify himself and show his credentials. However, Jeff Clark also testified that he saw Detective Stafford flash his badge; thus, this distinction is flawed. We have held that where similar evidence was previously admitted without objection, the admission of later testimony on the same subject is not prejudicial. *Hooper, supra*. Similarly, the court has refused to find prejudicial error where the evidence erroneously admitted was merely cumulative. *Id; Bussard* v. *State*, 295 Ark. 72, 747 S.W.2d 71 (1988); *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986), *cert. denied* 484 U.S. 872 (1987) and 490 U.S. 1075 (1989).

III. Accomplice liability jury instruction

For his last allegation of error, Jeffrey claims that the trial court erred in instructing the jury on accomplice liability. This objection was properly made and preserved, but the argument is meritless.

According to Ark. Code Ann. § 5-2-403 (Repl. 1993), an individual is liable for the commission of a criminal offense

as an accomplice if he, with the purpose of promoting or facilitating the commission of the offense, either solicits, advises, encourages, or coerces another person to commit the offense, or aids, agrees to aid or attempts to aid the other person in planning or committing the offense. *See Vickers* v. *State*, 313 Ark. 64, 852 S.W.2d 787 (1993). A person need not take an active part in an offense to be convicted of such if the person accompanied the person or persons who actually committed the offense and assisted in such commission. *Henry* v. *State*, 278 Ark. 478, 647 S.W.2d 419, *cert. denied* 464 U.S. 835 (1983).

Several witnesses testified that *both* brothers acted in punching and perhaps kicking Detective Stafford. Catherine Bunn claimed that James Gibson hit Stafford over the head with the crowbar and that, at that point, Jeffrey got out from beneath Stafford and began hitting and kicking him, and that James Gibson started doing the same. Tim Cohen testified that Jeffrey got on top of Stafford and hit him in the face after James hit the officer in the back and knocked him out. Harry Janson's testimony was essentially the same as Catherine's; he stated that both Jeffrey and James kicked and punched Stafford in the face. Under the circumstances, we hold that the facts support the accomplice jury instruction.

Affirmed.

Luther MARTIN *v.* STATE of Arkansas

CR 93-1314 875 S.W.2d 81

Supreme Court of Arkansas
Opinion delivered May 2, 1994

Jim Pedigo, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. Appellant Luther Martin was sentenced to forty years imprisonment in the Department of Correction for aggravated robbery of a convenience store in Hope, Arkansas. He raises three arguments for reversal of his conviction: (1) the trial court erred in permitting the prosecutor to twice amend its original information prior to actual trial and in denying Martin's request for a continuance and a new lawyer in light of the fact that the court granted the prosecution's second request to amend; (2) the trial court erred in admitting Detective Bill Otis's testimony as to information received from a third party during his investigation; and (3) the trial court erred in denying his motion for directed verdict.

We first address Martin's challenge to the sufficiency of the evidence prior to a review of his other asserted trial errors. *Coleman* v. *State*, 315 Ark. 610, 869 S.W.2d 713 (1994); *Clark* v. *State*, 315 Ark. 602, 870 S.W.2d 372 (1994); *Ricks* v. *State*, 316 Ark. 601, 873 S.W.2d 808 (1994). On appeal, the evidence is reviewed in the light most favorable to the appellee, and the judgment will be affirmed if there is any substantial evidence to support the jury's verdict. *Green* v. *State*, 313 Ark. 87, 852 S.W.2d 110 (1993). Evidence is substantial when it is forceful enough to compel a conclusion one way or the other, beyond suspicion and conjecture. *Ricks, supra.* We need consider only that testimony which supports the verdict of guilty. *Thomas* v. *State*, 312 Ark. 158, 847 S.W.2d 695 (1993).

I. Sufficiency of the evidence

Reviewing the evidence in the light most favorable to the State, as appellee, we hold that the evidence was more than sufficient to uphold Martin's conviction.

According to the testimony of Mary Kay Taylor, on December 26, 1992, she was working the 3:00 p.m. to 11:00 p.m. shift at the E-Z Mart convenience store in Hope, Arkansas. At about 7:40 p.m., a man, whom she described to police as black, five feet, nine inches tall, with a mustache, hair close to his head, a brown jacket, dark pants, and a plaid shirt, came into the store. He brought a Pepsi to the counter, got a dollar from his pocket, and placed it on the counter. He then put his right hand in his pocket, "as if he had a gun," and said, "Freeze or you're dead." She did freeze, and the robber reached with his other hand over the counter, grabbed all the money out of each slot of the cash register, and headed for the door. As Ms. Taylor moved toward the phone, the robber said, "I told you not to move. I'll kill you." Frightened, she stopped until he went out the door and around the corner. Once he was out of sight, Ms. Taylor called the police. When they arrived, she recounted the events of the evening, emphasizing that while he removed the money, he kept his hand in his pocket as though holding a gun; it was her insistently stated belief that he had a gun.

Sergeant Stan Bailey, a member of the Hope Police Department, testified that he was working as patrol supervisor when he received a radio dispatch shortly after the robbery to look for a black male, five feet, nine inches to five feet, ten inches in height, and weighing 140 to 150 pounds. About seven blocks from the E-Z Mart, the sergeant saw a dirty, "beat up" Ford pickup truck parked on the street. The missing glass window on the driver's side had been replaced with a piece of plastic. A black male was sitting in the passenger side of the truck accompanied by a black female who was standing beside the vehicle. Sergeant Bailey approached them and asked them if they had seen anyone fitting the description he had just received, to which they responded, "No." Later, Sergeant Bailey heard that the robber was supposed to be in an old pickup with plastic on the driver's window. At that point, he contacted Officer Zeke, told him about his contact with the vehicle, and asked him to go to the Shover Village apartment complex to attempt to locate the vehicle.

Acting on the information he received from Sergeant Bailey, Officer Zeke drove to Shover Village, where he spotted a pickup matching the description of the truck. Because the registration check on the truck revealed that it was registered to a

Jewel Muldrew, a man for whom warrants were outstanding, Officer Zeke initiated a traffic stop and found that the driver was Martin. Officer Zeke told him that there were active warrants out for the car's owner and that a truck matching that description had possibly been involved in an aggravated robbery. He did not arrest Martin, however, because he did not have a warrant for him.

Detective Gary Wayne Billings explained that after Officer Zeke informed him about stopping Martin, he obtained the photo spread which included Martin's photograph and took it to the E-Z Mart, where Ms. Taylor identified Martin. Later that evening, Sergeant Bailey examined the photo spread and also identified Martin. Based, in part, on Ms. Taylor's and Sergeant Bailey's identification of the suspect, a warrant was issued for Martin's arrest, and he was picked up.

The photo spread was introduced into evidence. Officer Bailey's testimony placing Martin near the scene of the robbery shortly after it occurred and Ms. Taylor's unequivocal testimony identifying Martin as the culprit are sufficient to sustain the appellant's conviction. *Luckey* v. *State*, 302 Ark. 116, 787 S.W.2d 244 (1990).

II. Amendment of informations

Martin's next argument concerning error on the part of the trial court is premised on the fact that the court permitted the prosecutor, over Martin's objection, to amend the charging instrument, an information, near the beginning of trial and again before the case had been submitted to the jury, and because the trial court refused to grant him a continuance after the second amendment so that he could get a new attorney.

An examination of the record of trial reflects that a felony information was filed with the circuit clerk on December 28, 1992, charging Martin with aggravated robbery pursuant to Ark. Code Ann. § 5-12-103, stating that:

> With the purpose of committing a theft, he was armed with a deadly weapon, and knowingly took or exercised unauthorized control over the property of another person, with the purpose of depriving the owner thereof . . .

The record further reflects the filing of a supporting affidavit for warrant of arrest, dated December 27, 1992, which alleged that:

> With the purpose of committing a felony *or misdemeanor* theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another, while being armed with a deadly weapon or *representing by word or conduct that he is so armed.*

(Emphasis added.) In addition, the affidavit spells out details constituting reasonable cause including the fact that "the suspect simulated a weapon in his right coat pocket while he reached into the cash register. . . ."

On the day of Martin's trial, before voir dire began, the prosecutor asked permission to amend the information. In support of his request, he alluded to the original information and its supporting affidavit:

> The affidavit which was approved by the Honorable Jim Gunter when the warrant was issued back on 12/27 of 1992. The language in the affidavit for probable cause had the correct language which correctly cites 5-12-103 Arkansas Code Annotated which is aggravated robbery statute. The only thing in the amended information that is changed is being armed with a deadly weapon or representing by word or *conduct that he was so armed.* That's the only change that has been made, so certainly there could not be prejudice and we furnished both the affidavits to Mr. Pedigo and it's been with him ever since we completed discovery, so I don't think there is any surprise or prejudice to the Defendant and we would ask to go forward, and of course the Court's instructions would include the language also and that's why we amended it.

Defense counsel objected but acknowledged that he had received a copy of the amended information the day prior to trial. The judge overruled his objection, finding that the amendment was "just to the extent that it conforms with the probable cause affidavit that has been on file. . . ."

A short time later, after the jury panel had been sworn and the first amended information had been read, the prosecutor asked

the trial court to allow a second amendment to the charging instrument, explaining that the information should not read, "with the purpose of committing a felony," it should state, "with the purpose of committing a felony *or a misdemeanor theft.*" Counselor Pedigo asked for a recess to discuss this change with his client, Martin. After the recess, the trial court asked Martin if his attorney had talked with him and if he understood the amendment to the felony information. Martin responded that he understood and then asked for a continuance to "find my own lawyer because they indicted me on one charge and he ain't been representing me right." Explaining that Mr. Pedigo is a capable attorney, the trial judge denied his motion for continuance, stating:

> [T]he Court does recognize that the second instrument or document in the file which is an affidavit for warrant of arrest executed by Judge Jim Gunter on 12/27 of '92, at which time Luther Lee Martin was the individual sought in the affidavit and for aggravated robbery and it is alleged that on or about the 26th day of December 1992, committed by and being the Defendant, with the purpose of committing a felony or misdemeanor theft, and at that time — that is the only amendment sought by the State at this time and it does not in any way prejudice this Defendant's right to a fair trial.

Thereafter, the trial judge instructed the jury as to the second amended information, and Martin proceeded to trial.

Martin's argument requires two determinations: whether the court erred (1) in permitting either amendment to the information, and (2) in denying his request for a continuance.

Pursuant to Ark. Code Ann. § 16-85-407 (1987), the State may amend an information up to a point after the jury has been sworn but before the case has been submitted to the jury as long as the amendment does not (1) change the nature or degree of the crime charged or (2) if the accused is not surprised. *Kilgore* v. *State*, 313 Ark. 198, 852 S.W.2d 810 (1993); *Wilson* v. *State*, 286 Ark. 430, 692 S.W.2d 620 (1985). The amendments satisfied these criteria. As the trial court explained, the amendments merely tailored the information to the affidavit for warrant of arrest, the original information's supporting document, and

did not change the original charge of aggravated robbery against Martin. The facts constituting reasonable cause as provided in the affidavit clearly describe the factual allegations against Martin. Thus, from the date of his arrest, he and his counsel were on notice as to the specifics of the charges against him, and he cannot now claim to be surprised by either amendment.

Martin also contends that the trial court erred in refusing to grant him a continuance in order to engage a new attorney because of the changes in the information. In support of this contention, he complains that the court granted a continuance to the State two days prior to trial because their primary witness was not available. Trial courts are not required to grant continuances as a matter of *quid pro quo.*

The denial of a motion for continuance is within the sound discretion of the trial court, and the trial court's ruling will be reversed only if there is an abuse of discretion. *Kilgore, supra.* The burden is on Martin to show an abuse of discretion. *Id.* He must also demonstrate prejudice before we will consider the trial court's denial of a continuance as an abuse of discretion which requires reversal. *Finch* v. *State*, 262 Ark. 313, 556 S.W.2d 434 (1977).

There was no showing that Martin or his counsel were surprised by the wording changes made in the amendments to the information or that Martin was not receiving adequate representation by attorney Pedigo. Under the circumstances, Martin has failed to prove abuse of discretion.

III. Admission of Officer Otis's testimony

Next, Martin contends that the trial court erred in allowing Officer Bill Otis's testimony regarding information he received from an alleged informant because this information was inadmissible hearsay. In this regard, Officer Otis stated that he got a description of the robbery suspect from Ms. Taylor. Then as he began to say, "I developed some information that the suspect left the store —" Martin's counsel objected on hearsay grounds. Mr. Pedigo was permitted to voir dire the witness, and Officer Otis explained that when he said "developed information," he meant that he received information from one who wished to remain anonymous. Mr. Pedigo renewed his hearsay objection, and the prosecutor responded:

> The State agrees it's hearsay, and of course that's why we have rules of evidence in this court and there are exceptions to that hearsay rule and he's allowed to tell them if he relied on it and I think that's what he is fixing to say that he relied on it and acted on it.

The Court overruled the objection, and Officer Otis continued his statement, explaining that he learned that the subject had left the store in a dark blue, dirty, Ford pickup, with the driver's window covered with plastic rather than glass. In reliance on this information, he broadcast a description of the truck to other units in the area. Because of this information, Sergeant Bailey was alerted that the truck he had seen on the street matched the description of the perpetrator's vehicle, causing him to inform Officer Zeke to be on the lookout for the truck.

Martin submits that in denying his hearsay objection, the trial court violated his rights under the Sixth Amendment to confront his accusers because Officer Otis's statement does not fall within any of the hearsay exceptions provided in Rule 803. Although he did argue hearsay below, he did not raise any constitutional objections. We have repeatedly held that we will not consider constitutional issues raised for the first time on appeal. *Whitson* v. *State*, 314 Ark. 458, 863 S.W.2d 794 (1993); *Green* v. *State*, 313 Ark. 87, 852 S.W.2d 110 (1993); *Friar* v. *State*, 313 Ark. 253, 854 S.W.2d 318 (1993). We, therefore, address this issue in a limited manner.

An out-of-court statement is not hearsay if it is offered to show the basis of action. A.R.E. Rule 801(c); *Bliss* v. *State*, 282 Ark. 315, 668 S.W.2d 936 (1984). Officer Otis's testimony was given in order to explain why Sergeant Bailey instructed Zeke to locate the truck and determine the identity of the driver and why Martin's photograph was placed in a lineup to show to the victim. *See Dandridge* v. *State*, 292 Ark. 40, 727 S.W.2d 851 (1987). Because his testimony was provided in order to show the "basis of action," we hold that the trial court did not err in overruling Martin's hearsay objection.

Affirmed.

Robert B. BROWN *v.* STATE of Arkansas

CR 92-304 875 S.W.2d 828

Supreme Court of Arkansas
Opinion delivered May 2, 1994
[Rehearing denied April 18, 1994.*]

Corbin, J., not participating.

[redacted]

Diana M. Maulding, for appellant.

Robert B. Brown, pro se.

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

ROBERT H. DUDLEY, Justice. A jury found appellant guilty of first degree terroristic threatening, attempted first degree murder, and being a felon in possession of a firearm. The trial court ordered appellant's sentences to run consecutively. The court of appeals certified the case to this court. We affirm the judgment of convictions.

Appellant makes eleven assignments of error by the trial court. The first three assignments contain a number of sub-points, but the gravamen of each is that the trial court erred in refusing to grant his motion for a directed verdict. We do not address the merits of the arguments.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. We have repeatedly written that a challenge to the sufficiency of the evidence requires the moving party to apprise the trial court of the specific basis on which the motion is made. *See, e.g., Brown* v. *State*. 315 Ark. 466, 869 S.W.2d 9 (1994); *Middleton* v. *State*, 311 Ark. 307, 842 S.W.2d 434 (1992); *Pilcher* v. *State*, 303 Ark. 335, 796 S.W.2d 845 (1990); and *Taylor* v. *State*, 299 Ark. 123, 771 S.W.2d 742 (1989). "A directed verdict motion must be a 'specific motion to apprise the trial court of the particular point raised.'" *Patrick* v. *State*, 314 Ark. 285, 287, 862 S.W.2d 239, 241 (1993) (quoting *Middleton* v. *State*, 311 Ark. 307, 309, 842 S.W.2d 434, 435 (1992)). The reasoning underlying our holdings is that when specific grounds are stated and the absent proof is pinpointed, the trial court can either grant the motion, or, if justice requires, allow the State to reopen its case and supply the missing proof. *Standridge* v. *City of Hot Springs*, 271 Ark. 754, 610 S.W.2d 574 (1981).

Appellant's abstract reflects that at the conclusion of the State's case he "[m]oved for a directed verdict," which was denied, and at the end of the case he "renewed motion for a directed verdict," which was denied. Appellant's record on appeal is limited to that which is abstracted. *Porchia* v. *State*, 306 Ark. 443, 815 S.W.2d 926 (1991). Thus, we do not know whether the motion to the trial court applied to one, two, or all three of the charges, and we do not know the specific grounds of the motion or motions.

In his arguments to this court, appellant contends that the trial court erred in refusing to grant a directed verdict on the felon in possession of a firearm count because Ark. Code Ann. § 5-73-103 (Repl. 1993) does not define "felony" or "felon" when the conviction occurred out of state. He argues that the trial court erred in refusing to grant a directed verdict on the terroristic threatening count because there was no proof that he "filled [the two police officers] with intense fright." He argues that the trial court erred in refusing to grant a directed verdict on the attempted first degree murder count because the State failed to prove the "requisite intent." Not one of these specific arguments was raised at the trial court level, and we will not reach them for the first time on appeal.

Prior to trial, the trial court ordered that appellant be committed to the State Hospital for observation and examination. He was examined and the hospital staff's report stated that appellant had the capacity to effectively cooperate with his attorney and to understand the nature of the proceedings. On the first day of trial, appellant moved for a second mental examination. The trial court denied the motion, and appellant assigns the ruling as error. We summarily dispose of the argument. The State is not required to pay for a defendant to shop from doctor to doctor until he finds one who will declare him incompetent to proceed with his trial. *See* v. *State*, 296 Ark. 498, 757 S.W.2d 947 (1988); *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986); *Andrews* v. *State*, 265 Ark. 390, 578 S.W.2d 585 (1979). This is in accord with guidance from the United States Supreme Court. *See Ake* v. *Oklahoma*, 470 U.S. 68 (1985).

Appellant argues that the mental examination did not comply with the mandates of Ark. Code Ann. § 5-2-305 (Repl.

1993) because he was examined by a psychologist rather than a psychiatrist. We do not reach the merits of the argument because it was not raised below. In a related vein, appellant argues that the evidence was insufficient to prove that he was sane when he committed the offenses, and that he should have been acquitted by reason of insanity or mental defect. The defense of insanity is an affirmative defense, and the defendant bears the burden of proof by a preponderance of the evidence. *Davasher* v. *State*, 308 Ark. 154, 823 S.W.2d 863 (1992). Thus, appellant is arguing that the trial court should have granted a directed verdict for him on his affirmative defense. Again, a defendant must specifically preserve such issues by moving for a directed verdict at trial. Appellant did not move for a directed verdict on the basis of insanity or mental disease or defect, and he cannot raise the issue for the first time on appeal. *Wilson* v. *State*, 277 Ark. 43, 639 S.W.2d 47 (1982).

Appellant additionally argues that the convictions should be reversed because the trial court did not admonish the jury to disregard a comment made by a witness and did not admonish the jury to disregard a question by a deputy prosecutor. The argument is procedurally barred, as appellant did not ask the trial court for an admonitory instruction on either the comment or the question. *See Novak* v. *State*, 287 Ark. 506, 625 S.W.2d 518 (1985). The failure to give such an instruction is not prejudicial error in the absence of a request. *Miller* v. *State*, 269 Ark. 341, 605 S.W.2d 430 (1989).

The trial court sustained appellant's objection to both the comment and the question. Appellant acknowledges that he did not ask for admonitions after the objections were sustained, but contends that the trial court had a duty to "deal with the aftermath of an upheld objection" by admonishing the jury on its own motion. The argument is without merit because we do not impose a duty upon a trial court to give an admonitory instruction or limiting instruction in the absence of a request for such instruction. *See Miller* v. *State*, 269 Ark. 341, 605 S.W.2d 430 (1989).

One of appellant's theories of defense at trial was justification. The jury was instructed that, as a matter of law, one is not justified in using deadly physical force if he knows he can retreat with complete safety. One of the State's witnesses, over

appellant's objection, testified that appellant could have retreated safely from the premises but instead came back to the scene a second time and fired a weapon. Appellant argues that the trial court erred in overruling his objection. Rule 701 of the Arkansas Rules of Evidence allows admission of opinion testimony by lay witnesses if the opinions or inferences are "(1) [r]ationally based upon the opinion of the witness and (2) [h]elpful to a clear understanding of his testimony or the determination of a fact in issue." *Id.* We have said that the requirements of Rule 701 are satisfied if the opinion or inference is one which a normal person would form on the basis of the observed facts, but if an opinion without the underlying facts would be misleading, then the objection should be sustained. *See Carton* v. *Missouri Pac. R.R.*, 303 Ark. 568, 571-72, 798 S.W.2d 674, 675 (1990) (quoting 3 Jack B. Weinstein & Margaret M. Berger, *Weinstein's Evidence* § 701[02], at 701-11, -12, -13 (1987)). Here, the testimony met the criteria of Rule 701. It was helpful to the jury in factually deciding whether appellant acted with justification, and the record shows that the witness had a rational basis for his opinion.

The State, in order to prove one of the elements of the charge of felon in possession of a firearm, offered a copy of a judgment of conviction from South Dakota that showed appellant had received a prior sentence of imprisonment. The foreign judgment did not reflect whether the crime was a felony, but it did reflect that the sentence was for four years. This information gave the jury an indication of how serious the violation was in South Dakota. Appellant argues that the trial court committed reversible error in refusing to excise that part of the judgment that showed the length of the sentence. We have said that a jury, in a felon in possession of a firearm case, is entitled to know the nature and the circumstances surrounding the prior conviction in order to appropriately determine the sentence in the pending case. *Combs* v. *State*, 270 Ark. 496, 606 S.W.2d 61 (1980). If the seriousness of the circumstances surrounding the prior offense were not to be considered in fixing the sentence, the General Assembly easily could have provided a definite term of imprisonment upon conviction of a felon in possession of a firearm rather than leaving it to the jury to fix any sentence not in excess of six years. In this case, since the judgment did not reflect whether offense was a felony, the term given for the prior conviction was

the main indicator of the seriousness of the conviction for "burning within a structure where a person was lawfully confined." Consequently, the trial court did not abuse its discretion in refusing to excise the length of the sentence.

Appellant argues that the trial court erred in ordering his sentences to run consecutively. It is the province of the trial court to determine whether sentences should be run concurrently or consecutively. *Acklin* v. *State*, 270 Ark. 879, 606 S.W.2d 594 (1980). We have remanded for resentencing when it was apparent that the trial judge did not exercise discretion. *See Wing* v. *State*, 286 Ark. 494, 696 S.W.2d 311 (1985). In this case the trial court plainly exercised its discretion. In pronouncing the sentence, the trial court stated that the jury had not imposed a harsh enough sentence for the attempted first degree murder, and, as a result, the sentences would be made to run consecutively.

For his eleventh and final assignment, appellant contends the trial court erred in overruling his objection to a statement made by the prosecutor in closing argument. The prosecutor said that the only reasons appellant did not kill one of the victims was that he was drunk and shooting at a spinning target and that "[h]e [had] a pretty short barrel on [his] pistol and I would submit to you, the shorter the barrel, the harder it is to hit what you're aiming at." The appellant contends the quoted sentence contained facts not in evidence.

A trial court has wide discretion in controlling, supervising, and determining the propriety of counsel's arguments, and we will not reverse absent a showing of manifest abuse. *Hoover* v. *State*, 262 Ark. 856, 562 S.W.2d 55 (1978). Further, some leeway must be given in closing arguments, and counsel may argue every plausible inference which could be drawn from the evidence. *Abraham* v. *State*, 274 Ark. 506, 625 S.W.2d 518 (1981). The prosecutor's remarks were not an unreasonable inference from the evidence. Thus, the trial court did not abuse its wide discretion.

Affirmed.

Ollis X. HEARD *v.* STATE of Arkansas

CR 93-1261 876 S.W.2d 231

Supreme Court of Arkansas
Opinion delivered May 2, 1994

Bryant & Henry, by: *Craig L. Henry*, for appellant.

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

ROBERT H. DUDLEY, Justice. Ollis X. Heard was convicted of possession of a controlled substance with intent to deliver. He was sentenced to life imprisonment because he is a habitual offender. We affirm the judgment of conviction.

Appellant first challenges the sufficiency of the evidence. The test for determining sufficiency of the evidence is whether the verdict is supported by substantial evidence. *Brown* v. *State*, 315 Ark. 466, 869 S.W.2d 9 (1994). Substantial evidence is evidence

forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Thomas* v. *State*, 312 Ark. 158, 847 S.W.2d 695 (1993). In determining the sufficiency of the evidence, we review the proof in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Moore* v. *State*, 315 Ark. 131, 864 S.W.2d 863 (1993). The proof in this case meets the test.

Officer Allen Stovall of the Bi-State Narcotics Task Force testified that he had been investigating the use and sale of narcotics at a house located at #16 Ferguson Street in Texarkana, Arkansas. He received information that cocaine was being used and sold at that house and obtained a warrant to search the premises. In the affidavit for the search warrant, Stovall identified the house as appellant's residence. He testified that he and Officer Jerry Brown of the Texarkana, Arkansas Police Department went there to execute the search warrant and observed that the main front door was open and that only a screen door was closed. As Officer Brown stepped onto the front porch, Officer Stovall saw appellant begin to run toward the back of the house. Both officers chased appellant to a bedroom where Officer Stovall saw appellant sling a bottle under a bed. He looked under the bed and retrieved a bottle that contained sixteen off-white rocks of a substance that appeared to be cocaine.

Officer Brown testified to most of the same facts. He testified that he and Officer Stovall caught appellant in the bedroom, where appellant was lying on the bed with his arm underneath. Appellant was the only other person in the bedroom. A woman and two children were also in the house, but they remained in the living room. The State put on additional testimony that established that the substance in the bottle was cocaine and weighed 1.64 grams.

Appellant contends that the foregoing evidence is insufficient to establish possession of the cocaine because it was not found on his person, because there were other people in the residence, and because he had no proprietary interest in the house. It is not necessary for the State to prove an accused physically held the contraband in order to sustain a conviction if the location of the contraband was such that it can be said to be under the dominion and control of the accused. *Crossley* v. *State*, 304

Ark. 378, 802 S.W.2d 459 (1991). The State need only prove constructive possession, and constructive possession may be implied where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. *Id.* An accused's suspicious behavior coupled with proximity with the contraband is clearly indicative of possession. *Id.*

Here, appellant fled when he saw the police on the front porch. He was found in the bedroom on a bed with his hand underneath the bed, and was making a slinging motion with the hand. A bottle containing crack cocaine was located underneath the bed. He was alone in the room. The suspicious behavior coupled with the cocaine being found in an area immediately and exclusively accessible to appellant constitutes substantial evidence of possession of cocaine.

The fact that appellant had no proprietary interest in the house is of no consequence. He was there so frequently the officers thought it was his residence. He was seen there prior to the arrival of the police and was still there when the police arrived.

Appellant next challenges the denial of his motion to suppress the evidence seized in the search of the house. He contends the affidavit was insufficient to establish probable cause because it did not state the date the criminal activity occurred within the house, and because it did not contain sufficient indicia of the reliability of the confidential informant. Appellant had standing to raise the issue because he stayed at the house often enough for the police to believe it was his residence. The United States Supreme Court has pronounced a *per se* rule that one's status as an overnight guest is, alone, enough to show that one had an expectation of privacy in the home that society is prepared to recognize as reasonable. *Minnesota* v. *Olson*, 459 U.S. 91 (1990).

Appellant argues that the warrant was defective because the affidavit failed to state a specific time that the drugs were in the house. The argument is factually incorrect. The affidavit for the warrant states that "there is *now* being concealed . . . cocaine" at the house. Thus, the affidavit did sufficiently indicate a time frame for the illegal activity.

Appellant also argues that the warrant was defective

because the affidavit failed to state facts bearing on the informant's reliability. It states that "during this investigation, affiant [Officer Stovall] received information from a person proven to be reliable on several occasions, who has observed cocaine being possessed, used, and sold at the above described residence." In *State* v. *Mosley*, 313 Ark. 616, 856 S.W.2d 623 (1993), we adopted the totality-of-the-circumstances analysis as follows:

> In reviewing a trial judge's ruling on a motion to suppress, we make an independent determination based upon the totality of the circumstances, and we reverse only if the ruling is clearly against the preponderance of the evidence. *Illinois* v. *Gates*, 462 U.S. 213 (1983); *State* v. *Blevins*, 304 Ark. 388, 802 S.W.2d 465 (1991). We view the evidence in the light most favorable to the appellee. *State* v. *Villines*, 304 Ark. 128, 801 S.W.2d 29 (1990).

Mosley, 313 Ark. at 618-19, 856 S.W.2d at 624 (1993). On March 1, 1990, by per curiam opinion, we modified Rule 13.1 of our Arkansas Rules of Criminal Procedure to adopt the totality of the circumstances analysis.

In *Mosley* we went on to follow the totality-of-the-circumstances analysis enunciated by the United States Supreme Court in *Illinois* v. *Gates*, 462 U.S. 213 (1983):

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying the hearsay information, 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 magistrate had a "substantial basis for. . .conclud[ing]" that probable cause existed.

Mosley, 313 Ark. at 619, 856 S.W.2d at 624.

In interpreting the requirements of the rule and the totality-of-the-circumstances test, we have said it is no longer a fatal defect if an affidavit fails to establish the veracity of the informant "if the affidavit viewed as a whole provides a substantial basis for a finding of reasonable cause to believe that things sub-

ject to seizure will be found in a particular place." *Mosley*, 313 Ark. at 622, 856 S.W.2d at 626. The affidavit in this case, when viewed as a whole, provided a substantial basis for cause to believe that the cocaine would be found at the house. Thus, the trial court did not err in its refusal to suppress the evidence.

Appellant next argues that the trial court erred in considering its docket sheet to determine whether appellant had been represented by counsel when previously convicted. The Attorney General agrees with appellant's argument and concedes reversible error. We hold that the trial court did not commit reversible error by considering its own docket book. The argument comes about in the following manner. After the jury found appellant guilty, the bifurcated trial proceeded into the sentencing phase. Procedurally, at this phase of a trial, the trial court, out of the hearing of the jury, is to hear evidence of the guilty person's previous felony convictions and thereby determine the number of prior felony convictions. The trial court then instructs the jury as to the number of previous convictions and the appropriate statutory sentencing range. The jury retires and sets the appropriate sentence. Ark. Code Ann. § 5-4-502 (Repl. 1993). This point of appeal concerns the method of proof of appellant's prior convictions.

Before the State can use a prior conviction to enhance punishment it must demonstrate that the defendant was either represented by counsel or waived his right to counsel. *Lovell* v. *State*, 283 Ark. 425, 681 S.W.2d 395 (1984). In this case the State offered certified copies of previous convictions of fourteen felonies in the Circuit Court of Miller County, the same court in which this case was pending, and another conviction in the Circuit Court of Arkansas County. Appellant did not contest the validity of the conviction from Arkansas County. However, he argued that the certified copies of the convictions from Miller County did not reflect that he was represented by counsel and therefore could not be counted as previous convictions. The certified copies of the convictions do not in fact show that appellant was represented by counsel. To cure the defect the State asked the trial court to examine the entries for the cases in its docket book. Appellant objected because he had not been supplied with the docket sheets. The trial court examined the sheets from its own docket book and ruled that it reflected that appellant was represented in each of the prior convictions. Appellant subsequently objected to the trial court

using its docket book because the entries on the individual sheets were not authenticated. The State confesses error because the sheets were not authenticated.

The method of proof of previous convictions is as follows:

> (a) A previous conviction or finding of guilt of a felony may be proved by *any evidence* that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty.
>
> (b) The following are sufficient to support a finding of a prior conviction or finding of guilt:
>
> (1) A certified copy of the record of a previous conviction or finding of guilt by a court of record;
>
> (2) A certificate of the warden or other chief officer of a penal institution of this state or of another jurisdiction, containing the name and fingerprints of the defendant as they appear in the records of his office; or
>
> (3) A certificate of the chief custodian of the records of the United States Department of Justice, containing the name and fingerprints of the defendant as they appear in the records of his office.

Ark. Code Ann. § 5-4-504 (Repl. 1993).

The original commentary to the section provides: "The Commission wished to make clear the fact that the state may prove a previous felony conviction by means other than introduction of the certificates described in the statute." Ark. Code Ann. § 5-4-504 (Repl. 1993) original commentary.

In our first case interpreting this statute we agreed with the interpretation suggested by the commission. In that case, *Thompson* v. *State*, 252 Ark. 1, 477 S.W.2d 469 (1972), the defendant was charged and convicted in Miller County, the same venue as the case at bar, and we held that the official records of Miller County were sufficient to prove previous felony convictions. They were neither certified nor authenticated. We pointed out that they were the original records, not copies that needed to be certified, and were identified as such by the clerks. In *Reeves* v. *State*, 263 Ark. 227, 564 S.W.2d 503, *cert. denied*, 439 U.S. 964 (1978),

we held that proof of previous convictions was not inadmissible as hearsay where the circuit clerk's testimony about the convictions was based on docket entries, and there was no suggestion that the docket entries did not correctly reflect the court's judgments. We wrote: "Here there is no suggestion whatever that the docket entries did not correctly reflect the court's judgments in the earlier cases in which Reeves was convicted. We find no sound basis for saying that the trial judge's ruling was wrong." *Id.* at 231-32, 564 S.W.2d at 505.

The same reasoning applies in the case at bar. The docket book was the original, not a copy, and, therefore, there was no reason whatever to certify or authenticate that it was an exact copy. It was the docket book of the Circuit Court of Miller County, and it was being examined by the Circuit Court of Miller County for its own use. The docket sheets were not formally introduced into evidence for the jury to examine. There is nothing to prevent a Circuit Court from examining the entries of its own docket book. There was no doubt that the documents were what its proponent claimed. To this extent they are self-executing. *See* A.R.E. Rule 901 (a). The book was not hearsay. A.R.E. Rule 803 (8). Trial courts are frequently required to examine their own docket books to determine various matters. For example, the docket entries are often used by circuit courts to determine whether a speedy trial has been afforded. In such cases, we have said that the judge's docket entry is competent, but rebuttable, evidence of the facts recited. *Prout* v. *State*, 256 Ark. 723, 510 S.W.2d 291 (1974).

The Attorney General's confession of error is based upon his reading of our case of *Stewart* v. *State*, 300 Ark. 147, 777 S.W.2d 844 (1989). In that case, we upheld the Circuit Court of Pulaski County's use of certified copies of docket entries from the Circuit Court of Woodruff County. In upholding the use of the entries from the docket sheets we merely mentioned that they were certified. We did not hold that all docket entries must be certified before they are admissible as proof of prior convictions. The factual distinction between *Stewart* and the case at bar is clear. In *Stewart* a copy of the entry from the docket book of the Circuit Court of Woodruff County was being introduced in a proceeding in a Circuit Court in Pulaski County. In the case at bar, the trial court was looking at its own original record and not at a copy of some other court's proceedings.

Appellant also argues that it was error for the trial court to consider the entries from the docket sheets because they were not supplied to him until the penalty phase of the trial began. We have said that an accused is entitled to discover his prior convictions if they are to be utilized to enhance his sentence as a habitual offender. *Malone* v. *State*, 292 Ark. 243, 729 S.W.2d 167 (1987). Appellant was furnished a pen pack that reflected each of his prior convictions. While the pen pack did not reflect that he had an attorney in each case, it was clearly sufficient to put him on notice the State was going to ask for enhancement because of those specific convictions. He, more than anyone else, knew he had been represented by an attorney on each of the convictions and should have anticipated the deficiency being corrected. A defendant cannot rely on discovery as a total substitute for his own investigation. *David* v. *State*, 295 Ark. 131, 748 S.W.2d 117 (1988). Further, in order to demonstrate that a trial court should have imposed sanctions for a discovery violation, a clear abuse of discretion must be shown. *See Heffernan* v. *State*, 278 Ark. 325, 645 S.W.2d 666 (1983). The trial court did not abuse its discretion in refusing to exclude the reading of its own docket entries.

Appellant argues as his fourth point of appeal that the trial court erred in refusing to grant his motion for discovery of the identity of the confidential informant. Under Rule 17.5(b) of the Arkansas Rules of Criminal Procedure, the State is not required to disclose an informant's identity where his identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the accused. *Brown* v. *State*, 310 Ark. 427, 837 S.W.2d 457 (1992). The general rule is that when an informant is also a witness or a participant to the criminal incident, the identity of the informant should be disclosed. *Id.* This court has not required disclosure of the identity of an informant where the defendant was charged only with possession and the informant merely supplied information leading to the issuance of the search warrant. *See Jackson* v. *State*, 283 Ark. 301, 675 S.W.2d 820 (1984).

In the present case the informant did not witness or participate in the criminal incident. He merely supplied the police with information that led to the search of the residence where they found appellant in possession of cocaine. Under these cir-

cumstances it was not error for the trial judge to refuse to order disclosure of the identity of the informant.

Appellant's final assignment of error is that the trial court erred in failing to sanction the prosecuting attorney for remarks and gestures made in the presence of the jury. This assignment of error involves appellant's objection to the prosecutor's shaking his head "no" during cross-examination of a witness. Appellant was attempting to have the witness, Officer Jerry Brown, identify a diagram of #16 Ferguson Street. The prosecutor objected to the mischaracterization of the Officer's earlier testimony regarding the diagram. Appellant then repeated the question, and the prosecutor shook his head. When appellant complained to the judge, the prosecutor responded that he was shaking his head, not in an attempt to influence the witness, but because he objected to the question. The prosecutor then objected that the question had been asked and answered, and the judge sustained the objection.

Appellant did not object to the prosecutor's actions. He merely stated that he would like the record to reflect that the prosecutor was shaking his head "no" in an attempt to influence the answer of the witness. Moreover, appellant did not ask for any relief, such as a mistrial, for what he characterized as prosecutorial misconduct. Failure to object precludes appellate review of an issue. *Donald* v. *State*, 310 Ark. 197, 833 S.W.2d 770 (1992).

Because of the sentence in this case an examination of the record has been made in conformity with Rule 4-3(h) of the Rules of the Supreme Court, and we find no reversible error on other rulings that were adverse to appellant.

Affirmed.

Katherine BARNHART *v.* CITY OF FAYETTEVILLE, et al.

93-336 875 S.W.2d 79

Supreme Court of Arkansas
Opinion delivered May 2, 1994

E. Kent Hirsch, P.A., by: *E. Kent Hirsch* and *Pearson, Evans & Chadwick*, by: *Marshall Dale Evans* and *George K. Cracraft*, for appellant.

The Niblock Law Firm, by: *Katherine C. Gay* and *Walter R. Niblock*, for appellees.

Friday, Eldredge & Clark, by: *Herschel H. Friday, William H. Sutton, Larry W. Burks* and *Jeffrey H. Moore*, for appellee Financial Guaranty Ins. Co.

Everett, Mars & Stills, by: *John C. Everett*, for Amicus Curiae James M. McCord.

STEELE HAYS, Justice. This is a class action brought by appellant Katherine Barnhart on behalf of herself and other Fayetteville taxpayers and sanitation ratepayers against the Northwest Arkansas Resource Recovery Authority (Authority), Union National Bank of Little Rock, Financial Guaranty Insurance Company (FGIC), Washington County and the Cities of Fayetteville (City) and West Fork (appellees). A.G. Edwards & Sons, Inc., and the partners of the Rose Law Firm and of Wright, Lindsey and Jennings were joined as third party defendants.

Fayetteville, West Fork and Washington County had formed the Authority under the provisions of Act 699 of 1979. That act authorized municipalities and counties to organize authorities for the disposal of solid waste, including the power to later withdraw, without impairment of financial obligations incurred during participation. The project's purpose was to plan, construct and finance an incinerator to burn solid waste. The Authority's nine member board of directors consisted of seven Fayetteville directors and one each from West Fork and Washington County. The plan was for the incinerator to generate steam or heat for the production of electricity.

The Authority issued bonds totalling $22,405,000 to finance the development and construction of the facility. A site was selected and a construction contract entered into. The Authority also contracted with Financial Guaranty Insurance Company (FGIC) to insure the repayment of the bonds, obligating FGIC to pay any principal or interest due on the bonds but unpaid by the Authority. Union National Bank of Little Rock was named as trustee for the bondholders. In furtherance of the project the City entered into a Waste Disposal Agreement (WDA) with the Authority by which the City agreed to unconditionally guarantee the debts of the Authority, including debt service on the bonds. The revenue stream from which the bonds were to be repaid was provided by the WDA which stated that its members would deliver

waste to the project and pay processing charges ("tipping fees") for the disposal of such waste. Tipping fees were payable solely from income received by the cities and county from sanitation fund revenues and such fees had to be sufficient to pay operating expenses of the facility and debt service on the bonds.

While construction was under way public opposition over site selection and environmental concerns rose to such a level that the Fayetteville board of directors submitted the question of continuing the project to a non-binding vote by the voters of Fayetteville. On March 8, 1988, a majority of those voting voted against continuing the project and on March 9 Fayetteville notified the Authority it was withdrawing. On March 11 the Authority terminated the project.

Some $8,000,000 in bond proceeds had by then been expended. In order to retire the bonds at the first nonpenalty call date, the City of Fayetteville enacted Ordinance No. 3444 which increased the sanitation fees by $2.02 per month for residential and commercial users. After the passage of Ord. No. 3444, appellant Katherine Barnhart filed this class action against the appellees, the Bank and FGIC, alleging that the collection of revenue under Ord. No. 3444 constituted an illegal exaction.

The case was tried as to the issues between the plaintiff and the defendants, with the cross-claim and third party claims specifically reserved for a later date "pursuant to Rule 42, Arkansas Rules of Civil Procedure." The order recites the finding of the chancellor that Ord. No. 3444 is neither an illegal exaction nor ultra vires and concludes: "Pursuant to the rule 54(b) Arkansas Rules of Civil Procedure, it is specifically determined by the Court that the entry of this order shall be a Final Judgment on the Complaint of the Plaintiff."

While ARCP 42(b) does allow the trial court to order separate trials under certain circumstances, a separate trial order under Rule 42(b) usually results in but one judgment. Wright Miller, *Federal Civil Procedure*, § 2387. And an order granting separate trials under Rule 42 is not appealable as a final judgment. "There is no final judgment until all of the issues have been resolved and judgment entered on the whole case unless a lesser judgment is certified under the provisions of Rule 54(b)."

Id. at § 2392.

ARCP 54(b) provides that the trial court may direct a final judgment as to one of several parties or claims, "only upon an express determination, supported by specific factual findings, that there is no just reason for delay." There is no such determination in this case. Some years ago we emphasized that language in *Arkhola Sand & Gravel Co.* v. *Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987):

> We give notice that merely tracking the language of Rule 54(b) will not suffice; the record must show facts to support the conclusion that there is some danger of hardship or injustice which would be alleviated by an immediate appeal.

That admonition has been reiterated numerous times since. *See Davis* v. *Wausau Insurance*, 315 Ark. 330, 867 S.W.2d 444 (1993); *Franklin* v. *OSCA, Inc.*, 308 Ark. 409, 825 S.W.2d 812 (1992); *Fisher* v. *Citizens Bank* 307 Ark. 258, 819 S.W.2d 8 (1991); *Austin* v. *First National Bank*, 305 Ark. 456, 808 S.W.2d 773 (1991):

> In this case before us, the judgment granting the motion for interlocutory appeal does not include specific findings of any danger of hardship or injustice which could be alleviated by an immediate appeal. Nor does the judgment detail facts which establish that such a hardship or injustice is likely. Due to this noncompliance with Rule 54(b), we dismiss this appeal without prejudice to refile it at a later date.

Id., p. 332.

No such determination was made in this case and, accordingly, the appeal is dismissed.

James HUNTER *v.* STATE of Arkansas

CR 93-617 875 S.W.2d 63

Supreme Court of Arkansas
Opinion delivered May 2, 1994

William M. Howard, Jr., for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, James Hunter, was tried by jury and convicted of kidnapping, theft, theft by receiving, two counts of rape, and two counts of burglary. He argues the in-court identification of him by two victims should have been suppressed because the witnesses had identified him prior to the trial in a "show up" situation which was impermissibly suggestive. While we find no merit in that argument, we must reverse and remand for a new trial in response to his other contention that the Trial Court's refusal to grant a continuance due to the prosecutor's failure to comply with a discovery request resulted in unfair prejudice.

There was evidence from which the jury could have concluded these facts. Sheila Cook was assaulted in her home and raped by a man she could not identify, other than to say he was a black person, because he had an afghan taken from her couch wrapped around his head. The assailant twice forced her to engage in sexual intercourse and then left with a small amount of her money and her husband's Remington 30-06 rifle. Mrs. Cook called her husband and the police immediately after the incident. Samples of semen and hair were removed from her and preserved for blood grouping and DNA testing.

Less than two weeks later a man entered the home of Larry Knight. He was first seen by Mr. Knight's daughter, Missy, who after becoming aware of and observing the intruder for a second or two, screamed and ran. As she fled down a hallway, the intruder followed and collided with Mr. Knight who was running from the opposite end of the house in response to his daughter's scream. Mr. Knight had an opportunity to observe the intruder after the collision for one or two seconds at a distance of approximately six feet. The intruder ran, and Mr. Knight called the police. They described the intruder to the police as a black male who was wearing a yellow or mustard colored shirt and dark pants.

On the same day Mr. Hunter had a traffic accident. The investigating officer did not have his ticket book with him and asked Mr. Hunter to go to the police station so that he could issue him a citation for driving without a license. Mr. Hunter failed to arrive at the station, and an officer was sent to find him and bring him to the station. While Mr. Hunter was at the station receiving his citation the Knights arrived to confer with the police about

the offense committed against them. They saw Mr. Hunter, and told an officer he was the man who had been in their home earlier. Mr. Hunter was arrested and charged with burglary.

A search warrant was issued, and several stolen firearms were found at Mr. Hunter's residence, including Mr. Cook's Remington 30-06 which had Mr. Hunter's fingerprints on it. The State gathered blood and hair samples from Mr. Hunter, and these were compared with the samples gathered from Mrs. Cook. The information was then amended to include burglary, kidnapping, rape, theft by receiving, and theft. The trial was set for June 10, 1992.

Mr. Hunter filed a motion for discovery on March 16, 1992, in which he requested any reports or statements of experts concerning the case, including the results of any scientific tests. The prosecutor responded and informed Mr. Hunter he was welcome to any information in his file. On June 9, 1992, the State asked for and was granted a continuance so that the samples collected from Mrs. Cook and Mr. Hunter could be sent to the Federal Bureau of Investigation's DNA testing laboratory. The Trial Court reset the trial date for October 7, 1992.

On September 2, 1992, Mr. Hunter, in a lengthy motion for discovery, asked for all materials relating to the DNA testing including autoradiographs, lab notes, protocols, and other specific operating procedures.

On September 24, 1992, Mr. Hunter moved for a continuance on the ground that the notes and materials which were requested in his previous motion for discovery had not been furnished to him by the State. The Trial Court granted this motion on October 6, 1992, and reset the trial for November 5, 1992.

On November 2, 1992, Mr. Hunter requested another continuance as the State still had not provided the information he requested concerning the DNA test. The Trial Court asked Mr. Hunter's counsel to "waive" the issue. Counsel refused. The Trial Court then denied the motion and the trial proceeded.

During the trial both Mr. Knight and his daughter positively identified Mr. Hunter as the man who had been in their home. Each stated the identification was based on their recollection of Mr. Hunter's appearance at the time of the incident and not on the iden-

tification which occurred at the police station. Mr. Hunter objected and stated the identification was the result of a show-up and impermissibly suggestive. The Trial Court overruled the objection and allowed the in-court identification. The jury convicted Mr. Hunter on all counts and sentenced him to ninety-one years imprisonment.

We reverse because of the failure to provide the discovery requested and the refusal of the continuance. We address the matter of the identification testimony as it may arise on retrial.

1. Discovery violation

Arkansas R. Crim. P. 17.3 states in part that "[t]he prosecuting attorney shall use diligent, good faith efforts to obtain material in the possession of other governmental personnel which would be discoverable if in the possession or control of the prosecuting attorney." Reversible error exists when a prosecutor fails to comply with an appellant's timely request for discovery, resulting in prejudice to the appellant. *See Hall* v. *State*, 306 Ark. 329, 812 S.W.2d 688 (1991).

While Mr. Hunter's point of appeal is couched in terms of the Trial Court's failure to grant a continuance, the gravamen of the point is the fact that the State had not furnished the materials necessary to conduct effective cross-examination of the State's expert witness, an employee of the FBI, who was to present the DNA evidence linking Mr. Hunter to the rape of Mrs. Cook. The State's expert witness testified he was not made aware, until the day before the trial, of Mr. Hunter's previous requests for the information. It is apparent the prosecution had done nothing toward seeking the information to comply with the defense request.

The only argument presented to us by the State in response is that Mr. Hunter's counsel lacked diligence and suffered no prejudice due to the failure to supply the information sought, thus the Trial Court's refusal of a continuance was not an abuse of discretion.

In *Swanson* v. *State*, 308 Ark. 28, 823 S.W.2d 812 (1992), we affirmed a conviction resulting from a trial in which DNA test results were presented by the State. Swanson had been granted

four continuances, the first three of which were due to the fact that the DNA test results had not been received. In conjunction with his final continuance motion, Swanson's counsel stated he had been unable to locate but one expert in Arkansas capable of presenting the testimony required. The Trial Court asked why that one witness could not be presented, and counsel declined to answer. Counsel stated he had no other expert in prospect. The continuance was denied.

We affirmed Swanson's conviction because counsel had had months to locate a suitable expert, but in the process of doing so, we said:

> We have often written that the decision to grant or deny a continuance is addressed to the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion, *see, e.g., Butler* v. *State*, 303 Ark. 380, 797 S.W.2d 435 (1990), but we have also written:
>
> > DNA tests should not be ruled admissible before the accused's expert has had a chance to examine the evidence, procedures, and protocol. . . . [A]ccess to data, methodology, and actual results are crucial. An accused must be given the opportunity for independent expert review before a determination of reliability is made.
>
> *Prater* v. *State*, 307 Ark. 180, 200, 820 S.W.2d 429 (1991). Thus the denial of a continuance which would deprive an accused of the chance to have an independent review of DNA analysis will be closely examined.

In this case, Mr. Hunter's counsel did not announce that he had no expert available. To the contrary, he stated he had located an expert in Birmingham, Alabama, but could not possibly take advantage of her expertise without the information the State had failed to provide. The circumstances here are thus substantially different from those in the *Swanson* case, and we must reverse. Counsel was entitled to the materials sought, and absent a lack of diligence, the failure of the State to provide them was unfairly prejudicial to Mr. Hunter. The continuance should have been granted.

2. Witness identification

If there are suggestive elements in a pretrial identification procedure making it all but inevitable that one person will be identified as the criminal, the procedure is so undermined that it violates due process. *See Chism* v. *State*, 312 Ark. 559, 849 S.W.2d 959 (1993). A witness identification of a suspect at a police station, however, when the police have not orchestrated a pre-trial identification, does not invalidate a subsequent in-court identification. *Van Pelt* v. *State*, 306 Ark. 624, 816 S.W.2d 607 (1991).

Mr. Hunter contends the pre-trial identification was impermissible and the in-court identification was thus tainted and unreliable. He alleges the police conspired to have him present at the station when the victims arrived. From the record, however, it could easily be concluded that the witnesses were at the police station of their own accord and spontaneously identified Mr. Hunter who was at the police station on a completely unrelated matter.

It is for the Trial Court to determine if there are sufficient aspects of reliability to admit evidence of the identification, and it is for the jury to determine the weight given to it. A trial court's ruling will not be reversed unless it is clearly erroneous, considering the totality of the circumstances. *Chism* v. *State, supra.*

The facts which support the reliability of the in-court identification are: (1) both witnesses had an unrestricted close-up view of Mr. Hunter for a second or two; (2) although the initial description only concerned the intruder's clothes, Mr. Knight also added a description of the intruder's hair cut, and facial features; (3) there was no other identification of a suspect; (4) both witnesses stated at the police station and at trial that they recognized him as the man they saw in their home; (5) there was not an early failure to identify Mr. Hunter; and (6) the pre-trial identification occurred on the same day as the burglary. No error occurred on this point.

Reversed and remanded.

Calvin Lee MARSHALL *v.* STATE of Arkansas

CR 93-1081 875 S.W.2d 814

Supreme Court of Arkansas
Opinion delivered May 2, 1994
[Rehearing denied June 6, 1994.]

[redacted]

Simes & Simes, by: *Alvin L. Simes*, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Acting Deputy Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, Calvin Lee Marshall, appeals from his conviction of the capital murder of Robert Scheid for which he was sentenced to life imprisonment without parole, the capital murder of Susan Conwell for which he was sentenced to life imprisonment without parole, the kidnapping of Susan Conwell for which he was sentenced to sixty years imprisonment, and the rape of Susan Conwell for which he was sentenced to sixty years imprisonment. We find no merit in his arguments for reversal and affirm.

Mr. Marshall was arrested after his picture was identified in a photographic lineup by Ms. Conwell's fiance, David Denner, and an acquaintance, Lauren Crews. The victims, along with David Denner and Michael Pesicek, were en route down the Mississippi River destined for St. Croix after purchasing a sailboat in Memphis. When the boat's auxiliary engine failed to operate properly, they were forced to dock near Helena where they were joined by Mr. Crews who was also travelling down the Mississippi by boat. While the group was awaiting the repair of the engine, Ms. Conwell befriended Mr. Marshall and Curtis Pollard. After shooting pool with them on the afternoon of October 1, 1991, she and Mr. Pesicek invited the two men to the boat for dinner.

Evidence was presented that the two men went to the boat with Ms. Conwell and Mr. Pesicek and that they ate dinner and consumed alcoholic beverages. When Mr. Marshall and Mr. Pollard were ready to leave they asked for help in finding their way back to Helena. According to Mr. Pollard when the group was approximately 100 yards from the boat, where Mr. Denner and Mr. Pesicek had stayed, Mr. Marshall kicked Mr. Scheid to the ground and stabbed him with a knife. Mr. Marshall forced Ms. Conwell into the bushes where she was raped by Mr. Pollard and Mr. Marshall. Mr. Marshall then stabbed Ms. Conwell no less than nineteen times, and both men fled from the area. Mr. Scheid and Ms. Conwell died as a result of the violent attack.

1. Sufficiency of the evidence

Mr. Marshall contends the evidence was insufficient to sustain the convictions due to evidence of his intoxication, evidence that another person may have committed the crime, and the possibility a knife other than the one introduced into evidence was the murder weapon. Mr. Marshall moved for a directed verdict at the close of the State's case and then presented evidence. He did not attempt renewal of the motion until after the jury had been charged. According to Ark. R. Crim. P. 36.21(b) any question pertaining to the sufficiency of the evidence is waived when the objection is not renewed at the close of all the evidence. *See Cummings* v. *State*, 315 Ark. 541, 869 S.W.2d 17 (1994). An attempt to renew a directed verdict motion is ineffective when it occurs after the jury has been charged. *See Thomas* v. *State*, 315 Ark. 504, 868 S.W.2d 483 (1994).

2. Curtis Pollard's testimony

Mr. Marshall's next argument concerns the testimony of Mr. Pollard describing how Mr. Marshall stabbed the victims and raped Ms. Conwell. He asserts that it was unreliable due to Mr. Pollard's intoxicated state on the night of the murders and the fact that the testimony was given in exchange as part of a plea bargain.

We do not reverse a trial court's ruling on admissibility of evidence unless it is clearly erroneous. The defense was free to cast doubt upon the reliability of Mr. Pollard's testimony through cross-examination. The arguments that his ability to observe was hindered by intoxication and that his testimony was induced by his plea bargain are of the sort going to the weight of his testimony to be assigned by the jury rather than its admissibility. *See Wallace* v. *State*, 314 Ark. 247, 862 S.W.2d 235 (1993); *Ford Motor Co.* v. *Massey*, 313 Ark. 345, 855 S.W.2d 897 (1993); *Terry* v. *State*, 309 Ark. 64, 826 S.W.2d 817 (1992); *Bishop* v. *State*, 310 Ark. 479, 839 S.W.2d 6 (1992); *Gavin* v. *State*, 309 Ark. 158, 827 S.W.2d 161 (1992).

3. Standing to object to search

Mr. Marshall argues the Trial Court erred by denying his motion to suppress certain articles of clothing found by the authorities in a search of his mother's house. According to his mother's testimony he lived with his grandmother and stayed with his mother only occasionally. He had no standing to raise any Fourth Amendment right his mother might have had to object to a search of her premises. *Davasher* v. *State*, 308 Ark. 154, 823 S.W.2d 863 (1992).

In finding that Mr. Marshall lacked standing to object to the search we note there was no showing that he had been an "overnight guest" in his mother's home at the time the search occurred. Thus, unlike the accused in *Minnesota* v. *Olson*, 495 U.S. 91 (1990), Mr. Marshall had no reasonable expectation of privacy in his mother's home.

4. Drawing of the venire

Mr. Marshall argues that reversible error occurred due to the location of the jury selection box and the manner in which

the names were selected from the box outside the jury selection room. The statutes he contends were violated are Ark. Code Ann. § § 16-32-105 and 16-32-108 (Repl. 1994).

Section 16-32-105 provides that "[a]t the time and place designated, the wheel or box shall be unlocked in open court." The statute further states that "the circuit judge shall cause to be drawn the number of names . . . necessary . . . ." Section 16-32-108 also refers to unlocking the box in open court. Mr. Marshall objected because the jury selection box was not present in the jury selection room. Mr. Marshall also objected to the fact that one of the Trial Court's clerks entered the jury selection room with four names which had been drawn from the box. According to his objection, Mr. Marshall desired the names to be drawn in the presence of the judge.

[redacted] First, it should be noted that § 16-32-105 provides only that the circuit judge shall cause the names to be drawn. The statute, on its face, does not require the presence of the judge when the names are drawn. The objection on this ground is baseless. Second, the statute requires that the names be drawn in open court. On page 60 of the record Mr. Marshall's attorney states, "I am . . . asking the court to . . . place the juror potential list in this room . . . and not to have that box out in the courtroom where there are members of the public . . . ." The purpose of the statute is to ensure that the drawing of the names be open to the public. *See Hall* v. *State*, 259 Ark. 815, 537 S.W.2d 155 (1976). As the jury selection box was in the courtroom, the statute was not violated.

The Trial Court attempted to understand the nature of the objection and finally concluded that there had been no allegation of jury tampering or improper procedure which could have prejudiced the accused. We have no reason to disagree with his assessment.

5. Continuance

Mr. Marshall argues his motion for a continuance should have been granted due to the fact that a potential witness, Michael Pesicek, did not appear for the trial. He contends he has a right to a continuance if witnesses cannot be found or are unavailable and the accused is not dilatory.

A trial court's denial of a motion for a continuance will not be reversed absent a clear abuse of discretion, and the defendant has the burden of showing an abuse of discretion. *See Gillie* v. *State*, 305 Ark. 296, 808 S.W.2d 320 (1991). Arkansas Code Ann. § 16-63-402(a) (1987) requires a party moving for a continuance for the purpose of procuring the presence of a witness to file an affidavit showing facts the affiant believes the witness's testimony will tend to prove. *Johnson* v. *State*, 305 Ark. 580, 810 S.W.2d 44 (1991). The statute applies in criminal cases, and an abuse of discretion in denying a continuance will not be found when there is no compliance with it. *Id.* As Mr. Marshall failed to file an affidavit, the Trial Court did not abuse his discretion.

6. Admission of photographs

The State introduced photographs of the crime scene and the victims after the murder. Mr. Marshall objected on the ground that they were more prejudicial than probative. Ordinarily we would not review an argument that it was an abuse of discretion to admit photographs when copies of the photographs are not included in the abstract as required by Ark. Sup. Ct. R. 4-2(a)(6).

Rule 4-2 provides that photographs which must be examined for a clear understanding of the testimony must be attached to the abstract unless this procedure is shown to be impracticable and waived by the Court on motion. *See Carton* v. *Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993). As, however, Mr. Marshall was sentenced to life without parole, *Ark. Sup. Ct. Rule 4-3(h)* requires this Court to review all errors prejudicial to the appellant.

We have reviewed the photos and testimony in the record and find that Mr. Marshall's contention is without merit. The admissibility of photographs is in the sound discretion of the Trial Court, and a reviewing court will not reverse absent a showing of manifest abuse. *Haynes* v. *State*, 309 Ark. 583, 832 S.W.2d 479 (1992). Gruesomeness alone is not a basis for excluding photographs from evidence. *See Weger* v. *State*, 315 Ark. 555, 869 S.W.2d 688 (1994). Gruesome photos are admissible if they assist the trier of fact by shedding light on some issue, by

proving a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony or by enabling jurors to better understand the testimony. The photos which were introduced assisted the jury in understanding or assisted the witnesses in testifying. The Trial Court did not abuse his discretion.

7. Photographic identification

[redacted] Mr. Marshall contends the photographic lineup from which Mr. Denner and Mr. Crews identified Mr. Marshall was "totally suggestive." He does not, however, suggest how or why that was so, but shifts to argument that a photographic line-up requires the presence of counsel, citing *United States* v. *Ash*, 461 F.2d 92 (D.C. Cir. 1972). In the *Ash* case it was held that when an accused is in custody and a photographic line-up occurs, notice to counsel is required as the Supreme Court stated in *United States* v. *Wade*, 449 U.S. 431 (1981), in the case of a corporeal line-up.

[redacted] Mr. Marshall was not in custody when the photo line-up occurred. He could not have been afforded counsel, even if there were such a right, prior to becoming known by the police as a suspect in the case.

8. Conviction of the underlying felony

[redacted] The State points out that error occurred because Mr. Marshall was convicted of both capital felony murder of Ms. Conwell and the underlying predicate felony, rape. Mr. Marshall failed to raise this issue at the trial and has not argued it on appeal. We decline to address it at this juncture.

[redacted] This Court will not consider errors raised for the first time on appeal. *See Hughes* v. *State*, 295 Ark. 121, 746 S.W.2d 557 (1988). There are only four exceptions to this rule: (1) when error is made by a trial court without knowledge of the defense counsel who thus has no opportunity to object; (2) when a trial court should intervene on its own motion to correct a serious error by admonition or by mistrial; (3) when evidentiary errors affect a defendant's substantial rights although they were not brought to the court's attention, and (4) in death penalty cases when prejudice is conclusively shown by the record and we would unquestionably require the trial court to grant relief under Ark.

R. Crim. P. 37. *See Hughes* v. *State, supra*; *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

In all other circumstances a contemporaneous objection is required to preserve a point for review. Even constitutional arguments are waived unless raised before a trial court. *Lynch* v. *Blagg*, 312 Ark. 80, 847 S.W.2d 32 (1993). We note, however, that Mr. Marshall is not precluded from raising this issue if he chooses to initiate a separate proceeding pursuant to Ark. R. Crim. P. Rule 37. *See Wilson* v. *State*, 277 Ark. 219, 640 S.W.2d 440 (1982); *Rowe* v. *State*, 275 Ark. 37, 627 S.W.2d 16 (1982).

Pursuant to Ark. Sup. Ct. R. 4-3(h) we have considered all of Mr. Marshall's objections on which the Trial Court made an adverse ruling. We find no prejudicial error.

Affirmed.

IN THE MATTER OF THE ESTATE OF Othar HARP
Tommy Harp, et al. *v.* Sam Harp

93-1277 875 S.W.2d 490

Supreme Court of Arkansas
Opinion delivered May 2, 1994

Michael E. Kelly, P.A., by: *Michael E. Kelly*, for appellants.

Randall Hall, for appellee.

TOM GLAZE, Justice. Othar Harp died January 30, 1992, leaving heirs-at-law of sons Sam and Joe Harp; daughters Sue Calbert and Nola Lete; and grandchildren Jim, Tommy, and Rinda Harp who are children of Othar's deceased son, Jim Harp. Othar's will was admitted to probate, and according to its terms, Sam Harp was appointed executor. Sam Harp filed a petition requesting the court to interpret provisions of the will which appeared ambiguous and conflicting. The three grandchildren subsequently filed a petition to contest the will. The grandchildren contended that, when Othar executed his will, he was incompetent and had acted under undue influence and duress. They also claimed that the will's provisions were ambiguous and incapable of being interpreted or reconciled and that Othar's estate should be distributed in accordance with the laws of intestacy.[1] The grandchildren's contentions were rejected by the probate court, and they appeal that court's decision.

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[1]All the heirs-at-law received devises or bequests under the will. Additionally, Othar's stepson, Fred Coonts, was named a devisee.

On appeal, the only issue involves the interpretation of Othar's will and the ambiguity caused by paragraph 5 and paragraph 7 because both appear to be residuary clauses. The probate court found the two paragraphs were ambiguous with misspelled names and missing words, but it also considered that there is a legal presumption against intestacy and that the testator is presumed to have intended to dispose of his entire estate. In reading all of the provisions of Othar's will, the probate court upheld the will's validity, finding that paragraph 5 was a specific residuary clause devising the remainder of Othar's real estate to his son, Sam, and paragraph 7 was a general residuary clause benefiting Othar's daughters.

For reversal, the grandchildren argue that the probate court could not determine Othar's intent from reading the entire will and reaching the conclusion it did without resorting to speculation. They suggest Othar should be declared to have died partially intestate, and to support their proposition, they cite Ark. Code Ann. § 28-26-103 (1987), which provides that "[i]f part but not all of the estate . . . is validly disposed of by will, the part not disposed of . . . shall be distributed as provided by law with respect to the estates of intestates." The grandchildren argue to hold otherwise effectively disinherits them.

The executor, Sam Harp, counters by arguing the probate court properly employed rules of construction in giving effect to all provisions in Othar's will, he says to hold as the grandchildren argue, would cause paragraphs 5 and 7 to be null and void. Additionally, Sam Harp points to the clear division in the will between paragraphs dealing with devises of real property and bequests of personalty, and argues this division supports the logical construction given paragraphs 5 and 7 by the probate court. Finally, Sam Harp states the grandchildren were not disinherited by the court's construction, since the will provides for a bequest of $500 to each of them.

In the interpretation of wills, the paramount principle is that the testator's intent governs. *In Re the Matter of the Estate of Lindsey*, 309 Ark. 596, 832 S.W.2d 808 (1992); *Cross* v. *Manning*, 211 Ark. 803, 202 S.W.2d 584 (1947). The testator's intent is to be gathered from the four corners of the instrument itself. *Armstrong* v. *Bulter*, 262 Ark. 31, 553 S.W.2d 453

(1977). Further, the intention of the testator to dispose of his entire estate will be presumed, unless the language of the will shows the contrary. *Cross*, 211 Ark. 803, 202 S.W.2d 584. And while this presumption is not controlling, it must always be considered when the language is so ambiguous as to require construction. *Id.* In construing a will, a court should give force to each provision, and only when there is an irreconcilable conflict between two clauses, must one give way to the other. *Lindsey*, 309 Ark. 596, 832 S.W.2d 808.

As mentioned above, Othar's will contains two residuary clauses which appear to conflict, necessitating resolution by the court. Those two clauses read as follows:

> -5-
>
> All the rest of my estate wherever situated I give, devise and bequeath to my son SAM HARP.
>
> . . .
>
> -7-
>
> All the rest residue and remainder of my estate including any failed or lapsed gifts and bequeath to my daughters NOLA McLEET and SUE CALBERT in equal shares if both survive my death or to the survivor of the two.

The probate court found that paragraph 5 is meaningless unless read in light of preceding paragraphs 3 and 4 which devise two separate tracts of land. Paragraph 6, on the other hand, bequeaths specific sums of money to the grandchildren and paragraph 7 is a general residuary clause. The probate court found paragraph 5 was the last of a series of paragraphs dealing with devises of real property, and thus, the court held paragraph 5 was a specific residuary clause of any remaining real estate not already devised in paragraphs 3 and 4. Further, the court held that paragraphs 6 and 7 would be meaningless unless paragraph 5 was interpreted as a specific residuary clause. Under this interpretation, the court further concluded paragraph 7 was a general residuary clause — and as such, it disposed of personal property or other property not already disposed of by the prior provisions of the will.

Based on the language and organization of Othar's will, we find the interpretation by the probate court is correct. Such holding is consistent with this court's prior decision that a will may contain both a specific residuary clause and a general residuary clause, or several specific residuary clauses. *In the Matter of the Estate of Lindsey*, 309 Ark. 596, 832 S.W.2d 808 (1992). Further, where a will contains two or more clauses that are apparently residuary in character, the court should determine whether one or more refers to a specific or limited residuum. *Id.*

The probate court's application of the foregoing rules gives force and effect to all the paragraphs of Othar's will. As stated previously, it is generally the intention of a testator when executing a will that his or her will be given full effect whenever possible, and there is nothing in Othar's will which indicates Othar intended to devise and bequeath anything less than his entire estate.

For the foregoing reasons, we affirm.

Rachael MARTIN *v.* Greg MARTIN and Alice Martin

93-935 875 S.W.2d 819

Supreme Court of Arkansas
Opinion delivered May 2, 1994

Martha P. Gilpatrick, for appellant.

Gibson & Rhodes, by: *Richard Rhodes*, for appellees.

TOM GLAZE, Justice. In this adoption case, Rachael, the natural mother, and the adoptive parents, Rachael's brother and sister-in-law, appeared with an attorney before the probate judge on December 10, 1991, to present a petition for adoption. The judge, however, refused to approve the petition and enter an interlocutory decree because Rachael had executed her consent to adoption only that day (December 10th). By law, Ark. Code Ann. § 9-9-209(b)(1) (Repl. 1993), Rachael had ten days within which she could withdraw her consent, and no order of adoption could be entered prior to the withdrawal period. Ark. Code Ann. § 9-9-212(a) (Repl. 1993). The judge explained this statutory withdrawal period to Rachael in open court.[1] Afterwards, the adoptive parents filed their petition for adoption on December 13, 1991, and on December 23, 1991 — thirteen days after Rachael executed her consent — the probate judge signed and entered the interlocutory adoption decree.

Rachael did not perfect an appeal from the trial judge's decree or motion for a new trial under ARCP Rule 59. However, eighty-seven days after entry of the adoption decree, she filed her petition to set it aside. While she alleged that the adoptive parents obtained her consent through fraud and duress, the judge found no fraud and refused to set aside her consent and the adoption decree.

Significantly, as we address more fully below, Rachael chose not to challenge on appeal the lower court's ruling that no fraud or duress occurred. Instead, she argues the adoptive parents failed to comply strictly with the provisions of three adoption statutes,

[1]The consent itself was verified by Rachael and it provided she understood she had the right to withdraw her consent within ten days after execution of the consent.

Ark. Code Ann. § § 9-9-209, 9-9-212(a) and 9-9-214 (Repl. 1993), and the court erred in refusing to set aside the interlocutory decrees for such noncompliance. In sum, Rachael contends her consent was not properly or timely executed and a hearing on the adoption petition was not timely held.

The adoptive parents, on the other hand, rejoin by pointing out that the statutory provisions were complied with either by strict or substantial compliance. They emphasize, too, the trial judge's findings that Rachael had been fully apprised in open court that she had ten days to withdraw the consent, that the decree was entered thirteen days after she executed her consent, and that she waited nearly three months from when she signed the consent before filing her petition to set aside the adoption decree.

Rachael's arguments ignore the settled rule that consent to adoption can be withdrawn after an interlocutory order only upon a showing of fraud, duress, or intimidation. *Pierce* v. *Pierce*, 279 Ark. 62, 648 S.W.2d 487 (1983); *McClusky* v. *Kerlan*, 278 Ark. 338, 645 S.W.2d 658 (1983); *see also* Ark. Code Ann. § 9-9-209(a) (Repl. 1993). As previously mentioned, Rachael does not argue that her consent was obtained by fraud and duress.

It is suggested that the rule in *Pierce* and *McClusky* presupposes a consent executed in strict compliance with the provisions of § 9-9-209(a) and other adoption provisions. Rachael cites four cases in support of her argument. *Swaffar* v. *Swaffar*, 309 Ark. 73, 827 S.W.2d 140 (1992); *In the Matter of the Adoption of Parsons*, 302 Ark. 427, 792 S.W.2d 681 (1990); *Dale* v. *Franklin*, 20 Ark. App. 98, 733 S.W.2d 747 (1987); *Roberts* v. *Swim*, 268 Ark. 917, 597 S.W.2d 840 (Ark. App. 1980). These cases, however, are factually different from the situation before us now since those cases involved persons who were not shown to have executed a consent, had timely withdrawn the consent or the person successfully showed the probate court had entered its interlocutory adoption decree before the ten-day withdrawal period had expired. The holdings in those cases are consistent with Ark. Code Ann. § 9-9-206 (Repl. 1993) which requires a written consent before an adoption can be granted and with § 9-9-212(a) which further provides that no orders of adoption, interlocutory or final, may be entered prior to the ten-day period of

withdrawal. In this same vein, this court has held that the jurisdiction of the probate court to order an adoption depends upon the consent of the person legally authorized to represent the minor. *Swaffar*, 309 Ark. 73, 827 S.W.2d 140. Here, unlike the cases cited by Rachael, the record supports the trial judge's ruling that Rachael's consent was given. And, while Rachael argues otherwise, the record also reflects that the trial court entered its adoption decree *thirteen* days after she executed her consent — three days after the ten-day withdrawal period had expired. In signing the consent, Rachael also verified she knew she had only ten days to revoke her consent. Clearly, the trial court had Rachael's written consent and jurisdiction of the case when it entered its adoption decree.

Rachael complains that the adoption statutes provide that she was entitled to a new hearing after the December 10 hearing and after the adoptive parents filed their adoption petition on December 13. *See* § § 9-9-212 and 9-9-214(c). She also argues her consent failed to contain the name and address of the probate clerk whom Rachael should file with when withdrawing her consent. *See* § 9-9-209(b)(1) and (2). Regarding Rachael's complaint that a second hearing should have been held, the probate court certainly had authority to excuse the parties' appearance under § 9-9-214. And as to any omission of the clerk's name and address from the consent, Rachael obviously suffered no prejudice in this respect since she never attempted to withdraw her consent until long after the ten-day withdrawal period had expired. In any event, Rachael's complaints do not involve jurisdictional matters like that involving the execution of Rachael's consent as discussed above.[2]

Rachael's argument seems to suggest that any noncompliance with the adoption code, however slight, would prohibit a probate court's entry of an adoption decree. Such suggestion by its very nature would extend Arkansas's settled rule so as to permit an adoption order to be set aside for a reason other than fraud, duress, or intimidation. Certainly, no statute is cited to support this idea and our case law, particularly this court's deci-

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[2]We note that statutory exceptions are provided where consent is not required for certain persons or parents in specific situations described in Ark. Code Ann. § 9-9-207 (Repl. 1993).

sion in *Pierce*, disabuses us of any such notion. There, the natural parent's argument to set aside the interlocutory decree was based solely upon her contention that Ark. Stat. Ann. § 56-213 (Supp. 1981) [now Ark. Code Ann. § 9-9-213 (Repl. 1993)] had not been complied with since the child had not lived in the adoptive parents' home for six months. This court rejected the natural mother's request to revoke her consent for this statutory noncompliance, stating her consent could only be withdrawn upon showing that fraud, duress, or intimidation had been practiced.[3]

In the present case, we hold the record supports the trial judge's findings that Rachael's ten-day period for withdrawing her consent had been explained to and afforded her before the adoption decree was entered. Furthermore, as was the situation in *Pierce*, the failure, if any, of strict compliance with the provisions argued by Rachael here are simply insufficient grounds to set aside the trial court's decree.

Arkansas adoption statutes ensure adoption decrees obtained under the law possess that necessary and required finality so that an adoptive parent is not freed of the parental obligations he or she has willingly undertaken. *See Pham* v. *Truong*, 291 Ark. 442, 725 S.W.2d 569 (1987). This finality and stability to be given adoption decrees is further reflected by Ark. Code Ann. § 9-9-216(a) (Repl. 1993), which provides that, after one year, an adoption decree cannot even be questioned for (1) fraud, (2) misrepresentation, (3) failure to give any required notice, or (4) lack of jurisdiction of the parties or of the subject matter.[4] The commentary to the Uniform Revised Adoption Act sets out the importance and reasoning in keeping adoption orders intact by providing that "[t]he policy of stability in a family relationship, particularly when a young minor is involved, outweighs the possible loss to a person whose rights are cut off through fraud and

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[3]The *McClusky* case cited above does not reflect why the trial court set aside the interlocutory decree there, but just referenced the consent as "not valid." This court found the consent valid on appeal, but again, did not present the facts making the consent an issue. The court did reiterate the rule that consent could not be withdrawn after entry of an adoption decree except upon a showing of fraud, duress, or intimidation.

[4]Of course, this statutory limitation is subject to a party's having filed a direct appeal from an adoption decree and disposition of the appeal. No such appeal occurred in this case.

ignorance." *See* Unif. Adoption Act § 15, 9 U.L.A. 62 (1988), which is comparable to § 9-9-216 of the Arkansas Adoption Act.

In conclusion, we note that the adoptive parents now have had custody of the infant involved here for two years and four months. No fraud or duress was employed in obtaining Rachael's consent or custody of her child. To the contrary, Rachael was fully informed by the probate judge that she had only ten days within which she could withdraw her consent. For whatever reason, she waited nearly three months to withdraw it. To set side the trial court's decree on the grounds Rachael asserts would seriously undermine the stability and finality lawfully intended for adoption decrees once signed and entered. For the reasons discussed, we affirm the probate judge's decision.

DUDLEY, NEWBERN and BROWN JJ., dissent.

ROBERT H. DUDLEY, Justice, dissenting. A probate court granted an interlocutory decree of adoption. Eighty-seven days later the biological mother moved to set aside the decree. The probate court denied the motion. The biological mother appeals. The court of appeals certified the case to this court. The majority opinion affirms the ruling of the probate court. I would reverse.

In October 1991, about a month before her child was due, Rachael Martin, nineteen years old and single, asked her brother, Greg Martin, and his wife, Alice, if they wished to adopt her child when it was born. Greg and Alice responded affirmatively. Soon afterwards, the three, along with Rachael's mother, discussed the matter with an attorney. The baby was born on November 25, 1991, and appellees Greg and Alice Martin immediately took custody of the child. On December 6, 1991, Greg, Alice, and Rachael met with the attorney in his office in Osceola and employed him to represent them in the adoption.

On the morning of December 10, 1991, the parties met the attorney at the courthouse in Blytheville, and, in the hallway of the courthouse, Rachael signed a consent to adoption. Neither the consent to adoption nor the petition for adoption had been filed, but the attorney asked Probate Judge Ralph Wilson, Jr. to hear the matter. The parties and the baby were present, and a hearing was held that morning. Judge Wilson recognized there were irregularities because he refused to sign a precedent submitted at the

conclusion of the hearing. There was testimony that the judge requested that the attorney "redo the papers." The consent and petition for adoption were not filed until three days later, on December 13.

On December 20, or ten days after the hearing on the adoption, the attorney delivered a precedent for an interlocutory decree of adoption to Judge Wilson's chambers in Osceola. Judge Wilson did not grant the order at that time, but instead waited until December 23, which was ten days after the consent had been filed, and entered the decree.

The consent did not state that Rachael could withdraw her consent by filing an affidavit with the Probate Clerk of the Chickasawba District of Mississippi County. Rachael testified that about a month after the decree had been signed she told her brother she wanted her child back. In March 1992, she filed the petition to set aside the interlocutory decree of adoption. Probate Judge Rice Van Ausdall heard the petition and declined to set aside the decree. The attorney originally employed to represent the parties in the adoption does not represent either side in this appeal. The various components that comprise the law of adoption require reversal in my opinion.

I. Rules of Construction

The seminal adoption case in this State is *Morris* v. *Dooley*, 59 Ark. 483, 28 S.W. 30 (1894), a case in which the title to land depended on the validity of the adoption decree. In a collateral attack on the adoption decree, Morris contended that Dooley's adoption was void because the decree of adoption failed to recite that Dooley, at the time of adoption, was a resident of the county in which the decree was granted. The trial court upheld the adoption decree. In reversing we made three landmark holdings. First, we stated that the probate court was a court of limited jurisdiction and had only such jurisdiction as conferred by statutes. As part of this holding, we stated that the orders of a court of limited jurisdiction do not enjoy a presumption of regularity, as do the orders of a court of general jurisdiction. Consequently, all jurisdictional facts must be recited in a final adoption decree or else it is void, and, upon collateral attack, the jurisdictional facts cannot be supplied in the subsequent pro-

ceeding. Second, we held that, since the probate court is a court of limited jurisdiction and its only authority comes from statute, it has no authority to hear an adoption matter other than in the manner set out in the adoption statute. Adoption is not mentioned in our state constitution. Third, we held that adoption was unknown to common law and exists only as a special proceeding, and, therefore, the adoption statutes must be strictly construed.

At the time, this court was composed of a chief justice and four associate justices. The vote was three to two. Justice Riddick wrote a strong dissenting opinion in which Chief Justice Bunn concurred, but the majority opinion has consistently been followed.

II. Collateral Attack

A second important case is *Minetree* v. *Minetree*, 181 Ark. 111, 26 S.W.2d 101 (1930). Again, the case involved title to land and a collateral attack on an adoption decree. The infant's mother was deceased, and the decree reflected that the father was a resident of Mississippi County and that the child lived with the father. However, Mississippi County has two county seats: Blytheville is the county seat of the Chickasawba District, and Osceola is the county seat of the Osceola District. We held the decree was void because the decree did not reflect that either the father or the child lived in the Chickasawba District of Mississippi County.

By the time of *Minetree*, 1930, this court had seven members, and the vote was four to three. Justice Frank G. Smith wrote a moving dissent in which he urged, in part, that substantial compliance with the statutes should be sufficient in order to give effect to the legislative intent, but the majority opinion has consistently been followed in cases involving jurisdictional recitations. For example, in *Ozment* v. *Mann*, 235 Ark. 901, 903, 363 S.W.2d 129, 130-31 (1962), a case in which neither the petition nor the order recited the residence of the boys to be adopted, this court wrote: "[W]e have repeatedly held that an adoption order is void if it fails to recite such essential jurisdictional facts. *Dean* v. *Brown*, 216 Ark. 761, 227 S.W.2d 623." In *Poe* v. *Case*, 263 Ark. 488, 490, 565 S.W.2d 612, 613 (1978), another collateral attack case, we wrote:

> The probate court is a court of special and limited jurisdiction, having only such jurisdiction and powers as are conferred by the constitution or by statute, or necessarily incident to the exercise of the jurisdiction and powers specifically granted. *Hilburn* v. *First State Bank*, 259 Ark. 569, 535 S.W.2d 810. There is no mention of adoption, child custody or visitation rights in the Arkansas Constitution. Jurisdiction of adoption proceedings has been vested in the probate court by statute. Adoption proceedings were unknown to the common law, so they are governed entirely by statute. *Morris* v. *Pendergrass's Admr.*, 59 Ark. 483, 28 S.W. 30. See also, *Spencer* v. *Franks*, 173 Md. 73, 195 A. 306, 114 ALR 263 (1937).

III. Direct Attack

Cases involving direct attack involve a different standard. On direct attack, statutory provisions involving the adoption of minors are to be strictly construed and applied. In the case of *In re Adoption of Parsons*, 302 Ark. 427, 432, 791 S.W.2d 681, 683-84 (1990), we wrote:

> We reaffirmed our position of giving careful protection to a natural parent's rights in *In The Matter of the Adoption of Glover*, 288 Ark. 59, 702 S.W.2d 12 (1986) (citing *Woodson* v. *Lee*, 221 Ark. 517, 254 S.W.2d 326 (1953) (quoting *In re Cordy*, 169 Cal. 157, 146 P. 532 (1914))):
>
> > . . . the power of the court in adoption proceedings to deprive a parent of her child, being in derogation of her natural right to it, and being a special power conferred by the statute, such statute should be strictly construed; that 'the law is solicitous toward maintaining the integrity of the natural relation of parent and child; and in adversary proceedings in adoption, where the absolute severance of that relation is sought, without the consent and against the protest of the parent, the inclination of the courts, as the law contemplates it should be, is in favor of maintaining the natural relation. . . . Every intendment should have been [in] favor of the claim of the mother under the evidence, and if the statute was open to con-

> struction and interpretation it should be construed in support of the right of the natural parent.'

We have frequently written that there must be strict compliance with the statutory requirements for the petition, but we have not been unreasonable in finding that compliance. In *A & B* v. *C & D*, 239 Ark. 406, 390 S.W.2d 116, *cert. denied*, 382 U.S. 926 (1965), we used the words "substantial compliance" in discussing a direct attack, but, in reality, we held there was full compliance with the statute. The applicable paragraph is as follows:

> Finally, it is urged that the consent to adoption was not properly executed. Appellants point out that the adoption statute requires a written consent, verified by affidavit, and they assert that Mrs. Ward only witnessed and acknowledged B's signature. It is true that the evidence does not reflect that B held up her hand while Mrs. Ward recited a formal oath, but we think there was substantial compliance with the statutory requirement. Mrs. Ward was present in the room; Mrs. Ward *did* see B sign the consent; Mrs. Ward *did hear* the explanation given B by the attorney representing C and D, and it is obvious that this appellant executed the instrument with the full intent to do that which is required by the statute. Ark. Stat. Ann. § 28-206 (Repl. 1962) provides:
>
> "Every affidavit shall be subscribed by the affiant, and the certificate of the officer before whom it is made shall be written separately, following the signature of the affiant."

Id. at 413-14, 390 S.W.2d at 120.

Likewise, in *Taylor* v. *Collins*, 172 Ark. 541, 289 S.W.2d 466 (1927), we said compliance with the statute was "mandatory" and that there was "substantial compliance" with it. The court of appeals, in *Arkansas Department of Human Services* v. *Couch*, 38 Ark. App. 165, 832 S.W.2d 265 (1992), adopted our language from *Taylor* v. *Collins*. However, we have never intended to vary our requirement that on direct appeal there be strict compliance because, as we have often written, adoption statutes are in derogation of the common law and must be strictly construed. *See*

Swaffar v. *Swaffar*, 309 Ark. 73, 827 S.W.2d 140 (1992) and cases cited therein. This is a case of the direct appeal of an adoption decree.

IV. The Difference Between the Two Kinds of Appeal

In *Taylor* v. *Collins*, 172 Ark. 541, 289 S.W.466 (1927), we explained the difference between the standards for collateral attack and direct appeal. In that case, the petition for adoption alleged that the child was a resident of the county, but his name was unknown and could not be ascertained. Thus, it was impossible to comply with that part of the statute that required the name of the child be set out in the petition. *We explained that this might constitute error on direct appeal, but not on collateral attack because, once jurisdiction has been established, regularity is presumed.*

Another case setting out the difference in the proceedings is *Avery* v. *Avery*, 160 Ark. 375, 255 S.W. 18 (1923). In that case, we held that, unless the jurisdictional facts appear in the record, an adoption is void because jurisdiction is never presumed for a court of limited jurisdiction. However, if the jurisdictional facts do appear, the adoption is valid, and the jurisdictional facts recited cannot be attacked in a collateral proceeding. We explained that once jurisdiction is shown, the proceedings are presumed to be regular, but again wrote that there is a difference between collateral attack and direct appeal as follows:

> ["]Appellant contends that the order is void and subject to collateral attack because it does not recite that it was shown by two witnesses that the residence of the father was unknown. But the jurisdiction of the court did not, in our opinion, depend on such evidence, nor was it necessary to make such a recital in the record. Making the order of adoption without such proof would be error, and might be ground to set such order of adoption aside, on petition of the father of the adopted child, but neither D.L. Coleman, on whose petition the order of adoption was made, nor any one claiming through him, as plaintiff does, would be allowed to object to the judgment on that ground."

Id. at 384, 255 S.W. at 21 (quoting *Coleman* v. *Coleman*, 81 Ark. 7, 12 (1906)).

V. Subsequent Legislative Provisions

The General Assembly recognized a need to provide some protection to adoptive parents and adoptive children, who had long been united, from separation. As a result, a two-year statute of limitations was passed in 1949. Although that statute has now been repealed, we likened it to a two-year statute of adverse possession of a child held under a court order intended to be an order of adoption. *Dean* v. *Brown*, 216 Ark. 761, 227 S.W.2d 623 (1950). A similar statute of limitations exists today as part of the Revised Uniform Adoption Act. That code section provides in part:

> [U]pon the expiration of one (1) year after an adoption decree is issued, the decree cannot be questioned *by any person* including the petitioner, *in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter* unless, in the case of the adoption of a minor, the petitioner has not taken custody of the minor or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period.

Ark. Code Ann. § 9-9-216(b) (Repl. 1993) (emphasis supplied).

The court of appeals, in discussing a comparable predecessor statute providing a one-year limitation, wrote: "This statute which is couched in negative language gives rise to a corollary. *For one year following the adoption decree, the adoption may be challenged by any person with an interest.*" *Hensley* v. *Wist*, 270 Ark. 1004, 1006, 607 S.W.2d 80, 82 (Ark. App. 1980) (emphasis supplied), *overruled on other grounds by Wilson* v. *Wallace*, 274 Ark. 48, 622 S.W.2d 164 (1981).

Another part of the Revised Uniform Adoption Act provides that "A consent to adoption cannot be withdrawn after the entry of a decree of adoption." Ark. Code Ann. § 9-9-209(a) (Repl. 1993). This is the statute upon which the majority opinion relies in affirming the case at bar.

In our first case construing this provision, we reversed the ruling of a probate court that had allowed a consent to be withdrawn after the entry of an adoption decree. However, the con-

sent was entered in compliance with the statutes providing the manner for biological parents to consent to adoption, and we implied that the statute presupposes a *valid* form of consent. We wrote: "In making this ruling *we do not imply that consent could not be withdrawn after an interlocutory order upon a proper showing of fraud, duress or intimidation.*" *McCluskey* v. *Kerlen*, 278 Ark. 338, 341, 645 S.W.2d 948, 949 (1983). We cited an Oklahoma case, *In Re: Adoption of Graves*, 481 P.2d 136 (Okl. 1971), as authority for our statement. Our dictum was eminently correct because the statute provides that a consent to adoption cannot be withdrawn after a decree of adoption has been entered, and the statute assumes a consent entered in accordance with the applicable adoption statutes. The cited Oklahoma case fully supports this position. In that case the biological parents sought to set aside an adoption decree and contended that their consent was the result of fraud, coercion, and intimidation. The Oklahoma trial court held that, under a statute with the same provision as § 9-9-209(a), it had no authority to declare the consent invalid after the decree of adoption was entered. The natural parents appealed. The Oklahoma appellate court ruled that the fact that the Uniform Adoption Act contains both a statute of limitations and the statute barring the withdrawal of a consent after a decree has been entered means that some actions can be brought after the decree has been entered, as long as they are brought before the one-year statute of limitations has run. The same reasoning applies to the comparable Arkansas statutes. Thus, the statute presupposes a consent executed in accordance with the applicable statutes, and if the statutes are not complied with, an action can be maintained after an adoption has been granted, as long as the statute of limitations has not run. The statute of limitations had not run in the case at bar.

In our second case involving this provision, we affirmed the probate court's refusal to allow withdrawal of a *valid* consent after the decree of adoption, and in so doing we relied on our first case interpreting this provision, *McClusky*, and, in dictum, said, "[I]t is settled that consent to adoption can be withdrawn after an interlocutory order only upon a proper showing of fraud, duress, or intimidation." *Pierce* v. *Pierce*, 279 Ark. 62, 63, 648 S.W.2d 487, 487 (1983). The quoted dictum is the statement relied upon by the majority opinion. It wholly ignores the con-

cept that the statute prohibiting the withdrawal of a consent after an interlocutory order presupposes a consent executed in accordance with the statute.

VI. The Case At Bar

The case at bar is a direct attack on the order refusing to set aside the adoption. The first issue is whether the direct attack may be maintained after the interlocutory decree of adoption was entered. The majority opinion holds that it can not be so attacked. I would hold that the attack could be maintained since the form and manner of execution of the consent did not strictly comply with the statute and the action was not barred by the statute of limitations. As stated, section 9-9-209(a) of the Arkansas Code Annotated of 1987, which provides that a consent cannot be withdrawn after the entry of a decree of adoption, presupposes a *valid* written consent. The majority opinion holds otherwise. The holding is contrary to overall design of the Revised Uniform Adoption Act and places little or no weight upon the relinquishment of the natural parents' rights. *See In re Adoption of Infant Girl Banda*, 559 N.E.2d 1373 (Ohio Ct. App. 1988). Here, strict compliance with the statute providing the form of the consent was lacking, and there was very little compliance, certainly not strict compliance, with the statute providing for the form of the petition for adoption. The motion to set aside the interlocutory decree was filed within ninety days of the decree, and obviously within one year of the decree. Thus, the petitioner should be allowed to maintain this action.

A. The Petition

Two instruments were filed by the parties, the petition for adoption and the consent. The statutes applicable to the petition are as follows. Section 9-9-210 of the Arkansas Code Annotated of 1987 requires that a written and verified petition must be filed with the clerk. Section 9-9-212 provides that, after the written petition is filed, the court shall fix a time and place for hearing the petition. Section 9-9-212 additionally provides that before a judge conducts the hearing on a petition, the period in which the consent can be withdrawn *must* have expired. Section 9-9-209 provides that the consent may be withdrawn within ten calendar days after it is signed. In this case the petition was filed on

December 13, but the parties stipulated that the court held the hearing on December 10, three days before the petition was filed. Further, the parties stipulated that Rachael Martin signed the consent on December 10. Thus, the period for Rachael Martin to withdraw the consent had not passed at the time the hearing was held. This amounted to no compliance with the statutory requirements that a written and verified petition be filed with the clerk prior to setting a hearing date, that a written consent be filed with the clerk, and that the court *then* set a hearing on the petition later than ten calendar days after the consent was signed.

The code further provides that if the period for the withdrawal of the consent has not passed by the time of the court hearing "*the court shall dismiss the petition* and the child shall be returned to the person or entity having custody of the child prior to the filing of the petition." Ark. Code Ann. § 9-9-214(c) & (d) (Repl. 1993) (emphasis added). Rather than dismiss the petition as the statute provides, the trial court granted the interlocutory decree of adoption. This was in direct conflict with the statutory mandate. Consequently, the probate court erred in refusing to set aside the interlocutory decree of adoption that was granted in violation of applicable statutory directives.

B. The Consent

The statute setting out the requirements for a valid consent was not followed. Both this court and the court of appeals have consistently required strict compliance with the statute providing for a consent to adoption. *Roberts* v. *Swim*, 268 Ark. 917, 597 S.W.2d 840 (1980); *Bemis* v. *Hare*, 19 Ark. App. 198, 718 S.W.2d 481 (1986); *Dodson* v. *Donaldson*, 10 Ark. App. 64, 661 S.W.2d 425 (1983); *Brown* v. *Johnson*, 10 Ark. App. 110, 661 S.W.2d 443 (1983). The reason is the public policy of this state is solicitous toward maintaining the integrity of the natural relationship between parent and child, and a severance of that relationship should be allowed only under carefully defined circumstances. *Roberts*, 269 Ark. at 919, 597 S.W.2d at 841.

Here, the written consent did not inform Rachael that she could withdraw her consent by filing an affidavit with the Probate Clerk of the Chickasawba District of Mississippi County,

and it did not state the address of the clerk. The applicable code sections provide:

> A consent to adopt may be withdrawn within ten (10) calendar days after it is signed or the child is born, whichever is later, by filing an affidavit with the clerk of the probate court in the county designated by the consent as the county in which the adoption petition will be filed. . . .
>
> The consent shall state that the person has the right of withdrawal of consent and shall provide the address of the probate court clerk of the county in which the adoption will be filed. . . .

Ark. Code Ann. §§ 9-9-209(b)(1) & (2) (Repl. 1993).

In addition, section 9-9-208(a)(3) provides: "The required consent to adoption *shall* be executed in the following manner: . . . (3) . . . in the presence of the court or in the presence of a person authorized to take acknowledgements." Ark. Code Ann. § 9-9-208(a)(3) (Repl. 1993) (emphasis added). The consent was not signed in front of the judge. Joyce Howard, the lawyer's secretary, and a notary public, attested that Rachael signed the consent before her on December 10, 1991. She testified that Rachael signed the consent in the lawyer's office on the 10th, just before Rachael and the adoptive parents, Greg and Alice Martin, went to the courthouse for the hearing. Racahel, as well as Greg and Alice Martin, testified that the petition and the consent were both signed at the courthouse. The trial court found that Rachael signed the consent in the hallway of the courthouse. All of the parties agree that Joyce Howard was not present at the courthouse when Rachael signed the consent. In fact, the adoptive mother, Alice Martin, testified that neither the consent nor the petition had been acknowledged at the time of the hearing before the probate court. The trial court's finding that the documents were signed in the hallway of the courthouse is based upon substantial evidence. Thus, the consent was not executed in the presence of either the court or a person authorized to take acknowledgements and, as a result, was not executed in compliance with the applicable statute.

The majority opinion holds that it does not matter that there was not strict compliance with the statutory provisions for a con-

sent. The effect is to abandon our long-established public policy that has been solicitous toward maintaining the integrity of the relationship between biological parent and child, and to allow severance of that relationship under less than the statutorily mandated procedures. I dissent.

NEWBERN and BROWN, JJ., join in this dissent.

ROBERT L. BROWN, Justice, dissenting. I join in Justice Dudley's dissent but write to highlight the public policy behind the ten-day wait that must occur after the natural mother consents to adoption and before the hearing on the adoption petition can take place.

Our statutes require that ten-day period:

> (b)(1) A consent to adopt may be withdrawn within ten (10) calendar days after it is signed or the child is born, whichever is later, by filing an affidavit with the clerk of the probate court in the county designated by the consent as the county in which the adoption petition will be filed. . . .

Ark. Code Ann. § 9-9-209(b)(1) (1987).

> (a) Before any hearing on a petition, the period in which the relinquishment may be withdrawn under § 9-9-220 or in which consent may be withdrawn under § 9-9-209, whichever is applicable, must have expired. . . .

Ark. Code Ann. § 9-9-212 (1987).

> (c) If at the conclusion of the hearing the court determines that the required consents have been obtained or excused and the required period for the withdrawal of consent and withdrawal of relinquishment have passed and that the adoption is in the best interest of the individual to be adopted, it may (1) issue a final decree of adoption; or (2) issue an interlocutory decree of adoption . . . .
>
> (d) If the requirements for a decree under subsection (c) have not been met, the court shall dismiss the petition and the child shall be returned to the person or entity having custody of the child prior to the filing of the petition.

Ark. Code Ann. § 9-9-214(c) & (d) (1987).

An essential plank of the Adoption Code is the ten-day period during which time the natural mother can change her mind and renege on the adoption of her child. The obvious justification for the wait is that the decision is one of monumental importance that must be made coolly and deliberately. To rush pell mell into a hearing before a probate judge with all the inherent pressure and finality that the hearing suggests on the same day of the consent undermines and erodes this policy considerably.

In sum, the mother must have an unobstructed period before the adoption hearing to reconsider her decision, and that did not occur in this instance. We strictly construe and apply our adoption statutes. *Swaffar* v. *Swaffar*, 309 Ark. 73, 827 S.W.2d 140 (1992); Norris v. Dunn, 184 Ark. 511, 43 S.W.2d 77 (1931). I accordingly dissent.

NEWBERN, J., joins.

William C. HICKSON *v.* STATE of Arkansas

CR 93-1212 875 S.W.2d 492

Supreme Court of Arkansas
Opinion delivered May 2, 1994

Bryant & Henry, by: *Barry A. Bryant*, for appellant.

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

DONALD L. CORBIN, Justice. Appellant, William C. Hickson, appeals the denial by Miller Circuit Court of his request to be present for the hearing on his motion for order of delivery. Appellant also appeals the subsequent denial of his petition to correct sentence. This case presents another issue as well: the interplay of Ark. R. Crim. P. 37 and Ark. Code Ann. § 16-90-111 (1987) and their conflicting time limitations when one petitions for post-conviction relief. This court has jurisdiction since a sentence of more than thirty years was imposed.

Appellant was convicted of two counts of second degree murder and one count of first degree battery. After the jury returned its verdict, the court asked in counsels' and defendant's presence whether there was any reason sentence should not be imposed at that time. Both counsel replied that there was none, though the defendant himself did not reply. Sentence was then imposed.

Subsequently, appellant filed a motion asking to be present when his petition to correct sentence was heard asserting he had this right under the Ark. Const. art. 2, § 10 and Ark. Code Ann. § 16-90-106 (1987). After a hearing on this matter, it was denied. The petition to correct sentence was later denied, the sole issue being whether appellant had been given his right of allocution at trial. This appeal resulted, and we dismiss the appeal as untimely.

The state argues that the petition for correction of sentence was untimely. Specifically, all parties including the court appeared to have proceeded under the statutory allowance of correction of sentence which permits 120 days within which to file a petition. Appellant filed his petition citing this statutory rule. The state argues the corresponding rule in Ark. R. Crim. P. 37.2(c) requires this petition to be submitted within sixty days of the affirming mandate. The state submits that the procedural rule is paramount and should act as a bar to this petition, citing *State* v. *Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990). We agree. The pertinent wording in subsection (b) of Rule 37.2 makes this clear:

> All grounds for post-conviction relief from a sentence imposed by a circuit court, including claims that a sentence is illegal or was illegally imposed, must be raised in a petition under this rule.

Statutes are given deference only to the extent that they are compatible with our rules, and conflicts which compromise these rules are resolved with our rules remaining supreme. *Sypult*, 304 Ark. 5, 800 S.W.2d 402. This rule of criminal procedure is therefore controlling. Appellant's petition for post-conviction relief is untimely. Since the petition is untimely, appellant's other argument regarding his presence at the hearing is moot.

Appeal dismissed.

HAYS, J., concurs.

JACUZZI BROTHERS, INC. *v.* Floyd L. TODD

93-1288 875 S.W.2d 67

Supreme Court of Arkansas
Opinion delivered May 2, 1994

Friday, Eldredge & Clark, by: *James C. Baker, Jr.*, for appellant.

Gary Eubanks & Associates, by: *James Gerard Schulze*, for appellee.

DONALD L. CORBIN, Justice. Appellant, Jacuzzi Brothers, Incorporated, appeals a judgment of the Saline Circuit Court awarding appellee, Floyd L. Todd, damages of $612,500.00 in a slip and fall case. Appellant asserts three points of error in the jury trial. We find merit in the last point, and we modify on condition of remittitur.

Appellee was employed by Little Rock Sheet Metal when he slipped and fell as he exited appellant's plant on February 20, 1990. Appellee entered appellant's plant to measure for a new sheet metal job. He returned to the same door he had entered and found it closed, so he exited a red door with an "exit" sign above it. He tripped near the bottom of the concrete stairs that were approximately three feet from the door he exited. A chunk of concrete was missing from one of the steps, and appellee caught his foot in the hole created by the missing concrete. As a result of the fall, appellee suffered a back injury requiring two surgeries and the possibility of a third surgery in the future. Pursuant to the jury verdicts, appellee was awarded $600,000.00 in damages and a separate verdict of $12,500.00 for future surgical expenses. Appellant unsuccessfully moved for a new trial, and this appeal followed.

Appellant first contends the trial court erroneously allowed the interjection of evidence concerning a subsequent remedial measure. At the time of appellee's fall, there was an "exit" sign on the door he exited, and subsequent to his fall, the sign was removed. Appellant argues the removal of the "exit" sign constitutes a subsequent remedial measure which is inadmissible as proof of negligence under A.R.E. Rule 407. Appellant contends

this prejudicial error occurred during cross-examination of Mr. Gale Graham, appellant's facilities and environmental engineer:

> Q Just to be sure. You're not saying there was a sign that said emergency exit only, you're saying you just don't know?
>
> A Right.
>
> Q You do know that there was a sign at one point in time that said exit?
>
> A Probably was, yeah. There's evidence there was a sign on the door, okay.
>
> Q Since February 20, 1990, there has been a sign that said exit?
>
> A I didn't see an exit the other day. I didn't see a sign on the door that said exit.

Appellant moved for a mistrial after the last question and answer quoted above. Appellee contends this last question was justified impeachment based upon misleading statements Mr. Graham made characterizing the door as an emergency exit door painted red with panic hardware. Apparently, appellee relies on the impeachment exception to Rule 407. However, reliance on the impeachment exception is misplaced. Appellee could have established what he desired — that the door did have an "exit" sign on it as opposed to an "emergency exit only" sign on the day of appellee's accident, February 20, 1990, and that Mr. Graham stated in his deposition that the door did in fact have an "exit" sign on it — without ever making reference to the status of the door after February 20, 1990.

We agree with appellant that the question relating to the status of the sign on the door after the date of the accident was an improper question for the purpose of proving appellant's negligence at the time of the accident. A.R.E. Rule 407. The trial court correctly instructed appellee not to proceed with any questions regarding the status of the door after February 20, 1990. However, the trial court, who was in a superior position to judge the effect of the erroneous question on the jury, did not see the error as prejudicial and grounds for a mistrial. We cannot say the trial court abused its discretion in this regard.

The trial court had twice previously sustained objections appellant made regarding subsequent remedial measures, and the judge offered to give the jury a cautionary instruction. Appellant did not accept the trial court's offer nor did it request the question and answer be stricken. Appellant contends a mistrial is the only remedy appropriate in this instance and that this is the reason it did not accept the trial court's offer to give the jury a cautionary instruction. We cannot agree that a mistrial was the only appropriate remedy here, given that the trial court had previously sustained appellant's objections on Rule 407 grounds and was very careful to maintain strict control of the evidence in this regard.

We also cannot agree that Rule 407 is something akin to a privilege, requiring automatic reversal if violated. While we recognize there is a two-pronged rationale for excluding evidence of subsequent remedial measures — the lack of relevance and the public policy of encouraging such measures — the policy consideration merely strengthens the argument for exclusion, but does not require exclusion. Rule 407 remains part of the article on relevance, not part of the article on privileges. *See* Arkansas Rules of Evidence, Articles IV and V.

A trial court is vested with considerable latitude and discretion when considering a motion for mistrial. *Bull Shoals Community Hosp.* v. *Partee*, 310 Ark. 98, 832 S.W.2d 829 (1992). A mistrial is an extreme remedy to be granted only when it is apparent that justice cannot be served by continuing the trial. *Morton* v. *Wiley*, 271 Ark. 319, 609 S.W.2d 322 (1980); *Rickett* v. *Hayes*, 256 Ark. 893, 511 S.W.2d 187 (1974). Deferring to the trial court's superior position to judge these matters, we cannot say the error committed here was so egregious to prevent a just and fair trial. A mistrial was therefore not warranted, and we cannot say that reversible error occurred.

Appellant also contends the trial court erred in denying its motion for new trial made on the same grounds as the motion for mistrial. When the primary issue on a motion for new trial is not a question of liability, we sustain the trial court's denial unless there is a clear and manifest abuse of discretion. *See Fisher Trucking, Inc.* v. *Fleet Lease, Inc.*, 304 Ark. 451, 803 S.W.2d 888 (1991). We have already determined the trial court did not abuse its discretion in this regard.

As its second argument, appellant contends the trial court erred in refusing its proffered jury instructions on the duties owed to a licensee and trespasser. Appellant objected to the giving of AMI 1104, which instructed the jury that appellee was a business invitee to whom appellant owed the duty of ordinary care to maintain its premises in a reasonably safe condition. Appellant argues there was substantial evidence to support the conclusion that appellee was a business invitee who had crossed the boundary of his invitation and become either a licensee or trespasser. *See Daniel Constr. Co.* v. *Holden*, 266 Ark. 43, 585 S.W.2d 6 (1979). Therefore, appellant proffered eight interrogatories along with AMI 1106, which both defined the three classifications of injured persons along with the corresponding duties owed them by the landowner and instructed the jury to determine appellee's classification. Appellant argues the trial court erred in limiting the jury to the instruction on business invitee and should have given the proffered instruction on licensee and trespasser as well.

[redacted] In its brief, appellant has carefully summarized all the evidence lending support to its argument that appellee went beyond the scope of his invitation. Although the trial court was aware of such evidence, the trial court was not aware of the particular argument appellant makes on appeal. As abstracted, the only basis for appellant's objection to the AMI 1104 business invitee instruction was that the proffered AMI 1106 should be given instead. Appellant did not give a reason why AMI 1104 should not be given, nor did it give a reason why AMI 1106 should be given. Such an objection accomplished nothing as far as informing the trial court of the particular error appellant saw in AMI 1104. We have recently held that a proffered instruction without an accompanying reason for the objection to the instruction given is insufficient to preserve the issue for our review. *Gilliam* v. *Thompson*, 313 Ark. 698, 856 S.W.2d 877 (1993).

We do not intimate that appellant should have summarized all the evidence for the trial court as it did in its brief to this court. However, an objection simply stating that there was evidence indicating Mr. Todd had exceeded the scope of his invitation into the plant and therefore the jury should be allowed to make the determination of fact as to whether Mr. Todd was a business invitee, licensee, or trespasser was required as a bare minimum to apprise the trial court of the particular error of which appel-

lant complains on appeal. Accordingly, appellant has waived this argument on appeal. *Gilliam*, 313 Ark. 698, 856 S.W.2d 877.

As its last point of error, appellant contends the trial court erred in denying its motion in limine requesting the exclusion of Dr. Zachary Mason's testimony regarding the possibility that appellee would require future surgery. Dr. Mason, a neurosurgeon, testified there was a thirty percent chance that appellee would require a future orthopedic surgery. He estimated the cost of such surgery to be $10,000.00 to $15,000.00. Dr. Mason also stated that because of appellee's size, appellee had an increased risk of needing surgery. Dr. Mason testified that while appellee's increased risk was not speculative, whether appellee would require the surgery at all was speculative.

Appellant maintains that to be admissible an expert's testimony must be that his opinion represents his professional judgment as to the most likely or probable result and that Dr. Mason's testimony that appellee may require future surgery is speculative and therefore inadmissible. Appellant relies on *Waterfield* v. *Quimby*, 277 Ark. 472, 644 S.W.2d 241 (1982). We agree that a thirty percent chance of requiring a future surgery is not the most likely result and therefore constitutes speculative evidence. The trial court therefore erred in allowing Dr. Mason's testimony in this regard.

Appellant argues this error tainted the entire verdict, and thus a remittitur of the $12,500.00 awarded for future surgical expenses is not warranted. We disagree. Ordinarily, a general verdict is a complete entity which cannot be divided, requiring a new trial upon reversible error; however, when a trial error relates to a separable item of damages, a new trial can sometimes be avoided by the entry of a remittitur. *Wheeler* v. *Bennett*, 312 Ark. 411, 849 S.W.2d 952 (1993); *White River Rural Water Dist.* v. *Moon*, 310 Ark. 624, 839 S.W.2d 211 (1992); *Martin* v. *Rieger*, 289 Ark. 292, 711 S.W.2d 776 (1986). In this case, the $12,500.00 for future surgical expenses was awarded as a separate verdict, not part of the $600,000.00 general verdict. We have no hesitation in holding the $12,500.00 is a separable item of damages justifying a remittitur. If appellee remits the $12,500.00 within seventeen days, we will affirm as modified. Otherwise, as a general verdict cannot be divided, we must remand

for a new trial. Moon, 310 Ark. 624, 839 S.W.2d 211; *Martin*, 289 Ark. 292, 711 S.W.2d 776. We misspoke in *Wheeler* when we stated a new trial only on damages would result if the conditional remittitur was not accepted. *See Wheeler*, 312 Ark. at 422, 849 S.W.2d at 958.

The judgment is affirmed as modified on condition of remittitur.

DUDLEY, J., concurs.

GLAZE, J., concurs as to point one expressing his opinion that Todd's evidence reflecting subsequent remedial measures was admissible because it showed the extent Jacuzzi Brothers, Inc. intended to control exiting its building.

HAYS and NEWBERN, JJ., dissent.

STEELE HAYS, Justice, dissenting. This personal injury case was defended throughout on the theory that the plaintiff Todd became a licensee rather than an invitee when he left the Jacuzzi plant by a route he was not authorized to use. Beginning with its answer alleging that the plaintiff had "trespassed into an area of the premises in which he was not authorized to be present," to its answers to interrogatories asserting that Todd had left the area he was authorized to use, to its request for a jury trial asserting the same grounds, to the testimony of witnesses that Todd disregarded yellow lines leading out and used an "emergency" exit he had never previously used, Jacuzzi's position was clear. This is a familiar issue and the law is settled:

> We have said that when one crosses the boundaries of the invitation, he ceases to be an invitee and becomes either a licensee or a trespasser. *Husted* v. *Richards*, 245 Ark. 987, 436 S.W.2d 103. This is in keeping with the general rule recognized by the authorities. It is said that one who enters a building as an invitee for a business purpose is an invitee only while he remains in a portion of the building in which he had a legitimate errand, but if he leaves a place of safety and goes to a place where his business does not require him to be, deliberately placing himself in a position where he is injured by a defective appurtenance, he acquires a less favored status. 62 Am. Jur. 2d 286,

> *Premises Liability*, § 47. It is necessary that an employee of a subcontractor, in order to recover as a business invitee of the general contractor, show that, when he was injured, he was using a part of the premises reasonably within the contemplation of the employer's contract or accepted by defendant as being so. Annot., 20 ALR 2d 868, 914.

Daniel Const. Co. v. *Holden*, 266 Ark. 43, 585 S.W.2d 6 (1979).

In this case most of the trial testimony and evidence centered on whether Todd was an invitee, express or implied, in the area where his injury occurred and clearly a question of fact on that issue was created by the proof. When the testimony was concluded and instructions were under discussion Jacuzzi objected to AMI 1104, which told the jury categorically that Floyd Todd was an invitee:

> In this case Floyd Todd was a business invitee upon the premises of Jacuzzi Brothers, Inc. Jacuzzi Brothers, Inc. owed Floyd Todd a duty to use ordinary care to maintain the premises in a reasonably safe condition.

In lieu of AMI 1104, Jacuzzi asked that AMI 1106 be given, which instructed the jury to decide whether Todd was an invitee or a licensee and explained the duty owed to each.

On appeal, the majority rejects Jacuzzi's contention, not for lack of merit, but because the argument was waived when counsel for Jacuzzi failed to give a reason why AMI 1104 should not be given, and failed to give a reason why AMI 1106 should be given. I submit the appellant preserved the point for review by objecting to AMI 1104, which told the jury that the plaintiff was an invitee as a matter of law, and proffering AMI 1106, which submitted that issue to the jury. The reason for the request could hardly have been clearer and I have no doubt but that the trial judge understood what he was being asked to do. It is, of course, error for an instruction of the trial court to assume a disputed fact which the jury should decide. *Porter* v. *Lincoln*, 282 Ark. 258, 668 S.W. 2d 11 (1989); *Thiel* v. *Dove*, 229 Ark. 601, 317 S.W.2d 121 (1958).

The majority relies on *Gilliam* v. *Thompson*, 313 Ark. 698,

856 S.W.2d 877 (1993). The last paragraph of that opinion ostensibly supports the majority. But if that is what this court meant to say in *Gilliam* then we were wrong and we should make haste to correct the error. This court has *never held* that when a correct jury instruction is proffered, consistent with the proof, it must also be accompanied by a statement as to why it should be given. Notably, *Gilliam* cites no authority for such a rule, because there is none. *Gilliam* refers to *Viking Ins. Co.* v. *Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992), but not for that reason. The *Viking* case, in fact, directly refutes *Gilliam*. There we wrote:

> In accordance with [Rule 51], we have said no party may assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection, *and no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue.* [My emphasis.]

That language, of course, is taken verbatim from ARCP Rule 51, which says nothing about a supporting statement when an instruction is refused. A careful reading of Rule 51 leads to the conclusion that the rule has three elements: one) objections to instructions must be made before or at the time an instruction is given; two) an objection to the *giving* of an instruction must be specific; and three) no error may be assigned to the *failure* to instruct on any issue unless the party has submitted a proposed instruction. In this case the appellant objected to the trial court deciding the issue of Todd's status as a matter of law and proffered an AMI instruction which submitted that factual issue to the jury. That is sufficient.

One may search our cases in vain for any decision in which we have held that for error to be preserved for the refusal to give a proper instruction, the proffer must be accompanied by supporting argument. Certainly when one objects to an instruction, a specific reason must be stated. Rule 51 makes that clear. But there is no requirement that when a correct instruction is requested and refused, a statement must be made as to why it should be given. If *Gilliam* is the law, Rule 51 is seriously misleading. Our cases, and there are many, hold uniformly that when one objects

to an erroneous instruction and proffers a correct instruction, the point is preserved for purposes of appeal. In *St. Louis Southwestern Ry Co.* v. *Ellis*, 169 Ark. 682, 276 S.W. 996 (1925), we reversed because the appellant objected properly to the instruction given and "asked for an instruction in the precise language approved by this court." That was sufficient for purposes of appellate review. Where the point is not preserved it is either because the appellant failed to submit a correct instruction or the proof was lacking, but not for want of supporting argument. *See, e.g., Kelly* v. *Medlin*, 309 Ark. 146, 827 S.W.2d 655 (1992); *Burnette* v. *Morgan*, 303 Ark. 150, 794 S.W.2d 145 (1990); *City of Little Rock* v. *Weber*, 298 Ark. 382, 767 S.W.2d 529 (1989); *People's Bank and Trust Co.* v. *Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986), *South Arkansas Oil Co.* v. *Livingston*, 250 Ark. 374, 465 S.W.2d 119 (1971); *Johnson* v. *Truck Insurance Exchange*, 285 Ark. 470, 688 S.W.2d 728 (1955); *Trisha* v. *Savage*, 219 Ark. 80, 239 S.W.2d 1018 (1951); *Ozark Packing Co.* v. *Stanley*, 211 Ark. 749, 202 Ark. 352 (1947); *Newman* v. *Peay*, 117 Ark. 579, 176 S.W. 143 (1915); *Boone* v. *Boone*, 114 Ark. 69, 169 S.W. 779 (1914); *Williams* v. *Clark*, 105 Ark. 157, 150 S.W. 568 (1912); *Allison* v. *State*, 74 Ark. 444, 86 S.W. 409 (1905).

We have long held that a party is entitled to have his/her theory presented to the jury and it is error to refuse a proper instruction when there is any evidence tending to support it. *Findley* v. *State*, 307 Ark. 53, 818 S.W.2d 242 (1991) ("even the slightest evidence"); *Dunlap* v. *State*, 303 Ark. 222, 795 S.W.2d 920 (1990) ("slightest evidence"); *Cain* v. *Songer*, 176 Ark. 551, 3 S.W.2d 315 (1928) ("it was error to refuse an instruction presenting plaintiff's theory that the contract was one of sale"); *Life & Casualty Insurance of Tenn.* v. *Gilkey*, 255 Ark. 1060, 505 S.W.2d 200 (1974) ("Since the trial court judge is under a duty to instruct as to the law applicable in the case, it was error not to give the instruction").

The fact is *Gilliam* stands alone among our cases — a radical departure from decades of trial and appellate practice. If that is to be the law, it ought to come only after fair warning and a revision of Rule 51. I respectfully dissent.

NEWBERN, J., joins in this dissent.

SECOND INJURY TRUST FUND *v.* POM, INC.,
Commercial Union Insurance Company, and Carl Ray Taylor

93-1327 875 S.W.2d 832

Supreme Court of Arkansas
Opinion delivered May 2, 1994

David L. Pake, for appellant.

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

DONALD L. CORBIN, Justice. This case comes to this court on a petition for review from an unpublished decision of the court of appeals. *POM, Inc.* v. *Taylor*, CA 92-1250, (Ark. App. December 1, 1993). We granted petitioner's request on the basis that this case, concerning statutory interpretation, is of significant public interest. Ark. Sup. Ct. R. 1-2(d)(2). The sole issue presented for review is the court of appeals' interpretation of the term "impairment" as it appears in Ark. Code Ann. § 11-9-525(b)(5) (1987):

> If the previous disability or impairment, whether from compensable injury or otherwise, and the last injury together result in permanent total disability, the employer at the time of the last injury shall be liable only for the actual anatomical impairment resulting from the last injury considered alone and of itself.

Carl Ray Taylor, the employee, first sustained a work related back injury necessitating surgery in February 1983. He was assessed a 10% disability rating to the body as a whole upon discharge from care but suffered no wage loss. This injury happened while in another company's employ. In February 1989, the employee, then working for POM, reinjured his lower back requir-

ing surgery in the same location, resulting in an increased impairment rating of 25% to the body as a whole. The administrative law judge determined that the employee was entitled to receive permanent total disability, that POM was required to pay for the entire rating and expenses, and that the fund had no liability. The judge reasoned that second injury fund liability did not attach because the first injury was not shown to produce a loss of earning capacity.

POM appealed to the Full Commission which adopted the administrative law judge's findings and added that in order to invoke fund liability, it was necessary to show that the employee suffered a loss in wage earning capacity where the initial injury was work related, because an "impairment" is necessarily non-work related. Thus, the first injury had to be considered a "disability" and not an "impairment" since it occurred at work.

POM appealed the Full Commission's affirmance to the court of appeals, arguing that it should only be liable for the actual anatomical impairment resulting from the last injury alone and that the fund should be liable for the remainder from the first injury. The court of appeals reversed and remanded, finding that a preexisting impairment under the statute can be either work related or non-work related. We uphold the decision of the court of appeals.

On review, the fund argues that the court of appeals impermissibly expanded the definition of "impairment" to include prior work related conditions, which opens theoretical flood gates to Second Injury Fund liability. The fund argues that this allows the fact finder to manipulate the standard of proof required to prove the fund's liability, arbitrarily allowing a finding of wage loss or not since an injury can be work or non-work related to initiate fund liability. We disagree with this "slippery slope" argument.

This court clearly set out in *Mid-State Constr. Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988), that defining "impairment" to necessarily include wage loss was wrong since it would undermine the purpose of the Second Injury Trust Fund to encourage the hiring of handicapped persons. In that case, the definition of "impairment" included only non-work

related conditions. Along that line of reasoning, the court of appeals has removed the restriction that impairment be limited to work related conditions in order to achieve the purpose of the Second Injury Fund.

The purpose of the fund is set out clearly in section 11-9-525:

> (a)(1) The Second Injury Trust Fund established in this chapter is a special fund designed to insure that an employer employing a handicapped worker will not, in the event the worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his employment.

To remove the non-work versus work distinction in defining "impairment" is indeed an extension of previous law but is warranted. This is only an extension that logically follows the extension we made in *Mid-State. Mid-State* held that it is not necessary to demonstrate wage loss when impairment is involved. This holding is explained well in the majority opinion:

> To hold otherwise would result in the unfounded and unintended situation that Second Injury Fund liability is denied in a case where a potential employee suffers from an impairment such as loss of one eye which would clearly be capable of supporting an award if the other elements of compensability were present, and the individual is subsequently hired and suffers a compensable injury, such as loss of the other eye, which combines with the former condition to produce the current disability status — complete blindness. Under the definition of impairment as set out in *Osage*, there is no Fund liability simply because the claimant was unable to demonstrate that the former condition had involved a loss of earning capacity.
>
> . . . That result impermissibly distinguishes between two types of handicapped persons, contravenes the statutory scheme which makes employers liable only for the "degree or percentage of disability or impairment which would have resulted from the [recent compensable] injury had there been no preexisting disability or impairment," and defeats the purpose of the Fund to encourage the hiring of the handicapped.

Id., 295 Ark. at 7-8, 746 S.W.2d at 542-43. The same logic must apply to impairment so that an injured group is not left without fund coverage. If the fund's argument that "impairment" means only non-work related impairment were accepted, then a claimant could never reach fund liability. To follow the fund's argument would discourage the very end the fund was designed to meet. Furthermore, the word "impairment" is used in section 11-9-525 in several differing contexts which cannot be read to define it in such a restricted manner. An impairment should be able to be considered work related, and we hold so.

The opinion of the court of appeals is affirmed.

GLAZE, J., concurs.

Allen Eugene DRYMON *v.* STATE of Arkansas

CR 93-1265 875 S.W.2d 73

Supreme Court of Arkansas
Opinion delivered May 2, 1994
[Rehearing denied May 31, 1994.]

[redacted]

Penix & Taylor, by: *Stephen L. Taylor*, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Allen Eugene Drymon appeals his judgment of conviction on four counts of rape involving his two minor stepdaughters, A.J. and H.J. He was sentenced to a total term of 50 years. He now raises four points for reversal: (1) whether the trial court erred by holding a Rape Shield hearing less than three days before trial; (2) whether the trial court abused its discretion by refusing to admit instances of alleged prior sexual conduct of the victims; (3) whether the trial court abused its discretion by refusing to grant a mistrial when defense counsel referred to prior sexual conduct in his opening statement; and (4) whether the trial court abused its discretion by refusing to suppress Drymon's incriminating statement on grounds of intoxication. We affirm the judgment.

Drymon, his wife (Elaine Drymon), her two daughters (H.J. and A.J.), and three other children moved from Missouri to a home near Prairie Grove in 1987. Elaine Drymon was employed at Braum's restaurant and went to work at 3:00 p.m. in the afternoon and worked until midnight. Drymon was employed at Chicken Pullman and went to work at approximately 5:30 p.m., according to several witnesses, although Drymon himself testified that he went to work earlier. In September of 1992, Elaine Drymon was told by her young son that Drymon was abusing her two daughters. She promptly advised the Washington County Sheriff's Office of this. As part of the Department's investigation, Deputy Sheriff Joanne Frieheit took a statement from Drymon in which he incriminated himself. Drymon was then charged with

four (4) counts of rape, consisting of sexual intercourse and deviate sexual activity with his stepdaughters, H.J., who was age 11 at the time Drymon was charged, and A.J., who was age 13 at that time.

On February 10, 1993, Drymon moved to suppress the custodial statement which he gave to Deputy Frieheit and asserted that when the statement was made, he was so intoxicated that he was not capable of knowingly and intelligently waiving his rights against self-incrimination. On March 8, 1993, he filed a motion to determine the admissibility of the victims' prior sexual conduct pursuant to Ark. Code Ann. § 16-42-101 (1987), commonly known as the Rape Shield Statute. The motion alleged that the victims' past conduct was relevant to Drymon's defense and requested that the court schedule a hearing to determine the relevancy of the evidence.

The day before the trial, on May 3, 1993, Drymon asked for a hearing on his two pre-trial motions, and the hearing was commenced late that afternoon and continued on the next day. Deputy Frieheit testified that she observed Drymon in her car during the twenty minute drive from Springdale to the Sheriff's office in Fayetteville on the day he made his statement. She stated that she smelled no alcohol on his breath, that he did not behave as though he were intoxicated, and that his speech was clear and not slurred. She added that upon arriving at the Sheriff's Department, Drymon was advised of his rights and waived them. She produced the waiver-of-rights form signed by him. She then conducted an interview with Drymon which took ten minutes and resulted in the incriminating statement. The interview was taped.

Other testimony at the pre-trial hearing was taken from Deputy Sheriff Charles Rexford, who testified that Drymon showed no signs of intoxication, and from Drymon himself who related that he had been drinking for two days prior to his arrest and had also smoked marijuana. He further stated that his supervisor, Harvey Ward, refused to let him work the day of his statement because he was too intoxicated.

The court next proceeded to hear testimony on Drymon's motion to permit evidence of the victims' prior sexual conduct. Drymon objected to the timing of the hearing on the basis that

the hearing was not conducted three days before trial as the Rape Shield Statute required. The trial court overruled the objection and stated that it did not know about the motion until advised by defense counsel on May 3, 1993. Once it learned of the motion, a hearing was scheduled immediately.

Drymon testified that he had witnessed the victims involved in "sex play" on several occasions. He stated that he saw H.J. masturbate with her fingers and found her in bed one time with her younger brother. He also stated that he witnessed A.J. masturbating with a doll leg and on another occasion with her fingers.

Drymon further imparted that he planned to testify at trial that A.J. had attempted to have sex with him. He stated that this occurred when he was drunk, and when he realized it was A.J. and not his wife, he terminated the activity. He testified that H.J. also initiated sexual contact with him but that it never was consummated. He stated that there was no further sexual contact with the two girls.

Drymon's third example of past sexual conduct was that A.J. had walked in front of him and Robert Williams, a friend, wearing a pair of pants with a hole in the seat which exposed her backside. Finally, he advised the trial court that he planned to have a psychologist, Dr. Bruce Allen, testify at trial that the victims had been "sexualized" by the dysfunctional nature of the family and by exposure to pornography.

The trial court ruled on May 4, 1993, that the motion to suppress Drymon's statement was denied and that the masturbation testimony, the torn-pants testimony, and the evidence by the psychologist of a "sexualized" environment were inadmissible. The trial court made no mention in its ruling of the two incidents where Drymon claimed that the two girls had tried to seduce him when he was intoxicated.

Following a brief recess, the trial court proceeded with jury selection and opening statements. During opening statement, defense counsel stated:

> What I'm about to tell you goes against my nature as a defense attorney. And I want to come in here and tell

> you everything is bright and rosy and we're here because of a mistake, but I don't believe that's true. There were potentially two acts of sexual conduct or sexual —well, conduct may be the best word — between Allen Drymon and these two girls. Now, keep in mind —

At this point, the State objected, and a conference was held at the bench. Drymon's counsel explained that he intended to refer to the two times when Drymon found the girls trying to have sex with him when he was drunk and that this evidence had not been excluded by the court under the Rape Shield Statute. The trial court sustained the State's objection, and defense counsel moved for a mistrial. The motion was denied, and though Drymon's counsel did not request it, the trial court admonished the jury:

> Ladies and gentlemen of the jury, I'm going to admonish you to disregard the last statement of Mr. Taylor in his opening statement.

Following the trial, the jury found Drymon guilty of all four counts of rape, and he was sentenced to a total term of fifty years.

I. RAPE SHIELD HEARING

For his first point, Drymon urges that the trial court violated the Rape Shield Statute by not holding a hearing three days before trial. Instead, the hearing was held the day before the trial (May 3, 1993) and the morning of the trial. The relevant subsection of the Rape Shield Statute reads:

> (2)(A) A hearing on the motion shall be held in camera no later than three (3) days before the trial is scheduled to begin, or at such later time as the court may for good cause permit.

Ark. Code Ann. § 16-42-101(c)(2)(A) (1987).

Drymon filed his motion to admit evidence of the victims' alleged prior sexual conduct on March 8, 1993. At that time trial was set in April, 1993. A continuance was ordered, and trial was reset for May 4, 1993.

The Rape Shield Statute clearly provides that a hearing *shall* be held on a motion. However, the timing of the hearing is not mandatory and may occur closer to the trial as the court permits

"for good cause." In this instance, the trial court stated that it was unaware of the motion or that Drymon wanted a hearing on it until May 3, 1993. Furthermore, despite Drymon's protest that the ruling was needed in order to adequately prepare for trial, it was his responsibility to pursue the motion and to bring the matter of a hearing to the court's attention. He did not do this until the day before the trial.

We hold that good cause for conducting the hearing within three days of trial clearly existed. In addition, Drymon's claim of prejudice resulting from the timing of the hearing is not convincing for several reasons. For one thing, he received a full hearing on his motion. For another, he was granted the opportunity to present witnesses in support of his motion, and at the close of the hearing, he stated that he had no other witnesses to present. He also failed to request a continuance of the trial to prepare his defense in light of the trial court's adverse rulings on his pre-trial motions. Under these circumstances, we discern no prejudice to Drymon's case.

II. EXCLUSION OF PROPOSED EVIDENCE UNDER THE RAPE SHIELD STATUTE

Drymon next asserts that the trial court abused its discretion by ruling that certain proposed incidents of prior sexual conduct by the victims were inadmissible.

The admissibility of a victim's prior sexual conduct is determined pursuant to the Rape Shield Statute and is discretionary with the trial court. *Laughlin* v. *State*, 316 Ark. 489, 872 S.W.2d 848 (1994). In evaluating the admissibility of such evidence under the statute, the court must determine whether the probative value of the evidence outweighs its inflammatory nature. *Id.*; *Logan* v. *State*, 300 Ark. 35, 776 S.W.2d 341 (1989). We will not disturb the trial court's decision absent a manifest abuse of discretion. *Id.*

We begin by addressing Drymon's claim that each of the victims initiated sexual contact with him on two separate occasions when he was intoxicated. It is settled law that acts of prior consensual conduct between the victim and the accused are admissible only when consent is at issue. *State* v. *Sheard*, 315 Ark. 710, 870 S.W.2d 212 (1994); *State* v. *Small*, 276 Ark. 26, 631

S.W.2d 616 (1982). Here, the two victims were younger than the age of consent at the time of the alleged conduct; thus, consent patently cannot be a defense in this case. Drymon maintains, however, that he was intoxicated and had no cognizant participation in the two sexual encounters with A.J. and H.J. But this assertion does not resolve the matter in his favor. Voluntary intoxication is not a defense to criminal prosecutions. *Spohn* v. *State*, 310 Ark. 500, 837 S.W.2d 873 (1992); *Mauppin* v. *State*, 309 Ark. 235, 831 S.W.2d 704 (1992); *Cox* v. *State*, 305 Ark. 244, 808 S.W.2d 306 (1991). Likewise, it is not a defense to having sexual relations with minor children. The trial court ruled correctly that this proffered evidence was irrelevant and of no significance in this case.

With regard to individual masturbation by the victims, this is not included within the definition of "sexual conduct" under the Rape Shield Statute. *See* Ark. Code Ann. §§ 16-42-101(a), 5-14-101 (1987). This court, however, has previously reasoned that irrespective of the Rape Shield Statute incidents of individual masturbation by a victim have no relevance when the question at hand is whether a defendant raped that victim. *Logan* v. *State, supra.*

Drymon argues that this evidence was intended to demonstrate that the victims had a propensity to initiate sex and to refute the testimony of Dr. Robert Irwin, who testified that the victims' vaginal injuries were caused by some kind of penetration. We view the probative value of this testimony as tenuous at best. Dr. Irwin testified that masturbation with a foreign object would have been painful because of vaginal infection. Moreover, as in the case of prior sexual conduct excluded under the Rape Shield Statute, there is a definite humiliation and embarrassment to the victims associated with such a line of inquiry which is not warranted when the evidentiary value of the evidence is so weak. In light of this, we cannot say that the trial court abused its discretion in denying the masturbation testimony.

Lastly, we turn to the incident of the torn pants worn by A.J., and the testimony of the psychologist relating to the girls' exposure to pornography and the effects of a dysfunctional family. We also note that these acts do not constitute sexual con-

duct under the Rape Shield Statute. Ark. Code Ann. §§ 5-14-101 and 16-42-101(a) (1987). Furthermore, such evidence falls far short in probative value and, again, would serve only to humiliate the victims. It was not error to exclude this evidence on grounds of relevance. *Slater* v. *State*, 310 Ark. 73, 832 S.W.2d 846 (1992).

III. MISTRIAL

For his third argument, Drymon insists that the trial court erred by refusing to declare a mistrial. His argument centers on the comment made by defense counsel in his opening statement that there had potentially been two acts of sexual conduct between Drymon and the two girls. These comments prompted an objection from the prosecution which the trial court sustained. The defense moved for a declaration of a mistrial which the trial court refused. The court, on its own volition, then admonished the jury to disregard defense counsel's statement.

Declaring a mistrial is certainly a drastic remedy, and proper only where the error is beyond repair and cannot be corrected by any curative relief. *Meny* v. *State*, 314 Ark. 158, 861 S.W.2d 303 (1993); *Sullinger* v. *State*, 310 Ark. 690, 840 S.W.2d 797 (1992). The trial court has wide discretion in this area, and we will not reverse absent an abuse of discretion or manifest prejudice to the complaining party. *Hall* v. *State*, 314 Ark. 402, 862 S.W.2d 268 (1993).

Drymon makes much of the fact that the trial court did not expressly exclude testimony of sexual conduct initiated by the two victims at the pre-trial hearing. But this argument turns the Rape Shield Statute on its head. It is incumbent upon the defendant under the statute to obtain a written order from the trial court detailing what evidence of prior sexual conduct by the victim may be introduced. Such an order relating to this incident was not obtained. The fact that the trial court was silent on this point following the pretrial hearing offers Drymon no relief. He, accordingly, proceeded to mention the incident in his opening statement at his own risk. We have held that an appellant may not claim reversible error based on his or her error at trial. *Morgan* v. *State*, 308 Ark. 631, 826 S.W.2d 271 (1992); *Terry* v. *State*, 303 Ark. 270, 796 S.W.2d 332 (1990).

But we also do not consider the remark by counsel to have been so irreversible and irredeemable as to warrant stopping the trial. The comment, though significant, was not an admission of guilt and was somewhat vague. An admonishment by the court quickly followed, and at the close of the evidence, the jury was instructed that opening statements were not evidence and that statements which had no basis in evidence should be disregarded. Drymon, of course, took the stand and denied any culpability.

We cannot conclude under these circumstances that the jurors were irrevocably prejudiced by the comment. *See Hall* v. *State, supra.; Miller* v. *State*, 309 Ark. 117, 827 S.W.2d 149 (1992); *Neff* v. *State*, 287 Ark. 88, 696 S.W.2d 736 (1985). The trial court was best positioned to determine the effect of the remark on the jury and concluded that a new trial was not warranted. We find no error in this ruling.

IV. CUSTODIAL STATEMENT

For his last point, Drymon contends that the trial court erred in refusing to suppress his custodial statement on the basis that he was too intoxicated at the time due to drug and alcohol usage to knowingly and intelligently waive his rights.

When the validity of a custodial statement is challenged, the State has the burden of proving that it was knowingly and intelligently made by a preponderance of the evidence. *McDougald* v. *State*, 295 Ark. 276, 748 S.W.2d 340 (1988). This court makes an independent determination based on the totality of the circumstances and does not reverse unless the trial court's determination is against the preponderance of the evidence. *Id.; Midgett* v. *State*, 316 Ark. 553, 873 S.W.2d 165 (1994); *Coleman* v. *State,* 315 Ark. 610, 869 S.W.2d 713 (1994). Intoxication alone will not invalidate a waiver, but simply goes to the weight accorded it. *Midgett* v. *State, supra*; *McDougald* v. *State, supra.* Whether a defendant made a valid waiver under the conditions is a question of fact for the trial court to resolve. *Id.*

In the instant case, Drymon acknowledged in a duly signed waiver that he understood his rights and had waived those rights. Additionally, Deputy Sheriff Frieheit, who conducted the interview, testified that he showed no signs of intoxication, his answers were clear and responsive, he did not slump or stagger, and he

did not smell of alcohol. Deputy Sheriff Rexford confirmed this based on his observations when he escorted Drymon from the Sheriff's Department to the jail.

There was contradictory testimony from defense witnesses, including Drymon, his supervisor (Harvey Ward), and his grandfather (Columbus McGarrah) that he was severely intoxicated. Drymon in particular testified that he had suffered a blackout at the time of his statement due to intoxication. We note, however, that such conflicts in testimony are for the trial court to resolve by evaluating the credibility of each witness. *Coleman* v. *State, supra.* In this instance, the trial court gave more credence to the testimony of the two deputy sheriffs, both of whom testified to considerable personal and professional experience in recognizing when a person is intoxicated. The testimony of the deputy sheriffs, the fact that Drymon signed a waiver-of-rights form, and the clarity of his statement combine to convince us that the trial court's ruling to admit Drymon's statement was supported by a preponderance of the evidence.

Affirmed.

Louis IVORY v. STATE of Arkansas

CR 94-285 874 S.W.2d 375

Supreme Court of Arkansas
Opinion delivered May 2, 1994

Bill R. Holloway, for appellant.

No response.

PER CURIAM. Appellant, Louis Ivory, by his attorney, has filed for a rule on the clerk.

His attorney, Bill R. Holloway, 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.

Edward Charles PICKENS *v.* Jim Guy TUCKER, Individually and in His Official Capacity as Governor of Arkansas

94-435 875 S.W.2d 835

Supreme Court of Arkansas
Opinion delivered May 2, 1994

Jeff Rosenzweig, for appellant.

No response.

PER CURIAM. Petition for stay of execution or, in the alternative, for expedited consideration is denied.

BROWN, J., concurs.

ROBERT L. BROWN, Justice, concurring. The movant, Edward Charles Pickens, mounts a Due Process claim, alleging that Governor Jim Guy Tucker is a biased determiner of his clemency application by virtue of his representation of the State in Pickens's appeal in 1977. *See Pickens* v. *State*, 261 Ark. 756, 551 S.W.2d 212 (1977). According to that opinion, two deputy attorneys general also acted as special prosecutors at the Pickens trial.

The power to exercise clemency is vested in the chief executive and not the courts. Ark. Const. art. 6, § 18; *Woods* v. *State*,

302 Ark. 512, 790 S.W.2d 892 (1990); *Coones* v. *State*, 280 Ark. 321, 657 S.W.2d 553 (1983); *Smith* v. *State*, 262 Ark. 239, 555 S.W.2d 569 (1977); *Patterson* v. *State*, 253 Ark. 393, 486 S.W.2d 19 (1972). Moreover, a convicted felon has no inherent constitutional right to a commutation of sentence. *Connecticut Board of Pardons & Dumschat*, 452 U.S. 458 (1981).

Nevertheless, a right to a fair and impartial tribunal, and equally as important the perception of such, is engrained in the Due Process clauses of our state and federal constitutions. A case with some similarities to the case before us was recently decided by the Eight Circuit Court of Appeals. *Otey* v. *Hopkins*, 5 F.3d 1125 (8th Cir. 1993). In *Otey*, a death case, the state attorney general sat on the Nebraska Board of Pardons, and this was contested by the clemency applicant on Due Process grounds. A majority of the three-judge panel dismissed the petition for procedural reasons. The third judge dissented on the basis that the presence of the "state's chief prosecuting officer" on the board violated substantive Due Process. Now, according to Pickens, a petition for a writ of certiorari in the *Otey* case is pending before the U.S. Supreme Court.

Though the *Otey* facts are not precisely the same as those in the Pickens case, they are analogous, and I agree with the reasoning of the dissent. Accordingly, I believe that Governor Tucker should be declared ineligible to determine the clemency issue, and Lieutenant Governor Mike Huckabee should be the determiner. Ark. Const. amend. 6, § 5.

In my judgment, Lt. Gov. Huckabee should be able to make a clemency determination before May 11, 1994. For that reason I concur in denying the stay of execution.

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