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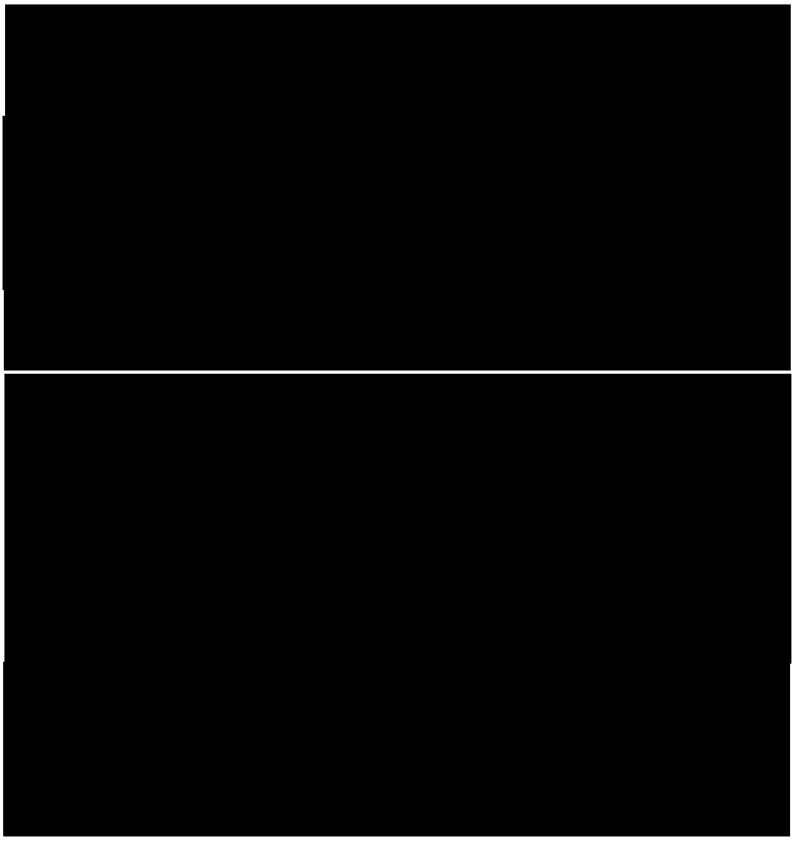
James JOHNSON *v.*
Martin "Bud" GILLILAND and Larry Huntsberger

94-627 896 S.W.2d 856

Supreme Court of Arkansas
Opinion delivered March 20, 1995



J. G. Molleston, for appellant.

Kinard, Grave & Butler, P.A., by: *Mike Kinard*, for appellee Martin Gilliland.

William H. Hodge, for appellee Larry Huntsberger.

JACK HOLT, JR., Chief Justice. This case requires us to decide whether the trial court erred in failing to apply certain statutes of limitations relating to the bailment or conversion of personal property. On appeal, three points are argued for reversal: (1) the trial court erred in finding that there was substantial evidence to support a finding that the complaint was filed within the time allowed by the statute of limitations; (2) the trial court erred in finding that there was substantial evidence to support the jury verdict finding that the boat and trailer in question were "capable of restoration" to appellee Gilliland; and (3) the trial court erred in failing to order a remittitur. We affirm the trial court as to the first two issues; however, there is merit in Johnson's argument that a remittitur is in order.

In 1981 or 1982, appellee Martin Gilliland put his boat and trailer in a barn owned by Guy Johnson in Stamps, Arkansas, with an understanding that Mr. Johnson would keep it for him while he attended medical school in Grenada. Mr. Gilliland contends that he offered to pay rent several times but that Mr. Johnson refused, saying he was not using the barn for anything else.

In 1984, Mr. Gilliland's son, when using the boat, damaged the engine and left it with another party. Later, Guy Johnson's son, James, the appellant, returned the boat to the barn. In April 1988, James Johnson removed the boat from the barn and took it with him to Wickes, Arkansas, and then, two years later, to DeQueen, Arkansas. The boat remained in a state of disrepair and stood on a used-car lot run by James Johnson.

In March or May 1991, James Johnson sold the boat to appellee Larry Huntsberger for $3,000.00. After acquiring the boat, Mr. Huntsberger made numerous improvements to it, including rebuilding the engine. In the summer of 1991, Mr. Gilliland returned to get the boat and was told by Guy Johnson that his son James had taken the boat from the barn. Mr. Gilliland contacted the younger Mr. Johnson and asked for the boat, but James refused to give it back to him. Mr. Gilliland filed an action claiming that James Johnson unlawfully detained his property when he removed it from storage and for an order of replevin. Later, the father, Guy Johnson, and Larry Huntsberger were named party defendants, at which time Mr. Gilliland sought an order of delivery of the boat from Mr. Huntsberger. Appellant James

Johnson was also charged with converting the motor boat to his own use.

In response to Mr. Gilliland's complaint, the appellant, James Johnson, denied the allegations in general, asserting a defense of abandonment and also "the affirmative defense of the statute of limitation which was tolled prior to May, 1988, and adverse possession because prior to and subsequent to 1988, he exercised possession of the boat in question under a claim of right, openly, publically and notoriously." James Johnson also claimed the right of set-off for storage costs against Mr. Gilliland.

A jury trial was held, and at the close of Mr. Gilliland's evidence, the appellant, James Johnson, made a motion for directed verdict, claiming that the plaintiff had failed to meet all the evidence and that his open, notorious, and continuous use of the boat gave him the right of adverse possession, and that a period of more than three years had gone by since Mr. Gilliland placed the boat in possession with Guy Johnson. Mr. Gilliland countered with the argument that James Johnson was actually acting as agent for Guy Johnson because Mr. Gilliland was without knowledge of the fact that James Johnson possessed the boat. Further, Mr. Gilliland urged, the statute did not begin to run until he discovered that James Johnson was in possession. The trial court denied James Johnson's motion. At the close of the defendant's case, James Johnson renewed his motion for directed verdict "on the grounds stated at the close of plaintiff's case," which was again denied by the trial court.

The jury was instructed, without objection, on the laws of bailment, negligence and wrongful possession, as well as the affirmative defenses of adverse possession and James Johnson's claim for "set off." The jury was furnished with interrogatories relating to bailment, negligence, and damages. In rendering its judgment in favor of Mr. Gilliland, the jury found by way of interrogatories that there was gross negligence on the part of James Johnson which was the proximate cause of damages to Mr. Gilliland, and that James Johnson was not entitled to a set-off. In addition, the jury found that Mr. Huntsberger should be ordered to deliver the boat to Mr. Gilliland and that Mr. Huntsberger should have judgment on his cross-complaint against James Johnson for damages in the sum of $20,250. As mentioned pre-

viously, a motion for JNOV or new trial was made by James Johnson, predicated on the same grounds as his motions for directed verdict, but the motion was denied.

I. Statute of limitations

Mr. Johnson first asserts that there was no substantial evidence to support a finding that the statute of limitations for conversion had not run. He correctly states that the applicable statute of limitations is Ark. Code Ann. § 16-56-105(6) (1987), which provides a three-year statute of limitations for the "taking or injuring any goods or chattels." We further note that:

> "In suits to recover personal property, the statute of limitations and the principle of adverse possession are inseparably connected, on the theory that the statute does not begin to run until the possession becomes adverse, and a limitations statute relating to suits to recover personalty is affected by the doctrine of adverse possession by the defendant."

Henderson v. *First Nat'l Bank*, 254 Ark. 427, 433, 494 S.W.2d 452, 456 (1973), quoting 54 C.J.S., *Limitations of Actions*, § 119. In other words, the statute of limitations for conversion of personal property and the running of time for adverse possession will be the same.

By James Johnson's account, his father asked him to move the boat because he didn't want it in his barn anymore. Mr. Johnson assumed that, from this request, his father wanted him to have the boat and that Gilliland had abandoned it. (Guy Johnson did not testify at trial, it was explained, because he was bedridden and paralyzed.) Mr. Johnson argues that the evidence required a finding that the three-year statute of limitations had run on adverse possession and conversion. He points out that the statute of limitations for replevin or conversion begins to run at the date of his possession and exercise of control over property and not at the time of the Gilliland's demand for it. *See Pickens* v. *Sparks*, 44 Ark. 29 (1884). He then argues that it is undisputed that he exercised dominion and control over the boat in April 1988, and, therefore, that the statute of limitations had run when the suit was filed more than three years later in August 1991.

Mr. Johnson loses sight of the fact that the trial court was not required to direct a verdict based on one theory to the exclusion of all others. Even if the testimony about the removal of the boat in 1988 was undisputed, such a finding would not have entitled him to a directed verdict on Mr. Gilliland's claim. As Mr. Gilliland correctly pointed out to the trial court in response to the directed verdict motion, there were other remedies available to him with limitations that would be triggered by the later act of Mr. Gilliland's discovery that the boat was gone, thus permitting him to file his action within the proper time.

[redacted] For example, in cases of bailment of personal property, the same three-year statute of limitations period for conversion applies, but it does not begin to run until there has been a demand by the bailor and a refusal by the bailee. *Shewmake* v. *Shifflett*, 205 Ark. 875, 171 S.W.2d 309 (1943); *Lee County Nat'l Bank* v. *Hughes*, 165 Ark. 493, 265 S.W.2d 50 (1924). The rule is essentially the same as between agent and principal. 3 Am. Jur. 2d. Agency, § 336 (1994). Similarly, in cases of fraudulent concealment, the period does not begin to run until the fraud has been discovered. *Kurry* v. *Frost*, 204 Ark. 386, 162 S.W.2d 48 (1942).

These theories of recovery were available to Mr. Gilliland, as well as conversion. Under these theories and the facts in this case, the statute of limitations would not have begun to run until Mr. Gilliland had asked for the boat and discovered it had been removed from the barn in the summer of 1991. Mr. Johnson does not dispute that these theories support the trial court's ruling nor does he argue any error in the jury's finding of responsibility, which was based on bailment and negligence instructions.

[redacted] Obviously, the trial court found that the underlying issue was a matter of bailment and that the three-year statute of limitations did not begin to run until there had been a demand by Mr. Gilliland for the return of his property.

The case was submitted to the jury, without objection, with instructions on the laws of bailment, negligence, wrongful possession, as well as on Mr. Johnson's affirmative defense of adverse possession. Simply put, the jury found in Mr. Gilliland's favor. Under these circumstances, the trial court did not err.

II. Restoration of the boat

Mr. Johnson's second argument is based on the jury's verdict to have the boat delivered to Mr. Huntsberger. In his directed-verdict motion, Mr. Johnson argued that the boat was incapable of restoration to Mr. Gilliland, and, on appeal, he argues that the redelivery to Mr. Gilliland should be set aside on that basis. He argues that if property sought in replevin has become so intermingled with the bailee's property so as not to be identifiable as the same property, the replevinor does not have to return the property. In support of this argument, Mr. Johnson cites *Standard Inc.*, v. *Standard Coin-op Distributors*, 238 Ark. 489, 382 S.W.2d 888 (1964). It is not clear whether Mr. Johnson is arguing that such a case requires a finding that there is no further obligation to the true owner or simply that damages must be accepted in place of the property itself. In either case, *Standard* does not support Mr. Johnson's contentions.

In the *Standard* case, the plaintiff had sent two dry-cleaning machines to the defendant for reconditioning. When the machines were not returned, the plaintiff made a request for them, but it was refused. The plaintiff filed for replevin, and, as a defense, the defendant argued that the plaintiff had not made a proper demand for a return of its goods because it was not able to identify its machines. The plaintiff prevailed and was awarded damages for the value of its machines.

On appeal, the defendant in *Standard* again argued that the plaintiff had failed to identify its goods and therefore had not made a proper demand. We pointed out that the only reason the plaintiff was unable to identify its machines was because the defendant had disassembled them and intermingled the parts with other like machine parts belonging to the defendant. We further held that, in such a case, the answer is not to deny the plaintiff his recovery, but to find that the action is one of conversion and to hold the defendant liable for the value of the property.

Obviously, this case does not support an argument that such intermingling denies the true owner any recovery. Alternatively, if Mr. Johnson is arguing that the boat was incapable of identification, there was no error to deny judgment notwithstanding the verdict on that basis. In *Standard*, there was simply

no basis for the plaintiff's identification of the constituent parts. Here, there was reasonable basis for Mr. Gilliland's identification of the boat.

III. Remittitur

James Johnson argued below that the evidence did not support the jury's verdict for $20,250, but instead, at most, $10,000. He requested a remittitur for the difference of $10,250. The motion was denied, and on appeal he argues that this denial was error.

Remittitur is a proper remedy to seek from this court on the grounds Mr. Johnson argues. While remittitur generally is requested from this court in order to lower punitive damages that are found to be grossly excessive or that appear to be motivated by passion or prejudice, *McNair* v. *McNair*, 316 Ark. 299, 870 S.W.2d 756 (1994), we have also held that it is appropriate when the compensatory damages awarded cannot be sustained by the evidence. *Shepherd* v. *Looper*, 293 Ark. 29, 732 S.W.2d 150 (1987). The standard of review in this case is that appropriate for a new trial motion, *i.e.*, whether there is substantial evidence to support the verdict. See Ark. R. Civ. P. 59(a)(5).

We agree with Mr. Johnson that there was no substantial evidence to fully support the jury's verdict. Mr. Huntsberger testified that he purchased the boat for $3,000, spent about $5,000 for new parts, and put in 200 to 300 hours of labor on renovations. He then stated unequivocally, when asked, that the fair-market value was $10,000: "[$10,000] is a fair-market value if I was trying — if somebody was trying to buy it from me today, yes." While Mr. Huntsberger later testified in response to a leading question, that the $10,000 did not include his labor, he offered no further basis for a determination of what that labor was worth, or if he even considered it should be part of the boat's worth. In fact, Mr. Huntsberger's testimony on cross-examination confirmed his earlier statement that, in fact, he did not believe that his labor should put the figure beyond $10,000:

> Q. If I understand correctly, then, you paid James Johnson $3000 for a boat which he says he thought was worth $1,800, but you wanted that boat and you wanted to upgrade it and you put $7,000 more in to upgrade it?
>
> A. I wanted to put it back like it was.

Q. And if the jury should restore Mr. Gilliland to his boat, then you're going to look to Mr. Johnson for $10,000, is that right?

A. I feel I should be compensated for what I have in it.

When all the testimony is read as a whole, it is clear that the only dispute on the value of the boat was whether it was a lower figure of $10,000 that he was claiming in court. Further, Mr. Huntsberger's one response to a leading question on the exclusion of his labor, with no further testimony as to the value of that labor, is not a sufficient basis to support the additional $10,250 awarded. *See Robertson* v. *Ceola*, 255 Ark. 703, 501 S.W.2d 764 (1973).

Ordinarily, a general verdict is a complete entity that cannot be divided, requiring a new trial upon reversible error. When, however, a trial error relates to a separable item of damages, a new trial can sometimes be avoided by the entry of a remittitur. *Jacuzzi Brothers, Inc.* v. *Todd*, 316 Ark. 785, 875 S.W.2d 67 (1994); *Wheeler* v. *Bennett*, 312 Ark. 411, 849 S.W.2d 952 (1993); *White River Rural Water District* v. *Moon*, 310 Ark. 624, 839 S.W.2d 211 (1992). As Mr. Johnson testified that the fair market value of the boat was $10,000, we have no hesitation in declaring that a remittitur is in order. Should Mr. Johnson submit a petition within seventeen days, requesting a remittitur of damages from $20,250 to $10,000, we will affirm as modified. Otherwise, as a general verdict cannot be divided, we must remand for a new trial of Mr. Huntsberger's cross-complaint against James Johnson. *See Jacuzzi Brothers, Inc.* v. *Todd, supra; Interstate Freeway Serv., Inc.*, v. *Houser*, 310 Ark. 302, 835 S.W.2d 872 (1992).

Affirmed as modified.

ROAF, J., not participating.

ARKANSAS GLASS CONTAINER CORPORATION
v. James C. PLEDGER, Director of the
Arkansas Department of Finance and Administration;
Timothy J. Leathers, Commissioner of Revenues;
State of Arkansas

94-1139 894 S.W.2d 599

Supreme Court of Arkansas
Opinion delivered March 20, 1995

Bradley & Coleman, by: *Jon R. Coleman* and *Robert J. Gibson*, for appellant.

Brandon L. Clark, Revenue Legal Counsel, for appellees.

ROBERT H. DUDLEY, Justice. Arkansas Glass Container Corporation, appellant, manufactures clear flint soda lime glass and molds it into thirty-two ounce jars. The Director of the Department of Finance and Administration and the Commissioner of Revenues, appellees, conducted an audit of appellant and assessed additional gross receipts tax, or sales tax, in the amount of $126,637.84, a penalty of $17.92, and interest of $40,507.06 for the period of December 1, 1986, through February 28, 1990. Arkansas Glass objected to the assessment and requested a hearing pursuant to the Arkansas Tax Procedures Act. An administrative law judge affirmed the assessment. Arkansas Glass petitioned the Commissioner to revise the decision of the administrative law judge, but the decision was affirmed. A final assessment was issued, and Arkansas Glass paid $167,162.82 under protest. *See* Ark. Code Ann. § 26-18-406 (Repl. 1992).

In December 1992, Arkansas Glass filed suit in chancery court in which it alleged that the natural gas it used in the manufacture of glass was exempt from taxation. It sought a refund of the amount paid under protest, plus an additional $159,292.63, which was the amount of sales tax it had paid on natural gas after the audit. The complaint contained other allegations not material to this appeal.

The chancellor ruled that the natural gas used in the manufacture of glass was not exempt from the sales tax. Arkansas

Glass appeals. The ruling of the chancellor was correct, and we affirm.

Arkansas Glass seeks an exemption from the sales tax. A taxpayer must establish an entitlement to an exemption from taxation beyond a reasonable doubt. *Pledger* v. *C.B. Form Co.*, 316 Ark. 22, 25, 871 S.W.2d 333, 334 (1994). Any doubt as to the exemption suggests that it should be denied. *Ragland* v. *General Tire & Rubber Co.*, 297 Ark. 394, 396, 763 S.W.2d 70, 71 (1989).

Arkansas Glass claims it is entitled to a "sale for resale" exemption under Ark. Code Ann. § 26-52-401(12)(B) (Repl. 1992 & Supp. 1993). Section 26-52-401 provides exemptions from the gross receipts tax, which is imposed by section 26-52-301. At the material time the statute specifically included a tax on the gross receipts derived from sales of natural gas. Ark. Code Ann. § 26-52-301(2) (Repl. 1992 & Supp. 1993). (After this case was filed, the General Assembly passed Act 1140 of 1993, which grants an exemption from the sales and use tax for natural gas used to manufacture glass, but that Act does not affect this case.)

Sale for resale exemptions are enacted by the General Assembly so that the same property will not be twice subject to the same tax. *Hervey* v. *International Paper Co.*, 252 Ark. 913, 483 S.W.2d 199 (1972). However, there is a reciprocal legislative intent that all property be subjected to the tax at some point in its manufacture and sale to the consumer. *Hervey* v. *Southern Wooden Box, Inc.*, 253 Ark. 290, 486 S.W.2d 65 (1972).

The test for the sale for resale exemption is whether the property becomes a "recognizable integral part" of the manufactured product. Ark. Code Ann. § 26-52-401(12)(B) (Supp. 1993); *Southern Wooden Box, Inc.*, 253 Ark. at 291, 486 S.W.2d at 67. We have defined "integral" as necessary to the completeness of the final manufactured product. *International Paper Co.*, 252 Ark. at 916, 483 S.W.2d at 201.

The manufacture of one "batch" of glass consists of placing sand, limestone, feldspar, soda ash, salt cake, carbocite, and selenium into a furnace, which is then heated by natural gas for twenty-four hours. At the end of that time 200 tons of molten glass comes out of the forehearth, or far end of the furnace. The

glass drops into a mold cavity, which is either pressed or blown into the final shape of the container. The annealing process then occurs. During the manufacturing process the furnace is, at times, heated to 2750 degrees Fahrenheit. In the process appellant uses approximately 1,800,000 cubic feet of natural gas per day, and approximately seventy percent of that amount comes into contact with the molten glass.

Sulphur is found in natural gas. A witness testified it is added to natural gas so that a gas leak might be smelled. SO3, a sulphur compound, is found naturally in salt cake, which is one of the components placed in the furnace. The chancellor made a finding of fact that the manufactured glass product contains .0013 to .003 integral parts SO3. It is undisputed that SO3 adds to the integrity and life of the finished glass product. Proof did not establish whether the trace amounts of SO3 in the finished product came from the natural gas or the salt cake.

Section 26-52-401(12)(B) of the Arkansas Code Annotated (Supp. 1993) provides in pertinent part:

> [P]roperty sold for use in manufacturing . . . can be classified as having been sold for the purposes of resale or the subject matter of resale *only in the event* the . . . property becomes a recognizable integral part of the manufactured . . . products.

Id. (emphasis added).

Arkansas Glass sought exemption for all of the natural gas used in the process of making glass. The facts showed that most of the natural gas used in the process was used for heating the furnace. The bulk of the natural gas used for heating did not become a recognizable and integral part of the product, and, since Arkansas Glass did not attempt to measure that part of the gas that became part of the product, its claim for exemption must fail under the language of the sale for resale provision quoted above.

In addition, we have said that trace amounts of a compound or ingredient found in the finished product do not establish that the compound or ingredient was purchased for resale. In *Hervey* v. *International Paper Co.*, 252 Ark. 913, 483 S.W.2d 199 (1972), a case in point, we wrote:

> With respect to sulphur the appellees did introduce relevant testimony, but it actually refutes their contention. Various chemical compounds containing sulphur are used in the cooking liquor. The appellees' witness . . . testified that about 75% of the sulphur is recovered for reuse from the black liquor. Yet only minute traces of sulphur are to be found in Kraft paper. It necessarily follows that about 25% of the total sulphur in each batch of white liquor is consumed in the manufacturing process, presumably being discharged into the atmosphere or lost in some other way. *Thus it is certain that the sulphur is not resold. To the contrary, it is consumed in the process of manufacturing Kraft paper.*

Id. at 915, 483 S.W.2d at 201 (emphasis added).

The same is true in this case. The natural gas is not resold. To the contrary, it is consumed in the process of manufacturing glass.

The claim for exemption must fail for yet another reason. Appellant did not prove whether the compound contained in the glass product was contributed by the natural gas or by the salt cake, and the taxpayer must establish an exemption from taxation beyond a reasonable doubt. *C.B. Form Co.*, 316 Ark. at 25, 871 S.W.2d at 334.

Since we affirm the chancellor's ruling that Arkansas Glass is not entitled to an exemption from taxation on the natural gas, any argument about a refund based on an exemption from taxation on natural gas purchased during the post-audit period of March 1990 through July 1993, becomes moot. We need not address the moot issue. *Wright* v. *Keffer*, 319 Ark. 201, 890 S.W.2d 271 (1995).

Affirmed.

FORD MOTOR COMPANY
v. Donald NUCKOLLS and Betty Nuckolls

94-370 894 S.W.2d 897

Supreme Court of Arkansas
Opinion delivered March 20, 1995

Davis, Cox & Wright, by: *Paul H. Taylor*; and *McGuire, Woods, Battle & Boothe*, by: *Grace R. den Hartog* and *William H. King, Jr.*, for appellant.

Daily, West Core, Coffman & Canfield, by: *Stanley A. Leasure*, for appellees.

ROBERT H. DUDLEY, Justice. After hearing almost three weeks of testimony, the jury returned a verdict in favor of defendant Ford Motor Company in this products liability case. The defen-

dant's verdict was rendered at the close of the first part of a bifurcated trial, but it ended the trial because there was no need for the jury to hear the second part of the case, which was Ford Motor Company's cross-claim against other defendants for reimbursement under the Joint Tortfeasors Act. After the judgment was entered, the plaintiffs moved for a new trial. The trial judge granted a new trial on the ground that he made errors of law during the trial. We reverse and order the verdict reinstated because the trial judge did not make errors of law that materially affected plaintiffs' rights.

Plaintiff Donald Nuckolls, a roofer, was injured in a single-vehicle accident that occurred in 1990 on Highway 10 near Greenwood. He was driving a 1976 F-600 Ford truck, a fourteen-year-old truck, with a vertical lift bed, or scissors-up lift bed, mounted on the chassis. The lift bed was used both to reach roofs and to carry loads like an ordinary dump truck. The accident occurred when he was driving the truck at a speed of forty to forty-five miles per hour and the lift unexpectedly extended to its full height of about fourteen feet. The lift bed was loaded with almost six tons of roofing scrap. The truck became unstable with the large amount of weight lifted so high, and it began to skid. The truck turned over, and, as it came to rest, gasoline ignited. The gasoline came from the gasoline filler pipe that extended out of the side of the truck. Plaintiff escaped through the passenger door, but sustained burn injuries that required extended hospitalization and kept him from working for approximately nine months.

Plaintiffs, Donald Nuckolls and his wife Betty Nuckolls, sued Ford Motor Company, appellant, as the manufacturer of the truck, and also sued the following other defendants: Marion Metal Products Co. (Original Marion) as the manufacturer of the lift; Randall Ford, Inc. as the company that assembled and installed the lift; Truckstell Manufacturing Company, Inc. and A.B. Seimer, Inc. (Successor Marion) as purchasers of and successors to the Original Marion Company; Hansen-Dayton Corp. as a continuation of Original Marion; Sycon Corporation which merged with Successor Marion; and Marion Manufacturing Company which acquired some of the divisions of Sycon. Plaintiffs alleged that both the Ford truck and the vertical lift bed were defective products.

Plaintiffs pleaded that Ford was liable because of (1) negligent design of the fuel system and fuel tank; (2) failure to warn of an inherently dangerous condition in the fuel tank extension; (3) failure to install safety devices for the foreseeable danger to parties such as plaintiff; (4) failure to properly test for safety; and (5) failure to conduct adequate quality control. Plaintiffs did not sue plaintiff Donald Nuckolls's employer, the Dale Crampton Roofing Company.

Ford filed cross-complaints against the other defendants and alleged that the accident was caused by the unexpected activation of the lift bed and not from any defect in the Ford truck chassis. Ford asked that if it were found jointly and severally liable with any of the other defendants that the respective pro rata share of responsibility be submitted to the jury as under the Joint Tortfeasors Act.

Shortly before the trial began, plaintiffs settled with all of the defendants except Ford. This left the other defendants in the case as cross-defendants to Ford's claim for reimbursement from joint tortfeasors. The trial court ruled that the trial would be bifurcated. As a result, the other defendants did not actively proceed in the first part of the trial, the part that determined whether Ford was liable for plaintiffs' damages. Since the verdict from the first part of the trial was in favor of Ford, it was not necessary to hold the second part of the trial, the part that would have decided whether Ford was entitled to reimbursement from joint tortfeasors.

Plaintiffs filed a pretrial motion in which they sought to prevent Ford from introducing testimony that plaintiff Donald Nuckolls's employer, the Dale Crampton Roofing Company, had installed a locking device on another of its trucks with a similar bed lift soon after the accident. The trial court ruled that the evidence was admissible because it was a subsequent remedial measure by a third party rather than a defendant. At the conclusion of the presentation of evidence, the trial court, over plaintiffs' objection, instructed the jury to consider the fault of the codefendants when reaching the verdict.

Plaintiffs filed a motion for new trial, asserting that the court had erred in its interpretation of A.R.E. Rule 407, the rule involving subsequent remedial measures. They also argued that the

court should not have given instructions about the other defendants, because there was insufficient evidence of their fault. Finally, plaintiffs argued that the court should not have given a comparative fault instruction to the jury, as there was insufficient evidence of the fault of the other defendants.

The trial judge determined that he had made a mistake in ruling that the subsequent remedial measure evidence by a third party was admissible, and, even if his earlier ruling was not erroneous, the evidence was irrelevant and unfairly prejudicial. He also determined that he had made a mistake in instructing the jury about comparative fault because there had not been sufficient evidence of the fault of the other defendants. As a result, the trial judge set aside the verdict and ordered a new trial. The order specified that it was based on ARCP Rule 59(a)(8) because of errors of law. Ford Motor Company appeals.

I.

Standard of Review

The trial court based its decision to grant a new trial on errors of law, not on the fact that the verdict was clearly contrary to the preponderance of the evidence, or on one of the other grounds specified by Rule 59. Under A.R.C.P. Rule 59(a)(8), a new trial may be granted where there is error of law which was objected to by the party making the application, and the error materially affected the substantial rights of the party. *Id.; see also Nazarenko* v. *CTI Trucking Co.*, 313 Ark. 570, 856 S.W.2d 869 (1993). In *Security Insurance Co.* v. *Owen*, 255 Ark. 526, 501 S.W.2d 229 (1973), we wrote that, while a trial judge's discretion is much broader where the question is whether a jury verdict is supported by a preponderance of the evidence, still, his discretion in granting or denying a new trial based on errors of law should not be disturbed absent manifest abuse. *Id.* at 529, 501 S.W.2d at 231. Manifest abuse of discretion can be "discretion improvidently exercised." *Id.* at 530, 501 S.W.2d at 232. The showing that discretion was abused should be stronger when a new trial has been granted than when it has been denied. *Id.* at 529, 501 S.W.2d at 231. This court views a party who was the beneficiary of a verdict set aside by the granting of a new trial as having much less basis for a claim of prejudice than an unsuccessful movant for a new trial. *Id.* However, a clearly erroneous

interpretation or a clearly erroneous application of a law or rule can constitute a manifest abuse of discretion. *See Crowder* v. *Flippo*, 263 Ark. 433, 565 S.W.2d 138 (1978).

II.

Evidentiary Ruling

The evidentiary ruling came about as follows. After the accident, plaintiff Donald Nuckolls's employer installed a locking device on the lifting gears of a similar bed on another of its F-600 Ford trucks. Plaintiffs did not sue the employer, and Ford did not file a cross-complaint against the employer. Plaintiffs filed a pretrial motion objecting to the admission of the remedial evidence under A.R.E. Rule 407. Ford responded that, since the employer was a third party and had not been sued, the evidence was not subject to the restrictions of Rule 407. The trial court admitted the evidence.

Plaintiffs' pretrial motion was based on the grounds of a subsequent remedial measure and relevance. Plaintiffs' motion for a new trial contended that the introduction of the locking device was a subsequent remedial measure prohibited by Rule 407, and because the evidence was "central to Ford's defense strategy," it was substantial and prejudicial. In granting the motion for new trial, the court stated that the evidence fell within the purview of Rule 407, and, even if it did not, it was not relevant and that its prejudicial impact outweighed its probative value. This was the first mention of a weighing of prejudice against probative value.

Ford's first point of appeal is that the trial judge erred in granting a new trial on the ground that he had erred as a matter of law in admitting evidence of the subsequent remedial measure. The point is well taken.

Rule 407

Rule 407 of the Arkansas Rules of Evidence provides:

> *Subsequent remedial measures.* — Whenever, after an event, measures are taken which, if taken previously, would make the accident less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. *This rule*

> *does not require the exclusion of the evidence of subsequent measures if offered for another purpose, such as proving* ownership, control, or *feasibility* or precautionary measures, *if controverted,* or impeachment.

Id. (emphasis added).

[redacted] In *Carton* v. *Missouri Pacific Railroad,* 315 Ark. 5, 865 S.W.2d 635 (1993), we distinguished between the admission of remedial measures taken by a third party and those taken by a defendant. *Id.* at 16, 865 S.W.2d at 640-41. The former is potentially admissible, *see Riggan* v. *Langley,* 238 Ark. 649, 383 S.W.2d 661 (1964), while the latter is excludable. *See generally* Jack B. Weinstein and Margaret A. Berger, *Weinstein's Evidence* ¶ 407 (1993).

It is undisputed that the measure was taken by plaintiff Donald Nuckolls's employer, who was not a party to the suit. It is generally recognized that "[b]ecause the controlling ground for excluding evidence has been the promotion of a policy of encouraging people to take safety precautions [citation omitted], remedial measures carried out by a person not a party to the suit are not covered [by Rule 407]." Weinstein, *supra* at 407-09; *see also Pau* v. *Yosemite Park,* 928 F.2d 880, 888 (9th Cir. 1991); *O'Dell* v. *Hercules, Inc.,* 904 F.2d 1194, 1204 (8th Cir. 1990); *Dixon* v. *International Harvester,* 754 F.2d 573, 583 (5th Cir. 1985).

In *Pau* v. *Yosemite Park,* a federal district court ruled inadmissible the fact that a sign had been erected warning bicyclists to stop at the site where a cyclist had been killed. *Id.* at 887. The Ninth Circuit Court of Appeals held the ruling was an abuse of discretion, because the sign had been erected by a nondefendant, rather than the party being sued. *Id.* at 888. The court reasoned that, "A nondefendant will not be inhibited from taking remedial measures if such actions are allowed into evidence against a defendant." *Id.; see also Causey* v. *Zinke,* 871 F.2d 812, 816-17 (9th Cir. 1989).

Rule 403

[redacted] Plaintiffs' pretrial motion was based on A.R.E. Rule 407, the subsequent remedial measure rule, and Rules 401 and 402, the relevancy rules. The plaintiffs did not ask the trial court

to conduct a Rule 403 weighing of probative value against unfair prejudice.

The trial court erred in granting a new trial based on a Rule 403 weighing of probative value versus prejudice because that objection was not raised either before or during the trial. Rule 59(a)(8) of the Arkansas Rules of Civil Procedure provides that a new trial may be granted for an "error of law occurring at the trial *and objected to by the party making the application*" for the new trial. A.R.C.P. Rule 59(a)(8) (emphasis added); *see also Crowder*, 263 Ark. at 434, 565 S.W.2d at 139; *Walker* v. *State*, 301 Ark. 218, 783 S.W.2d 44 (1990). Plaintiffs ask that we not follow the language of Rule 59(a)(8) in this case, because it is recognized that when evidence of a subsequent remedial measure is not barred by Rule 407, its probative value should outweigh any dangers associated by its admission. *See Carton*, 315 Ark. at 16, 865 S.W.2d at 641; *Anderson* v. *Malloy*, 700 F.2d 1208, 1213 (8th Cir. 1983). Plaintiffs correctly state the general evidentiary rule, and if they had objected on the basis of a Rule 403 weighing of probative value against prejudice either before or at trial, the trial court could have considered the matter in deciding whether to grant a new trial. However, plaintiffs did not make the objection, and Rule 59(a)(8) is clear. Thus, the trial court erred in holding that it could, for the first time in the motion for a new trial, weigh probative value against prejudice.

Rules 401 and 402

We now turn to the relevancy issue which was raised by plaintiffs, both before and at trial.

Rule 401 of the Arkansas Rules of Evidence provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided." There are no other provisions applicable to this case.

To be relevant, it is not required that evidence prove the entire case or even all of a single issue. It requires only proof that has "any tendency" to make any fact that is of consequence to the determination of the action more or less probable. *Rich*

Mountain Elec. Coop. v. *Revels*, 311 Ark. 1, 841 S.W.2d 151 (1992). When the argument is focused solely on relevance, with no consideration of prejudice because of the lack of a weighing objection, there is no support for the ruling that the subsequent remedial measure was not relevant.

Ford's primary defense was that the accident was caused, not by a defective truck chassis, but by the unexpected activation of the lift bed that held almost six tons of roofing scrap high above the truck. The lift bed was manufactured and installed by other defendants. Ford cross-examined plaintiff about how the lift activated, and how the accident occurred. It introduced testimony about the availability of safety devices that could have prevented the inadvertent lifting of the bed while the truck was in motion, and it introduced testimony that these devices were available at the time the lift was installed on the truck. It then proved that plaintiff's employer had installed one of these safety devices after the accident. This proof, taken together, had the tendency to show that the accident was caused by the failure of others to install a safety device, that such devices were available at the time the bed was installed on the truck, that it was feasible to install them at the time the accident occurred, and that a defective truck chassis was not the cause of the accident.

In sum, the trial court did not err at trial in admitting evidence of the subsequent installation of a safety device by a third party. It erred only in ruling that the admission of the evidence was a ground for a new trial.

III.

Instructions

The trial judge, in granting a new trial, concluded that he erred in giving instructions to compare the fault of plaintiff Donald Nuckolls, Ford, and the other defendants because "there was insufficient evidence of liability or fault" by the other defendants. The other defendants named by plaintiffs in their complaint and amended complaints were the Marion Metal Products Company (Original Marion), the manufacturer of the vertical lift bed, and the various successors to that company, including Truckstell; A.B. Seimer, Inc., and A.B. Seimer individually; Marion Metal Products Company (Successor Marion); Sycon Corporation; Mar-

ion Manufacturing, Inc.; and Hansen-Dayton, Inc. The complaint also named Randall Ford, Inc., the local dealership that sold the truck, and alleged it supervised the installation of the vertical lift bed. In an amended complaint plaintiffs named Truck Equipment Company as the entity that installed the vertical lift bed. In Ford's cross-claim against the other defendants, Ford denied negligence or any liability for the accident and asserted claims for contribution and indemnity against these same codefendants. Ford's cross-complaint also recited that plaintiffs alleged independent allegations of fault on the part of the other defendants.

Randall Ford

Ford Motor Company presented sufficient proof of fault on the part of Randall Ford to entitle it to the instruction. Carl Rose, one of the principals at the Dale Crampton Roofing Company, Donald Nuckolls's employer, testified that the Dale Crampton Roofing Company purchased the 1976 Ford truck in question from Randall Ford with the vertical lift already installed. An invoice was offered as proof of purchase and indicated that the vertical lift was installed by the Truck Equipment Company. However, the amount for installation was included in the total purchase price paid Randall Ford. Rose testified that Crampton Roofing relied on Randall Ford or Truck Equipment Company to fit the vertical lift bed on the truck.

Original Marion

Plaintiffs do not dispute that the proof showed the lift was a Marion lift, rather they contend that Ford failed to demonstrate which "Marion" company manufactured the lift. Carl Rose testified that the lift installed on the Ford F-600 truck involved in the accident was a 1964 Marion lift VL7272. Defendant's exhibit fifty-four was offered in support of this statement. The exhibit is a photocopy of the specifications on Marion vertical lifts models VL7272 and VL6246. While it is true that the specifications are undated and do not of themselves identify the lift in question, Carl Rose testified that the vertical lift in question was a 1964 Marion VL7272 vertical lift. His testimony was corroborated by that of Gilbert Herr, a former president and CEO of Marion Metal Products Company. Twice in his testimony he referred to the year 1964 in a way that one can only conclude that the lift in question was manufactured in 1964.

While there were several "Marion" entities involved in the suit, the evidence presented established the existence of only one of those entities in 1964, the Original Marion. Thus, neither the Successor Marion Metal Products Company, which came into existence in 1967, or the Marion Manufacturing Company, which acquired Successor Marion in 1976, could have manufactured a vertical lift in 1964. This was sufficient proof to entitle Ford to the instruction about Original Marion.

Sycon Entities

[redacted] The Sycon Entities consist of Truckstell, A.B. Seimer, Inc., A.B. Seimer, individually, Marion Metal Products Co. (Successor Marion), and Sycon Corporation. The liability of these parties is derived from that of Original Marion. They could only be liable if the Original Marion was liable. The general rule is that a corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation. *Swayze* v. *A.O. Smith Corp.*, 694 F. Supp. 619 (E.D. Ark. 1988). We have recognized the general rule. *See Fort Smith Refrigeration & Equip. Co.* v. *Ferguson*, 217 Ark. 457, 230 S.W.2d 943 (1950). In *Swayze*, four exceptions to the general rule were set out: (1) where the transferee assumes the debts and obligations of the transferor by express or implied agreement; (2) where there is a consolidation or merger of the two corporations; (3) where the transaction is fraudulent or lacking in good faith; and (4) where the purchasing corporation is a mere continuation of the selling corporation. *Swayze*, 694 F. Supp at 622.

James Smith, the attorney who prepared the 1967 sale of assets from Original Marion to Truckstell/A.B. Seimer, Inc., testified that Truckstell was the purchaser and that it assigned its rights under the purchase agreement to A.B. Seimer, Inc. Smith indicated that Truckstell purchased all or substantially all of Marion's assets, including inventory, receivables, and work in process. Smith also testified that the factory employees and most of the office employees of the Original Marion continued on in their employment. His testimony indicated that the seller required the buyers and A.B. Seimer individually to execute an "indemnity assumption of liability agreement" as part of the consideration for the sale. A 1967 letter from Smith to the attorney for Original Marion verified the sale of assets and referred to the assump-

tion of liability agreement. Smith testified that after the sale the name A.B. Seimer, Inc. was changed to Marion Metal Products Company, Inc.

Gilbert Herr, president and CEO of the Original Marion in the 1960's, corroborated Smith's testimony. He indicated that Mr. Seimer was in charge after the purchase, but relied on employees of the Original Marion, including himself, to continue the day-to-day operation of the company. Herr testified that Successor Marion continued to make vertical lifts until he retired in 1976. Other managers and employees testified as to their continued employment and the continuity in production of goods after the Seimer purchase.

Thus, Ford presented sufficient evidence for the jury to consider whether, under either the continuation exception or the express assumption exception, Truckstell, Seimer, Inc., and Seimer individually assumed the liability of the Original Marion.

Plaintiffs, in their original complaint, alleged that Sycon Corporation succeeded to Original Marion's liabilities "because . . . on about October 15, 1971 Successor Marion merged into Sycon." In its answer, Sycon admitted "that on or about October 15, 1971 various corporations merged, including Sycon Corporation and Marion Metal Products Company [Successor Marion], and the resulting company was known as Sycon Corporation." In the oral argument of this case Ford stated that it relied on plaintiffs' proof on the matter, which was never contested, as sufficient proof of Sycon's merger with Successor Marion. However, in addition, Theodore Berger and James Smith both testified that at one time Sycon Corporation succeeded to the business. The general rule is that, after a merger, the resulting corporation is liable for the debts of the other corporation.

> Indeed, it has been said that public policy requires that the obligations of the extinguished corporation in a merger survive as obligations of the surviving corporation. Corporations cannot by merger or consolidation escape the obligation to pay debts incurred before the merger or consolidation or defeat the right of their creditors to subject their property to the satisfaction of such debt.

19 Am. Jur. 2d *Corporations* § 2715 (1986).

In summary, the trial court did not err in instructing the jury to compare the fault of plaintiff Donald Nuckolls, Ford Motor Company, and the other defendants based on insufficient identification of the Original Marion and insufficient proof of successor liability.

However, even if the giving of the instructions were in error, we would still reverse the grant of the new trial. The instructions that plaintiffs objected to were instructions numbers seven, eight, nine, thirteen, and twenty-five. Instructions seven, eight, and nine were modified versions of AMI Civil Instruction 206. Instruction seven stated that Ford contended that Marion Metal Products Co. was chargeable with fault that was a proximate cause of plaintiffs' damages and that Ford had the burden of proving such. Instruction eight stated the same as to A.B. Seimer, Inc., A.B. Seimer, individually, Successor Marion, and Truckstell Manufacturing. Instruction nine stated the same as to Randall Ford. Instruction thirteen, AMI Civil 306, stated that the word "fault" means "negligence and breach of warranty and supplying a product in a defective condition." Instruction twenty-five is AMI Civil 2111, concerning comparative fault and joint tortfeasors, and was given as follows:

> If you find that Donald Nuckolls was free of any fault which was a proximate cause of his claimed damages, then Donald Nuckolls is entitled to recover the full amount of any damages you may find he has sustained from any fault of Ford Motor Company which you find to have proximately caused these damages.
>
> If you should find that any damages sustained by Donald Nuckolls were caused by fault on the part of Donald Nuckolls and also were proximately caused by fault on the part of Ford Motor Company, then you must compare the percentage of fault to Donald Nuckolls, Ford Motor Company and any other party identified in these instructions contended by Ford Motor Company to be guilty of fault, proximately causing damage to Donald Nuckolls.
>
> If the fault of Donald Nuckolls was of less degree than the total fault of Ford Motor Company and all other parties identified in these instructions whom you find to be chargeable with fault, then Donald Nuckolls and Betty

> Nuckolls are entitled to recover from Ford Motor Company any damages which you may find they have sustained after you have reduced their damages in proportion to the degree of Donald Nuckolls's own fault.
>
> On the other hand, if the fault of Donald Nuckolls was equal to or greater than the total fault of Ford Motor Company and all of the parties identified in these instructions whom you find to be chargeable with fault, then Donald Nuckolls and Betty Nuckolls are not entitled to recover any damages.

The court, in instruction number ten, instructed the jury that more than one party could be deemed to have proximately caused plaintiffs' injuries, and, in instruction number fifteen, instructed the jury that "if you find that the negligence or fault of Ford Motor Company proximately caused damage to Donald and Betty Nuckolls, it is not a defense that some other persons may also have been to blame."

The jury was given four verdict forms. They were as follows:

> (1) We, the jury, find in favor of the Plaintiff, Donald Nuckolls, and fix his damages as follows:
>
> (2) We, the jury, find in favor of Betty Nuckolls and fix her damages as follows:
>
> (3) We, the jury, find in favor of Ford Motor Company on the claims of Donald Nuckolls:
>
> (4) We, the jury, find in favor of Ford Motor Company on the claims of Betty Nuckolls[.]

The jury answered verdict forms (3) and (4) in favor of Ford. In order to have done so the jury could have determined that plaintiffs failed to prove liability on the part of Ford. This finding would not have involved the other defendants. Alternatively, the jury could have determined that Donald Nuckolls was partially at fault and that his fault was equal to or greater than that of Ford and any other parties to whom the jury found that fault should be attributed. This finding would not have been affected by the addition of fault of other parties. If a jury determines the plaintiff is fifty percent or more at fault, it does not matter whether

there is one defendant or multiple defendants. Thus, the plaintiffs could not have been harmed by the instructions, even if they had been erroneous.

Plaintiffs contend that the introduction of the fault of the other parties misled the jury and caused the jury to think that the other parties were responsible. However, the addition of fault of other parties and the comparison of the fault of those parties against plaintiff Donald Nuckolls's fault would not have affected the verdict. Instruction fifteen instructed the jury that it was not a defense for Ford if some other person may also have been at fault. In addition, considering the options given to the jury in comparing fault under instruction twenty-five, it is obvious that there is no way the addition of fault of the other defendants could have affected the verdict as between Ford and plaintiffs. Thus, even if the instructions had been given in error, they could not have "materially affect[ed] the substantial rights" of appellees. *See* ARCP Rule 59(a).

We have stated that a moving party under Rule 59(a) must demonstrate that its rights have been materially affected by demonstrating that a "reasonable possibility of prejudice has resulted" from the error. *Diemer* v. *Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993). *Diemer* involved a granting of a new trial under subsection (2) of section (a) of Rule 59, concerning juror misconduct. However, the standard is equally applicable to Rule 59(a)(8), involving errors of law, because section (a) states at the beginning that all the grounds must materially affect the rights of the moving party. Since a reasonable possibility of prejudice was not demonstrated, the trial court erred in granting a new trial.

We reverse and remand for reinstatement of the jury verdict and entry of orders consistent with this opinion.

Ricky Joe HODGE *v.* STATE of Arkansas

CR 94-820 894 S.W.2d 927

Supreme Court of Arkansas
Opinion delivered March 20, 1995

Clarence Walden Cash, for appellant.

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

DAVID NEWBERN, Justice. Ricky Joe Hodge was given con-

current sentences amounting to 40 years after pleading guilty to rape, kidnapping, aggravated robbery, robbery, and theft, all arising from the same incident. The judgment and commitment order was entered, and execution of it commenced March 16, 1994. The prosecution then discovered Mr. Hodge had previously been convicted of two counts of rape, so the sentence should have been to life imprisonment according to Ark. Code Ann. § 16-90-202 (1987). The Trial Court entertained a motion to resentence Mr. Hodge and, on April 12, 1994, entered a sentence of life imprisonment on each count of rape, aggravated robbery, and kidnapping, to run concurrently with 10-year sentences for theft and robbery.

Mr. Hodge contends the second sentencing violated his right not to be placed twice in jeopardy. We do not address his constitutional argument because it was not raised before the Trial Court. *Fuller* v. *State*, 316 Ark. 341, 872 S.W.2d 54 (1994). We will address his contention that his plea was not voluntarily made, but only to the extent of pointing out that it raises an issue that is not appealable. We must, however, modify the judgment to reinstate the original sentence because the Trial Court lacked authority to increase Mr. Hodge's sentence after execution of it had begun.

The charges arose from an incident in which a convenience store clerk was brutally robbed, kidnapped, raped at knife point, and left without her pants and shoes in a remote area south of Alexander Mountain in Pulaski County.

The plea statement, signed by Mr. Hodge, which was before the Trial Court when the guilty plea was accepted in February 1994 contained the following: "You are charged with Rape, Kidnapping, Aggravated Robbery, Robbery and Theft of Property in the Pulaski County Circuit Court. It is necessary that you fully understand the contents of this document. You are charged with a felony\misdemeanor and with 1 prior conviction."

Despite the State having informed Mr. Hodge in the plea statement that he was charged with one prior conviction, Wanda Wyeth, the deputy prosecutor handling the case, was unable to present evidence of any prior conviction at the hearing. The victim and her husband gave statements about the impact of the crime upon their lives and asked that Mr. Hodge be sentenced to

life imprisonment. Ms. Wyeth concurred in the request for a life sentence. The Trial Court then asked, "What's his prior record?" Ms. Wyeth responded, "Your Honor, he doesn't have any priors that we could find proof on. We had some information of a prior in another state but we were not able to get any proof on that. It was for a burglary, I believe it was. We don't have any in Arkansas or in the ACIC or anything." She then stated that if Mr. Hodge were sentenced to only 40 years he could "conceivably be out in ten years."

At that point, the husband of the victim said, "He raped another girl here, two of them." The Trial Court inquired whether the prosecution had "checked into that," and Ms. Wyeth replied, "We've checked all his history that we could find, your Honor. Unless there may be a pending charge out there somewhere that we don't have yet. But I have no proof of that." The Trial Court then pronounced the 40-year sentence.

At the April 12, 1994 hearing on the motion to vacate and resentence, the sentence was changed to the concurrent life and 10-year sentences.

1. Appealability

The State first argues we should not entertain an appeal from a guilty plea. We indeed do not allow appeals from guilty pleas when the appeal alleges an error having to do with an integral part of the plea and its acceptance by a trial court, Ark. Code Ann. § 16-91-101(c) (1987); *Henagan* v. *State*, 302 Ark. 599, 791 S.W.2d 371 (1990). That completely answers Mr. Hodge's argument for reversal on the ground that his plea was not voluntary. When, however, the appeal is from a decision which was neither a part of the guilty plea acceptance nor the sentencing procedure which was an integral part of the guilty plea acceptance, the appeal is allowed. *Jones* v. *State*, 301 Ark. 510, 785 S.W.2d 217 (1990)(supp. opn. on denial of reh. 301 Ark. 512-A, 789 S.W.2d 730 (1990)) (appeal from denial of post trial motion to correct illegal sentence); *Brimer* v. *State*, 295 Ark. 20, 746 S.W.2d 370 (1988)(appeal from denial of post trial motion to modify sentence to give credit for jail time). *See also State* v. *Sherman*, 303 Ark. 284, 796 S.W.2d 339 (1990).

The appeal in this case is from a post trial motion of

the sort allowed in the *Jones* and *Brimer* cases, and it is thus not barred by the rule prohibiting appeals of guilty plea convictions.

2. Resentencing

As a general rule, a trial court may not revise a valid sentence after execution of the sentence has begun. *DeHart* v. *State*, 312 Ark. 323, 849 S.W.2d 497 (1993). It may, however, correct an illegal sentence even after execution of the sentence has begun. *Lambert* v. *State*, 286 Ark. 408, 692 S.W.2d 238 (1985). The issue to be addressed here is whether the sentence initially meted out to Mr. Hodge, and which he had begun to serve, was an illegal sentence and thus one the Trial Court had the authority to change.

At the April 12, 1994 hearing on the State's motion to vacate the sentence and resentence Mr. Hodge, Ms. Wyeth reported having learned, subsequent to the earlier sentencing hearing, that Mr. Hodge had been convicted of two counts of rape in Saline County in 1980. Citing § 16-90-202, she asked that Mr. Hodge be sentenced to life imprisonment. Subsection (a) of the statute provides, in part:

> When any person shall be convicted of . . . rape . . . and it shall be shown that the person has been twice previously convicted of . . . [rape] in this state or any other state, upon the third conviction the person shall be deemed an habitual criminal and shall be sentenced to life imprisonment in the state penitentiary.

Also cited was Ark. Code Ann. § 16-65-119 (1987), subsection (a) of which states that a judgment of a circuit court may be modified by the Supreme Court or the court in which the judgment was rendered.

The Trial Court expressed reservations about changing the sentence, referring to the *DeHart* case in which we stated, "It is clear that a trial court cannot modify or amend the original sentence once a valid sentence is put into execution," and noted that the issue is "jurisdictional."

The general rule prohibiting a trial court from revising a sentence that is not illegal, once execution of it has commenced, entered Arkansas jurisprudence in *Emerson* v. *Boyles*, 170 Ark.

621, 280 S.W. 1005 (1926). Mr. Boyles was convicted of manufacturing "mash" in Perry County and sentenced to one year in the penitentiary. The Perry Circuit Court later ordered his release, but the Board of Charities and Corrections refused to obey the order. Members of the Board sought *certiorari* to quash the release order, and they prevailed.

Citing cases from many jurisdictions, we recognized a conflict of authorities but held, over a strongly worded dissent by Justice Frank Smith, that once a sentence had been pronounced and execution of it had begun a trial court could not revisit it. The reason given, without constitutional citation, was that a person accused of a crime should not be subjected to trial more than once even though, as the dissenting opinion pointed out, Mr. Boyles desperately wanted the release order upheld. The rule has been solidly applied ever since. *See, e.g., Coones* v. *State*, 280 Ark. 321, 657 S.W.2d 553 (1983); *Williams* v. *State*, 229 Ark. 42, 313 S.W.2d 242 (1968).

In addition to allowing a trial court to correct an illegal sentence, as mentioned above, we have given trial courts authority over imposed and executed sentences which are not illegal in certain instances by institution of Ark. R. Crim. P. 37. *See Rogers* v. *State*, 265 Ark. 945, 582 S.W.2d 7 (1979).

In response to the Trial Court's reference to the rule, and to the *DeHart* case particularly, Ms. Wyeth cited the *Lambert* case in which we allowed correction of a sentence which was "illegal." She argued that the initial 40-year sentence was illegal because of § 16-90-202, and that is the State's argument on appeal.

In the *Lambert* case Thomas Lambert and Elmer Smith were charged with escaping from the Wrightsville Unit of the Department of Correction. They were given suspended sentences. The prosecutor subsequently realized there was a statutory prohibition against suspending the sentence of a person previously convicted of two or more felonies. The Trial Court granted a motion to correct the sentences, and we affirmed on the ground that the sentencing court may correct an original sentence, even though partially executed, if it was an illegal sentence.

The *Lambert* case differs from the one now before us. Mr.

Lambert was charged with having more than one prior felony and Mr. Smith with having four or more. The facts making suspended sentences illegal were before the Court. The prosecutor and the Trial Court were, however, apparently unaware of the law disallowing suspension of sentence for those who had been previously convicted of two felonies. In Mr. Hodge's case, there was nothing illegal about the initial sentence, given the facts which were before the Trial Court. This case, therefore, does not fall within the illegal sentence exception to the general rule that a sentence may not be changed after the execution of it has begun.

In conclusion, we note our appreciation of the State calling our attention to the possibility that § 16-90-202, which formed the basis of its challenge to the legality of the initial sentence, may have been repealed by later legislation. See Ark. Code Ann. § 5-4-104(a) (Repl. 1993) which provides, "No defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter." We have not addressed that issue as Mr. Hodge did not raise it either in the Trial Court or in his brief before us.

Affirmed as modified.

Edward G. PARTIN *v.* BAR of Arkansas

94-420 894 S.W.2d 906

Supreme Court of Arkansas
Opinion delivered March 20, 1995

Appellant, pro se.

Kaplan, Brewer & Maxey, P.A., for appellee.

DAVID NEWBERN, Justice. Edward G. Partin II seeks admission to the Bar of this Court. He has completed the necessary educational requirements and has passed the Arkansas bar examination. The Board of Law Examiners has, however, refused to recommend his admission on the ground that he is not morally qualified. Mr. Partin contends the Board erred as he has rehabilitated himself since his criminal convictions for drug-related offenses in 1973, 1984, and 1986. He also contends procedures utilized by the Board and the Director of Professional Programs denied his rights to equal protection of the laws and due process of law. We affirm the Board's decision.

Mr. Partin graduated from the University of Arkansas School of Law in Fayetteville in 1992. He applied for admission to the Bar and to take the bar examination administered in February, 1993. On his application form, he disclosed his criminal convictions. The 1973 conviction occurred in Baton Rouge, Louisiana. At age 18 he pleaded guilty to possession of a Dilaudid, a controlled substance. Mr. Partin was placed on 18 months probation, and after seven months, the charge was dismissed pursuant to Louisiana law.

The 1984 offense occurred in Arkansas. Van Buren County Sheriff and State Police officers obtained a search warrant for Mr. Partin's rural home based on observation of a large number of marijuana plants growing in the vicinity of Mr. Partin's property. The search revealed two pounds of marijuana, seeds, peat pots, cigarette rolling papers, and a set of Ohaus weighing scales. Mr. Partin pleaded guilty in Van Buren County to possession of marijuana with intent to deliver. He was sentenced to four years imprisonment, and he forfeited a 1984 four-wheel-drive pickup truck in lieu of a $10,000 fine. The prison sentence was suspended, and Mr. Partin was placed on probation. One of the conditions of probation was that he not violate any local, state, or federal laws.

The final offense occurred in 1986. Sheriff and State Police officers spotted marijuana plots again in the general vicinity of, but not on, Mr. Partin's land. An affidavit for a search warrant stated there was a clearly defined trail leading from Mr. Partin's property to the areas where marijuana plants were found to be growing. This time the search revealed items identified by the State Crime Laboratory as marijuana seeds and various specimens of plant material which tested positive for marijuana and tetrahydrocannabinol, including a bag containing vegetable material which tested positive for marijuana. Mr. Partin was charged with felony manufacture of a controlled substance. He pleaded not guilty and was found guilty by a jury of the lesser included misdemeanor, possession of a controlled substance, which resulted in a one-year sentence. His probation was revoked, and he was sentenced to a term of eight months in prison, which he served concurrently with the one-year sentence. The 1984 felony conviction was expunged in 1991.

At the hearing before the Board panel, Mr. Partin testified he entered Arkansas Tech University in 1987 and completed his bachelor's degree with high honors in two years and nine months. He discussed entering law school with an advisor at Arkansas Tech and was told his past should not be a problem if he continued his rehabilitation. He was aware, however, that in view of his criminal convictions there would be more to becoming a member of the Bar than graduating and passing the examination.

Two weeks before he was to take the bar examination, Christopher Thomas, this Court's Director of Professional Programs, informed Mr. Partin, apparently as a precondition to his taking the examination, that he would be required to sign an acknowledgement stating that further proceedings may be necessary concerning his application if he passed the examination. He executed the acknowledgement. Mr. Partin achieved a passing score on the bar examination, and then Mr. Thomas informed him he was deferring the decision on admission to the Chairman of the Board of Law Examiners, apparently following the procedure prescribed by Rule XIII of the Rules Governing Admission to the Bar for determinations of moral character and fitness for reinstatement of lawyers who are disbarred or whose licenses have been suspended.

Although Rule XIII dealt with aspects of initial applications for Bar membership, including the statement that applicants must demonstrate character and fitness, the *procedural* provisions in the Rule for cases in which there were character and fitness issues mentioned only reinstatement. The Rule has since been amended to make it clear that procedure such as that followed in this case is proper with respect to an initial applicant, and as we discuss below, we find no fault in following that procedure in the case of an initial applicant prior to the amendment. The Chairman was unable to reach a decision and, again following Rule XIII procedure, he referred the matter to a panel of three Board members.

Mr. Partin requested a hearing before the panel. He was informed, in accordance with Rule XIII, of the requirement that he post a bond for costs associated with the hearing. He responded with a request that he be allowed to proceed *in forma pauperis*. His request was denied. Through subsequent correspondence with Mr. Thomas, an arrangement was made for a reduced bond of

$250. In connection with that decision, Mr. Thomas informed Mr. Partin he would be allowed to make a brief presentation. Apparently that statement was made out of concern that a long record, together with associated copying and mailing expenses, could amount to considerably more than $250, and indeed that turned out to be the case. The cost to Mr. Partin ultimately exceeded $600. A hearing was held on November 20, 1993.

At the hearing, Mr. Partin testified on his own behalf and responded to questions by the panel members and Mr. Thomas who served as the evidence officer and presented the documentary record. After the record of the hearing was reviewed by eleven members of the Board, they voted eight to three to deny admission.

1. Good moral character

The applicant has the burden of proving eligibility and must do so by a preponderance of the evidence. We review bar admission and reinstatement cases *de novo*, and we will not reverse the findings of fact of the Board unless they are clearly erroneous. *In re Application of Crossley*, 310 Ark. 435, 839 S.W.2d 1 (1992). In cases in which we are asked to review a moral character decision of the Board, we are concerned with whether the applicant proved that he or she had sufficient moral character by a preponderance of the evidence. *See In re Shannon*, 274 Ark. 106, 621 S.W.2d 853 (1981).

The essence of Mr. Partin's first point of appeal is that the Board erred because it did not give sufficient consideration to his rehabilitation as demonstrated by his academic achievements and numerous letters from friends, teachers, and relatives attesting to his honesty and trustworthiness. We see the issue a little differently. Our first concern is with a factual finding which is determinative of the case if we cannot find the Board to have been clearly erroneous in reaching it.

In its written findings and conclusions, the Board discussed the facts and then set out its conclusions. The first four paragraphs of conclusions had to do with the facts of Mr. Partin's criminal record. The Board then set out the following:

> 5. In 1973, the applicant pled guilty to a felony charge in the State of Louisiana. While a majority of the Board tends

to discount the significance of this plea, due to the passage of time, and the age of the applicant at the time of the offense, it is, nonetheless, of some probative value when considered in light of the subsequent behavior of the applicant many years later.

6. In connection with the 1984 felony charge in Van Buren County, Arkansas, a search warrant was obtained by local law enforcement personnel. One basis for the issuance of the warrant was observation of "several hundred" marijuana plants being grown near the residence of the applicant.

As a result of the execution of the search warrant, approximately two pounds of marijuana was found on the applicant's premises, along with other evidence that the applicant was engaged in the manufacture of a controlled substance on a significant scale. This other evidence included commercial fertilizer, "peat pots" and a set of Ohaus scales. There is no evidence in the record to explain any other use for these items or materials. The Board also notes the presence of numerous weapons at the applicant's residence. Pursuant to evidence obtained in the search, the applicant was arrested and ultimately pled guilty to a felony charge of possession of a controlled substance with intent to deliver. In consequence of the guilty plea, the applicant received a four-year suspended sentence and four years probation.

A majority of the Board finds and concludes that the record shows, beyond a preponderance of the evidence, that the applicant was engaged in growing and possessing more than modest amounts of marijuana in 1984.

* * *

7. Less than two years after pleading guilty and being placed on probation, another search was conducted of Mr. Partin's residence in Van Buren County. This search was based on aerial observation of a large stand of mature suspected marijuana plants being grown approximately three hundred yards north of Mr. Partin's residence. By the time the search warrant was executed, the large stand of mari-

juana had been removed. Nonetheless, the search warrant was pursued and minor amounts of marijuana were discovered in the applicant's residence.

Although charged with a felony, i.e., manufacture of a controlled substance, the jury found the defendant guilty, in 1986, of misdemeanor possession of a controlled substance.

The applicant's 1984 suspended sentence was subsequently revoked. The stated reason for revocation was "the defendant has failed to refrain from being in the company of persons who use marijuana."

A majority of the Board finds and concludes that the applicant manifested a disturbing indifference to the terms of his 1984 probation within a very short period after its entry. Indeed, the applicant, according to the record, was in possession of marijuana, and in the presence of others using marijuana, less than two years after being placed on probation.

The applicant, during his testimony, continues to insist that he has never grown a controlled substance. A majority of the Board finds and concludes that the record, beyond a preponderance of the evidence, establishes otherwise. It is the conclusion of a majority of the Board that the applicant has yet to fully accept the criminality of his behavior, beginning in 1973, but most especially the more recent episodes of 1984 and 1986. [Emphasis added.]

* * *

In particular, the Board majority is compelled to conclude that the applicant engaged in criminal activity and has yet to exhibit remorse or acceptance of the criminality of his actions. The Board majority is persuaded that initial admission of this applicant would not contribute to the public interest, and may very well detract from the integrity of the bar and the Courts. Accordingly, Mr. Partin's application for initial instatement to the Bar of Arkansas is denied.

It is apparent that the Board concluded that Mr. Partin was not being truthful when he denied having grown marijuana upon

being asked by the hearing panel if he had done so. During oral argument before this Court, at which Mr. Partin appeared *pro se*, as he did at the initial hearing, he stated he had admitted to the panel that he had been *charged* with growing marijuana. The following colloquy ensued between Mr. Partin and Mr. Michael Mashburn, a member of the panel:

> MR. MASHBURN: I don't know much about growing marijuana but at some point in your life back in 1973 you had some books in your Volkswagen that apparently taught how that was done, is that right?
>
> MR. PARTIN: I've had books on it before, never been successful at it.
>
> MR. MASHBURN: When you were growing it, you were successful at growing it, is that right?
>
> MR. PARTIN: No, I said I never have been successful.
>
> MR. MASHBURN: Never have been successful growing it?
>
> MR. PARTIN: Right.
>
> MR. MASHBURN: Do you know enough about that process to tell me whether when you're starting the plants out and you have peat pots to start them out in, you start one plant per peat pot?
>
> MR. PARTIN: I've seen — starting them in peat pots was a joke. Marijuana plants, you know, they get about that tall and then they fall over and die. And that's all I know about growing marijuana in a peat pot.
>
> MR. MASHBURN: Have you ever successfully in your life, sir, grown a marijuana plant to its full mature height—
>
> MR. PARTIN: No.
>
> MR. MASHBURN: — and harvested one?
>
> MR. PARTIN: No.

In response to further questions, Mr. Partin denied some of the facts stated in the affidavits which resulted in the searches in 1984 and 1986, including, *e.g.*, denying any knowledge of how the stalks which tested positive for marijuana got on his property.

It is clear that the Board members did not believe Mr. Partin's testimony. The credibility of a witness is a matter of fact, and we have been given no reason to conclude that the Board's determination of the fact that Mr. Partin was being untruthful was clearly erroneous.

In their concluding remarks, members of the panel commended Mr. Partin for his efforts in obtaining an education and in maintaining a clean record since 1986. Our experience in cases of persons seeking initial admission to the Bar after denial by the Board is limited to a fitness, as opposed to character, case. *In re Application of Crossley*, 310 Ark. 435, 839 S.W.2d 1 (1992). Character cases have, however, arisen in other jurisdictions, and we have studied cases cited by Mr. Partin such as *In re Rowell*, 754 P.2d 905 (Or. 1988); *Petition of Diez-Arguelles*, 401 So.2d 1347 (1981). Mr. Partin is correct that those cases have emphasized the successful rehabilitative efforts of the applicants and have not concentrated on their criminal pasts. One of the items stressed in such cases, however, is candor about the past.

Mr. Partin cites a most interesting case from the California Supreme Court, *Martin B.* v. *Committee of Bar Examiners*, 33 Cal. 3d 717, 190 Cal. Rptr. 610, 661 P.2d 160 (1983). While serving as a U.S. Marine, Martin B. was acquitted of rape on a defense of consensual intercourse in 1972. In a later trial involving a separate accusation of rape by a different complaining witness, a jury deadlocked 11 to 1 in his favor, and the court dismissed the charge. Still later, he was convicted of filing a false claim against the government. The California State Bar Court refused to certify him for admission to the Bar. The State Bar Court conducted a "retrial" of the rape charges, calling live witnesses, and ultimately concluded that Martin B. had lied to that Court in maintaining his innocence.

In reversing and remanding the State Bar Court decision, the California Supreme Court concluded the "retrial" was unfair because vital court records no longer existed. The California Supreme Court recognized that, had Martin B. made a "pragmatic" admission to the Court of his guilt in the rape incidents, the State Bar Court probably would have recommended his admission to the Bar on the basis of his rehabilitation. The California

Supreme Court was critical of the State Bar Court for thus encouraging applicants who maintain innocence to be untruthful.

We find a difference between the *Martin B.* case and that of Mr. Partin. True, the one time Mr. Partin was charged with growing marijuana, he received a "favorable outcome" as he was convicted only of the lesser included offense of possession. He did not, however, receive such an outcome in 1984 when he was charged with possession with the intent to deliver and pleaded guilty of that offense after the Trial Court refused to suppress evidence strongly indicative that he was growing marijuana.

Of course we agree that Mr. Partin has a right to maintain that he has never successfully grown a marijuana plant or harvested one. We do not, however, know of any reason the Board should have been precluded from evaluating his truthfulness on the basis of its observations of him as a witness when confronted with the sworn statements used in the process of charging him in 1984 and 1986.

Mr. Partin's efforts at rehabilitation have apparently been remarkable, but the Board obviously concluded they are not complete in view of what the members perceived as his lack of candor, and we cannot disagree or find that conclusion clearly erroneous.

2. *Constitutional arguments*

a. Equal protection

Mr. Partin argues the Board violated his right to equal protection of the laws by impermissibly classifying him apart from other applicants with criminal records who have been admitted to the bar.

The basis of the equal protection argument is unclear. His opening brief does not set forth any authority, nor does he specify any impermissible classification was practiced by the State. The argument about impermissible classification first appears in his reply brief. Arguments cannot be made for the first time in an appellant's reply brief. *See John Cheeseman Trucking* v. *Dougan*, 313 Ark. 229, 853 S.W.2d 278 (1993).

b. Due process

Mr. Partin was afforded notice and a hearing before his application was denied. Nevertheless, he challenges the sufficiency of the procedure on two bases. First, he contends that the requirement that he post a bond before any further action could be taken on his application restricted his access to a hearing and caused undue delay in the disposition of his case. Second, he argues Mr. Thomas did not afford him procedural due process because the procedures used in reinstatement cases were used to resolve the character issue on his initial application to the bar.

An applicant who satisfies the statutory prerequisites for admission to the bar has a "legitimate claim of entitlement" to practice his profession. Those charged with investigating and making decisions upon an applicant's character and fitness to practice law must afford adequate due process of law. *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); *see also Board of Regents of State Colleges* v. *Roth*, 408 U.S. 571, 92 S.Ct. 2701 (1972).

In its decisions concerning the constitutionality of filing fees, the Supreme Court has held that when a fundamental right is involved, a fee cannot restrict an indigent person's access to the courts. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). However, where a fundamental right is not involved, such fees do not violate due process, especially if alternatives are available for the vindication of the indigent's rights. *United States* v. *Kras*, 409 U.S. 437, 93 S.Ct. 631 (1973); *Ortwein* v. *Schwab*, 410 U.S. 604, 93 S.Ct. 1172 (1973). We have been cited to no authority for the proposition that one may have a "fundamental right" to practice law.

It is difficult to understand how the bond requirement violated Mr. Partin's due process rights, as he was ultimately able to have a hearing and present evidence on his own behalf. Nor have we been shown how Mr. Partin may have been prejudiced by application of the procedures of Rule XIII despite the fact that those procedures referred to reinstatement rather than initial instatement when the hearing was arranged and held.

The procedure prescribed by Rule XIII is similar to that described in a concurring opinion in *Willner* v. *Committee*

on Character and Fitness, 373 U.S. 201, 83 S.Ct. 1175 (1963), in which Mr. Justice Goldberg summarized the constitutional requirements: "The applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence." The procedure used by Mr. Thomas and the Board afforded that opportunity.

The fact that the officers who gave the information contained in the search warrant affidavits which were part of the evidence were not present for cross-examination gives us some pause, but Mr. Partin has not shown that he objected on that or any other basis at the hearing. He merely disputed some of the significant details contained in those reports. He might have had more success in questioning that evidence had he been represented by counsel, but we have no reason to think that his *pro se* appearance was other than the result of his own choice, and we cannot say the hearing was other than fair in the circumstances.

Affirmed.

SPECIAL CHIEF JUSTICE MICHAEL R. MAYTON joins in this opinion.

ROAF, J., and SPECIAL JUSTICE RALPH WASHINGTON concur.

HOLT, C.J., and BROWN, J., not participating.

ANDREE LAYTON ROAF, Justice, concurring. The majority, in affirming the decision of the Board of Law Examiners denying the applicant's admission to the Bar of Arkansas, has, in effect, upheld the Board's findings that the applicant presently lacks good moral character. The Board found that Partin was not truthful regarding his involvement with marijuana in 1984 and 1986, and therefore did not demonstrate sufficient remorse or acceptance of the criminality of his actions.

This court has correctly determined that the findings of fact by the Board are not clearly erroneous. It is also clear that the Board did acknowledge appellant's commendable and apparently very successful efforts to rehabilitate himself since 1986; the consideration given these efforts is less clear.

However, the Board flatly did not believe the applicant's

responses to its inquiries about his past acts in allegedly manufacturing or growing marijuana on a large scale, acts for which he was never convicted, in either 1984 or 1986. The Board, in effect, conducted a trial and convicted the applicant of charges which he did not face in 1984 and was acquitted of in 1986, to reach its conclusion. Unfortunately for the applicant, it was permissible and appropriate for the Board to conduct this inquisition, as even the applicant agreed:

> Mr. Mashburn: [D]o you view our job as being ended if we determine that all you had was a series of — one dismissal of a felony conviction and then a series of misdemeanor convictions or do you view that we should look at the pattern of activity particularly after you're 30 years old and should have known better?
>
> Mr. Partin: I'm sure — yeah, I believe it should be considered.
>
> Mr. Mashburn: The pattern should be considered, shouldn't it?
>
> Mr. Partin: Yes.

The tenor of the questioning did not bode well for the applicant or for his chances before the Board:

> Mr. Mashburn: Let me just ask you this. You have a conviction in 1973 and then you have another conviction in 1984, *were you growing dope all that time between 1973 and 1984 or did they just happen to catch you with the first patch you planted?* (Emphasis added.)
>
> Mr. Partin: I've already told you that I wasn't growing dope.
>
> Mr. Mashburn: You weren't growing dope?
>
> Mr. Partin: No, sir.
>
> Mr. Mashburn: You've never grown dope —
>
> Mr. Partin: No.

Mr. Partin wanted to be judged by his actions since 1986; the Board would not or could not let him put his past behind him

and therein lies his dilemma. Although I cannot say that the Board was clearly erroneous in denying the application, if the decision ultimately turned on the applicant's perceived lack of candor about alleged past criminal acts, then the issue of his rehabilitation has really not been reached. I find the anaylsis employed by the Supreme Court of California in a similar case to be more equitable while still fulfilling the duty of a Board or Committee to safeguard the integrity of the bar and the courts, and to protect the public against potentially dishonest or unethical practitioners. In *Hightower* v. *State Bar of California*, 34 Cal.3d 150, 666 P.2d 10 (1983), the Supreme Court stated the "fundamental question remains whether petitioner is a fit and proper person to be permitted to practice, and that question usually turns upon whether he has committed or is likely to continue to commit acts of moral turpitude." In *Hightower*, the Court questioned "the wisdom of denying an applicant admission to the bar if that denial rests on the applicant's choosing to assert his innocence regarding prior charges rather than acquiesce in a pragmatic confession." *Id.; see also Martin B.* v. *Comm. of Bar Exrs. of State Bar*, 33 Cal.3d 717, 661 P. 2d 160 (1983). In the instant case, the prior charges are over eight years old and should be put to rest.

I concur only because the standard for review is such that it cannot be overcome in this case.

RALPH M. WASHINGTON, Special Associate Justice, joins in the concurrence.

Randy Keith BRISTOW and Razorback Cab of Fort Smith
v. Betty FLURRY

94-1078 894 S.W.2d 894

Supreme Court of Arkansas
Opinion delivered March 20, 1995

Skinner Law Firm, P.A., for appellant.

Hough, Hough & Hughes, P.A., by: *R. Paul Hughes, III*, for appellee.

TOM GLAZE, Justice. Randy Bristow was the driver of a Razorback cab in which appellee, Betty Flurry, was a back-seat passenger. The cab was involved in an accident and Flurry filed an action against Bristow and Razorback Cab of Fort Smith, alleging the accident and her resulting personal injuries were due

to Bristow's negligence. The jury trial ended in a unanimous verdict in favor of Bristow and Razorback, but the trial court ruled that the jury's finding was clearly against the preponderance of the evidence and granted Flurry's motion for a new trial. Bristow and Razorback Cab appeal the trial court's ruling. We affirm.

On the night of April 12, 1990, Bristow was driving Flurry eastbound on Garrison Avenue. Bristow's version of what occurred is that, as he approached the intersection of Garrison and Ninth Street, Flurry reached over the seat to pay her fare and said, "Here." Bristow claims that, when he last looked, the light in the intersection ahead was green, so he turned to collect the money from Flurry. However, when he turned back, he was in the intersection, at which point he saw a truck a moment before colliding with it. The truck, driven by Timothy S. Moore, was traveling north and struck Bristow's cab on its right-hand side. Bristow testified that Moore was driving in excess of the speed limit. Flurry testified both that she saw the signal light was red and then that she really was not paying attention to the light. She also said that, when she looked up, the truck was coming very fast.

Alfred Flesher, the officer who had investigated the accident, testified at trial that, at the scene of the accident, Bristow stated that he must have run through the red light, and based upon that statement, Flesher opined that Bristow was at fault. Officer Flesher further testified that, when investigating the accident, Bristow gave no indication that Ms. Flurry had done anything to cause him to run the red light. Flesher stated that Bristow seemed convinced after the collision that he (Bristow) must have run the red light.

Bristow testified that he did not see the light change from green because he was talking to Flurry at the time and was not paying attention. Bristow further stated that, while he admitted he told Officer Flesher that he must have or may have run the red light, Bristow was certain that the light could not have turned from green, to yellow, to red in the amount of time he diverted his attention to receive his fare from Flurry.

The jury heard the above evidence and the instructions by the trial court and found in favor of Razorback Cab and Randy Bristow. The trial court granted a new trial, basing its order on the following assessments: (1) Bristow admitted to Officer Flesher

that he ran the red light; (2) the jury could not reasonably have found that Flurry's action in distracting Bristow would have been more negligent than Bristow's failure to keep a proper lookout; (3) there was little or no basis in fact upon which the jury could have found Moore's speeding was the entire cause of the accident; and (4) the jury could not have reasonably found that Flurry did not receive injuries that were related to this accident.

Ark. Rule Civ. P. 59(a)(6) provides that 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 when the verdict or decision is clearly against the preponderance of the evidence or is contrary to the law. Although the trial court is granted some discretion in the matter, 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. *Richardson* v. *Flanery*, 316 Ark. 310, 871 S.W.2d 589 (1994). The test we apply in reviewing the trial court's granting of the motion is whether the judge abused his or her discretion. *Id.* 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. *Id.*

In *Richardson*, this court affirmed the trial court's granting of a new trial. There, defendant Richardson was driving her car on a feed-on lane, attempting to access Highway 107. Richardson failed to yield, thereby colliding with the Flanerys' car which was traveling south on the highway. At trial, the jury returned a general verdict in Richardson's favor, but the trial court set aside the verdict and granted the Flanerys a new trial. This court held that the trial judge did not abuse his discretion in granting the new trial because the overwhelming weight of the evidence was that Richardson's failure to yield had been the cause of the accident. The only evidence tending to disprove the allegations of negligence against Richardson was her own testimony regarding the cause of the accident.

Turrise v. *Crane*, 303 Ark. 576, 798 S.W.2d 684 (1990), is another case where this court affirmed the trial court's granting of a new trial. This case arose when defendant Turrise was the driver of a van that ran off the road, overturned and injured the plaintiff passengers. The trial court granted a new trial finding

that Turrise's testimony regarding another vehicle causing him to run off the road was at consummate variance with the physical evidence and the testimony of independent witnesses. The only evidence tending to excuse Turrise's failure to keep the van on the road was his own sudden emergency testimony. On appeal, this court concluded that the physical evidence showed a course of conduct contrary to that which an ordinary person would have undertaken when confronted with such an emergency. This court then upheld the trial court's finding that the combined physical evidence and testimony by other independent witnesses amounted to a clear preponderance in the plaintiffs' favor.

We hold that Bristow and Razorback Cab have failed to show that the trial court abused its discretion in granting a new trial. First, we point out that this case was submitted to the jury on an AMI 203 instruction wherein Flurry claimed damages resulting from the negligence of Bristow and Razorback Cab. Second, the trial court also gave AMI 901A and B, which generally spell out a driver's duty to lookout for other vehicles and to keep his vehicle under control. In addition, the trial court read AMI 910 to the jury, which provides a passenger in an automobile is required to use ordinary care for her own safety. Significantly, the trial court refused to instruct the jury on comparative fault. While the trial court refused Bristow's and Razorback Cab's proffer of AMI 2111 on comparative fault, they do not raise that as a point for reversal on appeal.

In considering the evidence in relation to the instructions given, it is uncontroverted that Flurry sustained an injury to her hand and, at the least, lost a day of work as a result of the accident.[1] By his own testimony, Bristow conceded he was not paying attention to the road as he entered the intersection prior to the collision. Although Bristow attempted to blame Flurry for diverting his attention by offering payment of her fare, Flurry never agreed she did anything to distract Bristow. And as previously stated, Bristow never mentioned to Officer Flesher that Flurry bore any blame for the accident.

The only significant evidence, favoring Bristow and Razor-

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[1]Flurry also presented considerable other proof, albeit disputed, bearing on injuries she sustained.

back Cab, came as a result of Bristow's own testimony. However, as discussed earlier, while Bristow testified that the signal light was green when he last saw it, his statements to Officer Flesher at the accident scene contradicted his own trial statements. To reiterate, Flesher testified that, after the accident, Bristow said that he was not paying attention before the collision and that he must have run through a red light. Once again, Bristow made no mention to Flesher of Flurry having done anything to cause the accident, nor did he suggest Flurry was at fault until trial.[2]

In sum, the record reflects that Bristow, by his own testimony and that of Officer Flesher, very clearly failed to maintain a proper lookout and maintain control of his vehicle at the time of the accident. By the same token, even if Bristow's testimony is accepted as true that Flurry said, "Here" when offering her fare, we cannot say the trial court abused its discretion in finding such remark did not constitute negligence in the circumstances. Because we cannot say the trial judge abused his discretion in finding the jury verdict was clearly against the preponderance of the evidence, we affirm.

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[2]At this point, we note that, while Bristow also argued Moore was at fault, no comparative fault instruction was given on this issue. We also note that Officer Flesher testified that Moore was not at fault, and while Bristow objected to Flesher's testimony, stating it called for a conclusion as to who was at fault in the accident, Bristow and Razorback Cab do not present their objection as a point for reversal on appeal.

Ben WAGGONER and Suzanne Waggoner, His Wife
v. TROUTMAN OIL COMPANY, INC.;
Billy S. Sublett; and Jim Reese, d/b/a J & S Quickstop

94-622 894 S.W.2d 913

Supreme Court of Arkansas
Opinion delivered March 20, 1995

[redacted]

Gregg, Hart & Farris, by: *Phillip Farris*, for appellants.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Kenny McCulloch*, for appellee Troutman Oil Company, Inc.

Matthews, Sanders, Liles & Sayes, by: *Marci Talbot Liles* and *Gail O. Matthews*, for appellee Billy S. Sublett.

TOM GLAZE, Justice. This case raises the issue concerning whether this court should adopt the Fireman's Rule. Ben Waggoner, a volunteer fireman for the Mt. Vernon Fire Department, was working at his business on the day Billy Sublett drove his pickup truck into an above-ground kerosene storage tank owned by Jim Reese. Reese was operating a business called J & S Quick Stop and the storage tank was part of that business. Waggoner was only about 200 feet from the truck at the time of the collision. He saw steam or smoke coming from the truck, so he ran to

the site to clear the area of children. Waggoner then saw flames arise from underneath the truck and fluid leaking from the tank. At about that time, a firetruck arrived, and Waggoner took the hose from one of the firemen and began hosing the fire. When he heard a percolating noise coming from the tank, Waggoner dropped the hose and ran, but after he ran about twenty feet, the tank exploded, causing Waggoner to sustain third degree burns over the backside of his body. Waggoner and his wife brought suit for negligence against Sublett, Reese and Troutman Oil, which was the supplier of kerosene to the above-ground tank. Troutman Oil filed a cross-complaint against Sublett and Reese.[1] Because Waggoner received workers' compensation benefits, the Association of Arkansas Counties' Workers' Compensation Trust Fund intervened, seeking its statutory lien on any recovery awarded Waggoner.

The trial court granted Sublett and Troutman Oil summary judgment, holding the Fireman's Rule governed the circumstances leading to Waggoner's injuries, and served as a complete bar to the Waggoners' claims against all party defendants. The trial court further found that Troutman Oil owed no duty to inspect or rectify any problems involving the tank, and that the actions of Sublett and Troutman Oil were not the proximate cause of Mr. Waggoner's injuries. The Waggoners bring this appeal from the trial court's summary judgment.

The Fireman's Rule (also known as the professional rescuer doctrine) generally provides that a professional firefighter may not recover damages from a private party for injuries the fireman sustained during the course of putting out a fire even though the private party's negligence may have caused the fire and injury. While Arkansas has neither adopted nor rejected the Fireman's Rule, the rule has been almost universally accepted by jurisdictions confronted with the choice. In fact, twenty-three states and the District of Columbia have adopted the rule, albeit based upon differing rationale, and only three states have rejected the rule either by case law or statute. *Grable* v. *Varela*, 225 Ariz. 222, 564 P.2d 911 (1977); *Baker* v. *Superior Court*, 129 Cal. App.3d 710, 181 Cal. Rptr. 311 (4th Dist. 1982); *Carpenter* v. *O'Day*, 562 A.2d 595 (Del.Super. 1988); *Gillespie* v. *Washing-*

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[1]Troutman Oil also filed a third-party complaint against four other defendants who purportedly were owners of the tank and the premises where Quick Stop was located.

ton, 395 A.2d 18 (D.C. 1978); *Bycom Corp.* v. *White*, 187 Ga.App. 759, 762, 317 S.E.2d 233 (1988); *Thomas* v. *Pang*, 811 P.2d 821 (Hawaii 1991); *Wynn* v. *Frasher*, 116 Idaho 500, 777 P.2d 722 (1989); *Core* v. *Grzelinski*, 72 Ill.2d 141, 379 N.E.2d 281 (1978); *Heck* v. *Robey*, 630 N.E. 1361 (Ind. App. 1 Dist. 1994); *Cohen* v. *Devereaux*, 495 N.E.2d 211, 215 (Ind. App. 1986); *Pottebaum* v. *Hinds*, 347 N.W.2d 642 (Iowa 1984); *Calvert* v. *Garvey Elevators, Inc.*, 236 Kan. 570, 694 P.2d 433 (1985); *Hawkins* v. *Sun Mark Industries, Inc.*, 727 S.W.2d 397 (Ky. 1986); *Flowers* v. *Rock Creek Terrace*, 308 Md. 432, 520 N.2d 361 (1987); *Kreski* v. *Modern Wholesale Electric Supply Co.*, 429 Mich. 347, 357, 372, 415 N.W.2d 178 (1987); *Hannah* v. *Jensen*, 298 N.W.2d 52 (Minn. 1980); *Anderson* v. *Cinnamon*, 365 Mo. 304, 282 S.W.2d 445 (1955); *Wax* v. *Co-Operative Refinery Association*, 154 Neb. 805, 49 N.W.2d 707 (1951); *England* v. *Tasker*, 129 N.H. 467, 529 A.2d 938 (1987); *Krauth* v. *Jeller*, 31 N.J. 270, 157 A.2d 129 (1960); *Kenavan* v. *City of New York*, 523 N.Y.S.2d 60, 517 N.E.2d 872 (1987); *Steelman* v. *Land*, 97 Nev. 425, 634 P.2d 666 (1981); *Scheurer* v. *Trustees of Open Bible Church*, 175 Ohio St. 163, 192 N.E.2d 38 (1963); *Cook* v. *Demetraks*, 108 R.I. 397, 275 A.2d 919 (1971); *Chesapeak & Ohio Ry.* v. *Crouch*, 208 Va. 602, 159 S.E.2d 650 (cert denied), 393 U.S. 845 (1968); *Hass* v. *Chicago & N.W. Ry.*, 48 Wis.2d 321, 179 N.W.2d 885 (1970); *contra Christensen* v. *Murphy*, 296 Or. 610, 679 P.2d 1210 (1984); *Minn. Stat.*, 604.06 (1984); *Fla. Stat.*, Ch. 112.182 (1990).

It is noteworthy to point out that some jurisdictions' rationale in adopting the rule is based upon treating the fireman as a licensee to whom landowners owe only the duty not to act willfully or wantonly. Other jurisdictions have predicated utilization of the rule upon the assumption of risk doctrine. However, the most persuasive decisions, we think, are those that justify the Fireman's Rule on public policy considerations. In those cases, the courts submit that the risk is one which the fireman has engaged to encounter by virtue of his employment and one which it is his duty to accept, and the person who negligently causes the fire has therefore not breached a duty owed the fireman. *Buchanan*, 203 Neb. 684, 279 N.W.2d 855. The Supreme Court of Hawaii related this public policy consideration similarly as follows:

> The very purpose of the firefighting profession is to confront danger. Firefighters are hired, trained, and com-

> pensated to deal with dangerous situations that are often caused by negligent conduct or acts. [I]t offends public policy to say that a citizen invites private liability merely because he happens to create a need for those public services.

Thomas, 811 P.2d 821, 825.

For examples of other jurisdictions adopting the Fireman's Rule based on public policy considerations, *see Pottsbaum*, 347 N.W.2d 642 (Iowa 1984); *Hawkins*, 727 S.W.2d 397; Kreski, 429 Mich. 347; *Phillips* v. *Hallmark Cards, Inc.*, 722 S.W.2d 86 (Mo. 1987); *Austin* v. *City of Buffalo*, 179 A.D.2d 1075, 580 N.Y.S.2d 604 (1992); *Heck*, 630 N.E.2d 1361.

After reviewing the foregoing case authorities on this subject, we conclude the Fireman's Rule is applicable to the circumstances here and should control. That being said, we affirm the trial court's decision and hold that the rule bars the Waggoners' recovery for the very valid public policy reason that the party or parties who negligently started the fire had no legal duty to protect the firefighter from the very danger that the firefighter was employed to confront.

The Waggoners argue alternatively that, even if the Fireman's Rule is adopted by this court, exceptions to that rule apply here that still permit their recovery. They mention, for example, that Sublett pled guilty to a felony for having driven his truck into the kerosene storage tank. While it has been said that the courts have traditionally held that the protection of the Fireman's Rule does not extend to willful, wanton or reckless conduct or hidden dangers caused by defendants, the Waggoners failed to make these allegations part of their complaint against the defendants-appellees, nor did they obtain the trial court's ruling on such an issue.[2] *See Petition of Sprague*, 564 A.2d 829 (N.H. 1989); *Thomas*, 811 P.2d 821; *Migdal*, 564 A.2d 826; *Mahoney*, 510 A.2d 4; 62 Am. Jur. Premises Liability § 431 (1990 and Cum. Supp. 1994); *see also Hawkins*, 727 S.W.2d 397; *contra Young*, D. 569 A.2d 1173.

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[2]We note that, in scouring the abstract, we find a letter dated February 7, 1994, to the trial judge which mentions certain Fireman's Rule exceptions including the "willful and wanton" exception and "hidden dangers" exception, but no pleading, motion or argument was made to the trial court, nor ruling obtained on these theories.

The Waggoners did appropriately and timely raise their arguments that Waggoner was not covered by the Fireman's Rule because he was a "volunteer" fireman. He also claimed that, even if volunteer firemen are covered by the rule, he was not acting as a fireman at the time of his injuries.

In concluding as a matter of law, Waggoner was acting as a fireman when he sustained his injuries, the trial court determined that Waggoner admitted in his amended response to Troutman Oil's motion for summary judgment that he was performing his duties as a volunteer fireman at the time of his injuries. In fact, the undisputed evidence reflects that at least at some point Waggoner clearly assumed his duties as a fireman by taking the Mt. Vernon Fire Department's hose under his control and fighting the flame resulting from the leaking storage tank. Waggoner's actions were consistent with his past and present history. Waggoner had trained as a firefighter, had served as Mt. Vernon's first volunteer fire chief, and continued on the town's roster of firefighters. He also conceded that, as a firefighter, he has received workers' compensation benefits for injuries sustained in this case as a result of such coverage having been provided by Mt. Vernon's volunteer fire department.

Concerning Waggoner's contention that, as a volunteer rather than a paid fireman, he should not be barred by the Fireman's Rule, we point out that the cases fail to support this view. In fact, the general rule appears to be that the duty owed to volunteer firefighters is no different from that owed to paid firefighters. *See Buchanan*, 203 Ark. 684; *Baker* v. *Superior Ct.*, 129 Cal. App. 3d 710, 181 Cal. Rptr. 311; *see also* 62 Am. Jur. 2d § 436. We further point out that, under Arkansas' statutory law, volunteer firemen are under a duty to respond to, attempt to control, and put out all fires occurring within their respective districts. Ark. Code Ann. § 20-22-901 (Repl. 1991). We would also be remiss in failing to mention that Waggoner, as a volunteer fireman, was not without relief since the injuries sustained by him were in the course of his employment and were compensable under Arkansas Workers' Compensation laws. *See Thomas*, 811 P.2d 821. In this respect and as previously mentioned, Waggoner claimed and received workers' compensation benefits for his injuries.

Because we hold the Fireman's Rule is applicable to and governs the facts and events set out by the Waggoners and party defendants below, we uphold the trial court's decision.

Affirmed.

ROAF, J., dissents.

ANDREE LAYTON ROAF, dissenting. The majority has chosen to adopt the century-old Fireman's Rule and to premise its adoption on the broadest possible underpinning, that of public policy. At first blush, the Fireman's Rule appears to be well founded in logic, reason, and sound policy considerations. Certainly, we are falling in line with the vast majority of jurisdictions in adopting this Rule. But numbers do not always equate with right. For me, the ultimate question is whether there is presently a valid, substantial public policy purpose to be accomplished by treating firemen and policemen differently than many other public and private workers whose jobs entail a degree of risk of injury. I think not and I find the rationale set forth in a case which abolished the rule and the dissenting opinions in two other cases to present more reasoned analyses and conclusions regarding this rule.

The rationale that a fireman, by virtue of his employment is paid to encounter risks created by the negligence of others, and is therefore owed no duty by such tortfeasors, is simplistic and patently unfair to these public servants. The dissent in *Walters* v. *Sloan*, 142 Cal. Rptr. 152 (1977), which calls the Fireman's rule "outmoded" and of ancient vintage, addressed this rationale:

> Proponents of the fireman's rule argue most frequently that it is the fireman's job to extinguish fires and the policeman's job to make arrests. They conclude that a fireman or a policeman can base no tort claim upon damage caused by the very risk that he is paid to encounter and with which he is trained to cope. The argument, in essence, is that the fireman or policeman in accepting the salary and fringe benefits offered for his job, assumes all normal risks inherent in his employment as a matter of law, and thus may not recover from one who negligently creates such a risk.
>
> The fallacy in this argument is simply that it proves too much. Under this analysis, an employee would rou-

> tinely be barred from bringing a tort action whenever an injury he suffers at the hands of a negligent tortfeasor could be characterized as a normal, inherent risk of his employment. Yet as noted above, past California cases have regularly permitted highway workers — whose jobs obviously subject them to the "inherent risk" of being injured by a negligent driver — to recover for damages inflicted by such third party negligence . . . and have permitted construction workers — whose employment poses numerous risks of injury at the hands of another — to recover tort damages for work-related injuries so long as the negligent tortfeasor is not their employer. . . .
>
> As these and countless other cases demonstrate, while policemen and firemen regularly face substantial hazards in the course of their employment and are, theoretically at least, compensated for such risks, a host of other employees — highway repairmen, high rise construction workers, utility repairmen and the like — frequently encounter comparable risks in performing their jobs and, again theoretically, also receive compensation for such risks. California decisions have never perceived such theoretical compensation as a sufficient basis for barring the employee's cause of action against a negligent tortfeasor. (Cites omitted.)

In *Christensen* v. *Murphy*, 678 P.2d 1210 (Or. 1984), the Supreme Court of Oregon abolished the Rule because its implied assumption of risk underpinnings had been abolished by Oregon statute. In determining whether any *other* theory would support the Rule the court stated:

> The most often cited policy considerations include: 1) To avoid placing too heavy a burden on premises owners to keep their premises safe from the unpredictable entrance of fire fighters; 2) To spread the risk of fire fighters' injuries to the public through workers' compensation, salary and fringe benefits; 3) To encourage the public to call for professional help and not rely on self-help in emergency situations; 4) To avoid increased litigation . . . .
>
> For example, policy consideration "1" above focuses on the fire fighter as a class from whom the premises owner needs immunity (akin to a licensee or trespasser), not on

> the reasonableness of the activity of the premises owner in the circumstances. Thus, it can be seen that the unusual hazard or hidden danger exception to the "fireman's rule" (allowing the fire fighter to recover under the old premises liability or the new foreseeability tests), discloses not a governmental policy concerning conduct of a landowner but a veiled form of assumption of risk analysis — usually characterized in language indicating that the fire fighter "* * * does not assume such risks" . . . .
>
> The remaining policy arguments are equally flawed. The weakness in the loss-spreading rationale, "2" above, is obvious. By denying a public safety officer recovery from a negligent tortfeasor, the officer is not directed to recover his damages from the general public; rather the officer is totally precluded from recovering these damages from anyone . . . Under the "fireman's rule" the injured public safety officer must bear a loss which other public employees are not required to bear . . .
>
> As for "3" above, Dean Prosser criticized as "preposterous rubbish" the argument offered to defend the "fireman's rule" that tort liability might deter landowners from uttering cries of distress in emergency situations. . . We agree. Furthermore, we have previously rejected "4" above, avoidance of increased litigation, as a ground for denying substantive liability. (Cites omitted.)

In *Berko* v. *Freda*, 459 A.2d 663 (N.J. 1983), where the Supreme Court of New Jersey extended the firemen's rule to a police officer, the dissent effectively dealt with the issue of disparate treatment of policemen and firemen as opposed to other governmental employees:

> The majority attempts to distinguish police officers and fire fighters who are paid to "confront danger" from other kinds of public employees on the ground that the latter are merely paid "to perform some other public function[s] that may incidentally involve risk. . . ." This asserted distinction merely disguises the fact there are more similarities than differences between police officers and fire fighters and a host of other public employees. Police officers on traffic patrol may be exposed to risks entirely com-

parable to highway workers doing road work. Many public employees — police officer and sanitation worker alike — confront dangers on the job. Conversely, both classes of employees also confront "ordinary" risks not involving unusual danger. Because law enforcement in some instances entails greater risks, police officers should not be deemed to have foresaken the right to seek compensation for injury resulting from such risks — unless, as the majority seems to believe, the monetary compensation that police officers receive is commensurate with the extraordinary risks of their jobs. . . But, no empirical or rhetorical support is marshalled to bolster this assumption. And even if police officers and fire fighters are presumed to be adequately compensated for the risks of their work, the majority does not explain why other governmental employees, who must also be presumed to receive adequate compensation for their work, should not therefore be prohibited, as are police officers and fire fighters, from recovering from negligent third parties for injuries attributable to the risks normally inherent in their employment. . .

Police officers and fire fighters should not be placed beyond the pale of a judicial philosophy that searches for just and fair results. Our jurisprudence has long established that individuals who voluntarily attempt a rescue in response to a negligently created danger have a valid cause of action under the rescuer's rule, which recognizes that danger invites rescue. . . I am at a loss to understand why this judicial philosophy is repudiated in a case such as this, where the rescuer is not simply a good samaritan but a professional, who is not simply "invited" to rescue but is expected to rescue. In this context, the foreseeability of rescue, which is the predicate for imposing a duty of care, moves from a reasonable anticipation to virtual certainty. If anything, the strength of the duty of care owed to such a rescuer by the negligent party should increase with the certainty of the foreseeability that rescue will be a consequence of the negligence. . . .

Further, I have encountered at least a superficially persuasive argument for adopting the Rule in Riley, *Fireman's Rule*, 71 Cal. L. Rev. 239 (1983). Using the policies behind insurance

and workers compensation as a basis, the article presents the public-as-employer analogy. The analogy goes something like this. Fire companies are created by the public to take care of certain hazards, and there is no need for their services until some danger arises. The fire station is not their true workplace; there is no "workplace" for such public employees except under hazardous conditions. Thus, by this analogy, any premises with a fire becomes the "workplace" and workers compensation is the appropriate and exclusive remedy. This analogy reads well, but it also fails to address the similarities between firemen and other public workers and does not provide at all a reason for disparate treatment.

The Fireman's Rule cannot be supported on sound policy grounds, not here and not now. In Arkansas, a comparative fault state, we do not need and are not warranted in now adopting this antiquated common law rule:

> Comparative fault is beginning to have an impact on the 'fireman's rule,' which in its original form stated that a landowner owes no duty to a fireman to keep the premises in a safe condition. . . Now that assumption of risk and the licensee/invitee distinction underpinning the rule have been limited or abolished, the fireman's rule still survives in most jurisdictions that have considered the question but has become more limited in scope. . . Schwartz, *Comparative Negligence* § 9-4(c)(1) (3d. 1994).

Finally, it seems to me that we should conduct a more studied analysis of the policy considerations before adopting this Rule. Such a review would of necessity require some knowledge of the frequency and variety of on-the-job injuries to firemen as compared to other public employees, and we do not have this information before us.

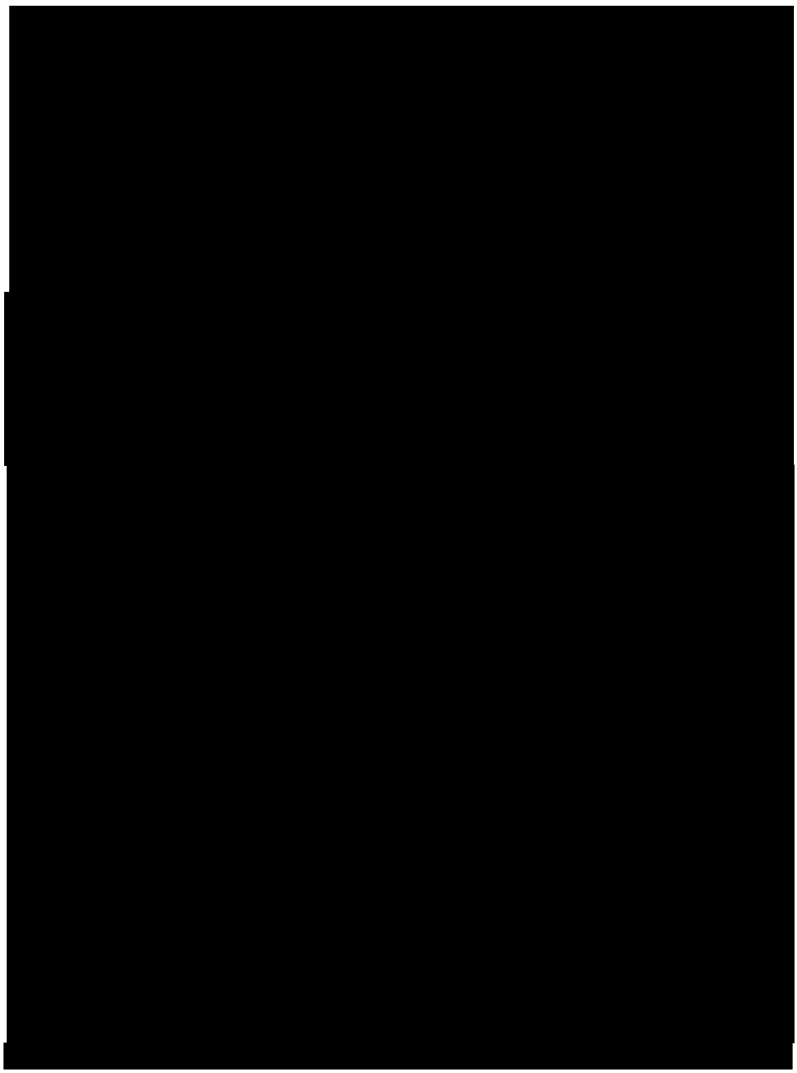
We have fared very well without the Fireman's Rule for the past one hundred years and I would not adopt it now.

I respectfully dissent.

Gary WILLIAMS *v.* STATE of Arkansas

CR 94-622 894 S.W.2d 923

Supreme Court of Arkansas
Opinion delivered March 20, 1995



[redacted]

Val P. Price and *Brent Crews*, for appellant.

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

TOM GLAZE, Justice. Appellant Gary Williams killed his parents, and was subsequently charged and convicted with two counts of capital murder. Prior to trial, Williams requested a psychiatric examination, which was granted. The Arkansas State Hospital's initial determination resulted in finding him incompetent to stand trial. After about nine months of treatment, state hospital officials found Williams had improved to the point where he was competent to stand trial. Those officials, however, still omitted any conclusion regarding whether Williams appreciated the criminality of his conduct at the time he killed his parents. Consequently, Williams asked for a second evaluation, stating he was entitled to an opinion on the criminal responsibility issue. The trial court denied that request. At trial, Williams raised the insanity defense, but the jury rejected it, finding him guilty of both counts of capital murder and sentencing him to life without parole.

On appeal, Williams first contends the trial court erred by failing to instruct the jury concerning what would happen to Williams if the jury acquitted him on the grounds of mental disease or defect. Williams proffered a modified AMCI 4009 instruction, adding a paragraph, reflecting that, if Williams is found not guilty by reason of mental disease or defect, the trial court must commit him to the Department of Human Services for further examinations and treatment. The trial court's ruling rejecting Williams's instruction was correct.

This court has repeatedly held that the jury is not to be told the options available to the trial court when a defendant is found not guilty by reason of mental disease or defect because

such an instruction raises questions foreign to the jury's primary duty of determining guilt or innocence. *Hubbard* v. *State*, 306 Ark. 153, 812 S.W.2d 114 (1991); *Robertson* v. *State*, 304 Ark. 332, 802 S.W.2d 920 (1991); *Love* v. *State*, 281 Ark. 379, 664 S.W.2d 457 (1981); *Curry* v. *State*, 271 Ark. 913, 611 S.W.2d 745 (1981); *Campbell* v. *State*, 216 Ark. 878, 228 S.W.2d 470 (1950). Williams cites to an annotation in 81 ALR4th 659 which states that a substantial number of jurisdictions have held or recognized that the trial judge in a criminal case involving the insanity defense must instruct the jury as to hospital confinement or other dispositional consequences of an acquittal on grounds of insanity. That same annotation, however, recognizes that courts in a large number of jurisdictions (including Arkansas) still adhere to the view that such instructions are generally inappropriate and unnecessary. The rationale announced in the annotation for rejecting such an instruction is consistent with that adopted by this court — it would permit or encourage the jury to base its verdict on speculation regarding the defendant's subsequent disposition rather than on the law and evidence as to his mental responsibility at the time of the crime. For twenty-five years, this court has adhered to this sound reasoning, and we decline Williams' suggestion to repudiate it now.[1]

Williams next argues the trial court erred when it denied his request for a second opinion on the issue of his criminal responsibility at the time of the crime. He points to Doctors Hall's and Simon's evaluation letter which stated that, "We feel unable to reach a definitive decision with regard to Mr. Williams' criminal responsibility in this case and thus respectfully leave the decision to the trier of fact."

Williams cites Ark. Code Ann. § 5-2-305(d)(4) (Repl. 1993) which provides that the mental examination report shall include an opinion as to the extent, if any, (1) to which the capacity of

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[1]Williams argues that, by enacting new bifurcated sentencing procedures (Ark. Code Ann. §§ 16-97-101 -104 (Supp. 1993)), the General Assembly appears to have established a policy in favor of informing juries of the consequences of a verdict of not guilty by reason of mental disease or defect. We find such argument disingenuous, since those new procedures merely provide for additional information that may be given juries at the sentencing phase of the trial and which may have been inadmissible at the guilt phase. *See* § 16-97-103.

the defendant to appreciate the criminality of his conduct or (2) to conform his conduct to the requirements of law was impaired at the time of the conduct alleged. He argues the state hospital's report did not contain an opinion bearing on his mental capacity when the crimes occurred. The state responds, stating that the statute requires no unequivocal opinion, but provides only that such reports contain an opinion as to the extent to which the defendant's mental capacity was impaired. The state is correct.

Doctors Hall and Simon concluded that there was little doubt that Williams was mentally ill, and they classified him as atypical psychosis, psychotic disorder not otherwise specified. They said this classification means Williams has some kind of mental problem, defect or disease, but they cannot fit him in any categories. The doctors further stated that it could certainly be argued Williams' criminal behavior was a direct product of his mental illness, and thus, he should not be held responsible for his actions. The doctors then opined that other factors suggested Williams appreciated the criminality of his conduct, and more than likely he could have conformed his conduct to the requirements of law at the time of the crimes. In support of this statement, the doctors related in their evaluation letter that Williams had (1) called the police and informed them he had murdered his parents, (2) refused to give a statement until he could speak to an attorney, (3) feared that his parents had planned to put him back in jail (when in fact evidence existed showing his parents were afraid of him and wanted him out of their home), and (4) appeared to appreciate the fact that he could be charged with murder for his acts and sent to prison, if found guilty.

The foregoing evidence reflects the doctors rendered an opinion that Williams suffered from an atypical psychosis (psychotic disorder), mental illness, but the doctors could not otherwise specify or fit him in any category. Nonetheless, the doctors' report did contain factors and opinions bearing on "the extent" to which Williams may have been mentally impaired when he murdered his parents.

In *Walker* v. *State*, 303 Ark. 401, 797 S.W.2d 447 (1990), this court held § 5-2-305(d)(4) was satisfied when a psychiatrist gave a conditional evaluation. There, the psychiatrist said it was

difficult for her to evaluate the defendant's mental condition at the time the offense was committed because she had not known him at the time. She further stated that the defendant would have been able to appreciate the criminality of his conduct *if* defendant's condition was the same at the time of the offense as it was on the date of her report and evaluation.

[redacted] As in *Walker*, the psychiatrists here experienced difficulty in giving an unqualified opinion, bearing on the criminal responsibility issue of the defendant. And while Williams argues a conclusive opinion is necessary under § 5-2-305(d)(4), this court has made it quite clear that a jury is not bound to accept opinion testimony as conclusive even when it exists and is introduced. *Robertson*, 304 Ark. 332, 802 S.W.2d 920. Thus, even when several competent experts concur in their opinions and no opposing expert evidence is offered, the jury is still bound to decide the issue upon its own fair judgment. *Id.*

[redacted] Before leaving this issue, we point out that Williams' argument seems to rest on the suggestion that the psychiatrists' report undermined his insanity defense. He simply fails to show any prejudice. First, Williams points to no new data, or to errors contained in the doctors' report, that might indicate any different, or more conclusive, opinion would be forthcoming if another expert had been engaged. Second, as matters stood when Williams was tried, his counsel thoroughly utilized in his closing argument the conclusions reached by Hall and Simon in their report. For example, Williams argued that, to prove his insanity defense, he need only do so by a preponderance of the evidence. He argued that Hall's and Simon's opinions showed it was "fifty-fifty" as to whether Williams was criminally responsible for his parents' deaths and that the doctors said unequivocally that Williams suffered from mental disease or defect. Williams used the doctors' qualified or conditional report to his advantage by arguing to the jury that "this is not a case where the doctors have come back and said, there's no question in our minds he's not guilty by reason of insanity." He further repeated the doctors' observations that it could be argued Williams' criminal behavior was a direct product of his mental illness, and he should not be responsible for his actions. In sum, Williams relied on Hall's and Simon's conclusions throughout his closing argument in support of his insan-

ity defense, and he offers nothing to show how his defense would have been enhanced merely by the appointment of another expert.

We next turn to Williams' argument that his four siblings, the victims' children, should not have been excluded from the courtroom during the trial. He argues his siblings should have been considered "victims of the crimes" under A.R.E. Rule 616 and allowed to be present during the trial. This argument is meritless. First, Williams cites no authority to support his argument that the "victim of the crime" language in Rule 616 refers to anyone other than the primary victims — in this case, the murdered parents. Second, he offers no authority giving him standing to assert the rights, if any, the siblings may have under Rule 616. Third, he fails to allege, much less show, any prejudice resulting from his siblings' exclusion from the trial.

Williams' next arguments are that the trial court erred in ruling that he was competent to stand trial and in failing to grant a directed verdict regarding his affirmative defense of insanity. We sustain the trial court's rulings on both points.

First, the rule is well settled that an accused is presumed competent to stand trial, and the burden of proving incompetence is upon the accused. *Baumgarner* v. *State*, 316 Ark. 373, 872 S.W.2d 380 (1994). After the state meets its burden of proving the elements of an offense beyond a reasonable doubt, the burden then becomes the defendant's to prove the affirmative defense by a preponderance of the evidence; the question is one for the jury and the jury may direct a verdict only if no factual issue exists. *Id.* 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. *Id.*

Here, the record reflects the following evidence was before the trial court when it rejected Williams' motion for directed verdict. In April 1993, the Arkansas State Hospital's staff reviewed relevant records, discussed Williams' progress and interviewed him for about an hour and a half. Doctors Hall and Simon reported that Williams seemed oriented to time, place and person; appeared to have a reasonably good understanding of the legal system; and was well aware of the charges he faced. They said that Williams acknowledged that he had an attorney, and expressed a willingness to work with him. The doctors further related Williams was

aware that he could be convicted if found guilty, and they concluded Williams could cooperate effectively with his attorney. Hall and Simon opined Williams was competent to stand trial.

[redacted] On September 9, 1993, two days before trial, Dr. Hall appeared at a competency hearing and confirmed his earlier opinion that Williams was fit to proceed to trial. Dr. Simon also testified that, although Williams was difficult to diagnose, and had long-term psychiatric problems, he was willing to work with his attorneys and was interested in defending himself. Marla Gergely, supervisor of the social department at the state hospital, testified that Williams had taken an eight-week competency class given at the hospital, and the class met once a week for an hour, where participants were taught about courtroom procedures and the different things that can happen in court. A test is given at the end, and a score of eighty percent means participants do not have to repeat the class. Williams scored eighty-two percent on the pretest, but still took the class. Questions asked of Williams included such things as what are the charges against you, why were you arrested, did you give a statement to the police, who is your lawyer, what are the three ways you can plead, and what are some of your rights during the trial. We hold this pretrial evidence was more than sufficient to sustain the trial court's denial of Williams' directed verdict motion.

[redacted] We reach the same result when considering Williams' argument that the trial court erred in denying his directed verdict motion on his affirmative defense of lack of criminal capacity or responsibility. Again, we hold substantial evidence exists to sustain the trial court's ruling on this point. We have already discussed much of the evidence relevant here in disposing of Williams' first two arguments, so we need not repeat all of that testimony or evidence. Suffice it to say, that the expert testimony, alone, related substantial evidence bearing on Williams' capacity and responsibility when he committed the offenses. In sum, the doctors said that Williams had reported his crimes to the police, thus indicating he knew he had committed the offense and knew who to call; he refused giving a statement to the police until he spoke to his attorney; his fear that his parents may have been planning to put him in jail was not delusional, as they were afraid of him and wanted him out of the house; and while he felt

justified in what he did, he appeared to appreciate the fact that he could be charged and convicted of murder and sent to prison.

In conclusion, the trial record has been examined pursuant to Ark. Sup. Ct. R. 4-3(h), and we find no reversible error on other rulings that were adverse to Williams. Thus, for the reasons given hereinabove, we affirm.

Carl A. STEWART *v.* STATE of Arkansas

CR 94-1068 894 S.W.2d 930

Supreme Court of Arkansas
Opinion delivered March 20, 1995

Hugh Finkelstein, for appellant.

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

DONALD L. CORBIN, Justice. Appellant, Carl A. Stewart, appeals a judgment of the Dallas County Circuit Court, filed May 4, 1994, convicting him of four counts of delivery of cocaine (counts I-IV), a Class Y felony, Ark. Code Ann. § 5-64-401 (Repl. 1993), and one count of maintaining a drug premises (count V), a Class D felony, Ark. Code Ann. § 5-64-402 (Repl. 1993). The judgment also sentenced appellant to a fine of $20,000.00 and

imprisonment at the Arkansas Department of Correction for a term of forty-five years (consisting of consecutive terms of fifteen years each for counts I, II, and III), and suspended imposition of sentence as to counts IV and V pending appellant's release from the Department of Correction, subject to conditions. Jurisdiction of this appeal is properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(2). We find no error and affirm the trial court's judgment.

Appellant's first argument for reversal is that the evidence was insufficient to sustain his premises conviction under section 5-64-402(a)(3) because the statute requires proof of multiple transactions involving multiple persons, but the evidence showed only one transaction involving only one person. The state contends this argument is not properly preserved for appeal. We agree that appellant did not raise this specific argument below. Appellant has therefore waived this argument on appeal.

A directed verdict motion is treated as a challenge to the sufficiency of the evidence and requires the movant to apprise the trial court of the specific basis on which the motion is made. *Campbell* v. *State*, 319 Ark. 332, 891 S.W.2d 55 (1995); *Daffron* v. *State*, 318 Ark. 182, 885 S.W.2d 3 (1994). Our law is well established that arguments not raised at trial will not be addressed for the first time on appeal, and that parties cannot change the grounds for an objection on appeal, but are bound on appeal by the scope and nature of the objections and arguments presented at trial. *Campbell* v. *State*, 319 Ark. 332, 891 S.W.2d 55; *Stricklin* v. *State*, 318 Ark. 36, 883 S.W.2d 465 (1994).

Consistent with this principle, we have held that, since the adoption of the Arkansas Rules of Criminal Procedure, including Rule 36.21(b) which was adopted in 1988, a general motion is insufficient to preserve a defendant's argument that the statutory elements of his crime were not proved. *Walker* v. *State*, 318 Ark. 107, 883 S.W.2d 831 (1994). We have held that the movant's failure to specifically apprise the trial court of a specific basis for his motion means the motion will be insufficient to preserve that specific argument for appellate review. *Id.*

In the instant case, at the close of the state's evidence, appellant made a general motion for directed verdict based on insufficient evidence. Appellant did not specifically address any

count charged against him, nor did he make any argument in support of his general motion. In particular, he did not argue, as he does now on appeal, that the evidence with respect to the premises count was inadequate to satisfy the statutory elements of the crime. At the close of all the evidence, appellant simply renewed his previous motion for directed verdict, again without presenting any specific basis for the motion. In summary, while appellant did make a timely motion for directed verdict, it was made only on general insufficiency grounds which are inadequate to preserve for our review the specific argument he now raises. *Campbell*, 319 Ark. 332, 891 S.W.2d 55; *Walker*, 318 Ark. 107, 883 S.W.2d 831. Accordingly, he has waived this argument on appeal.

Appellant's second argument for reversal is that the trial court erred in denying his motion for mistrial which was prompted by a remark, made off the record, by a potential juror, Mr. Davis, during appellant's *voir dire* of Mr. Davis. The part of appellant's *voir dire* of Mr. Davis which occurred after Mr. Davis made his challenged remark was abstracted, however, and is quoted as follows:

> [ABSTRACTOR'S NOTE: The following colloquy occurred at the bench during the *voir dire* of the jury:]
>
> DEFENSE COUNSEL: I move for a mistrial. That's tainted this whole procedure.
>
> THE COURT: You didn't want this recorded, so it wasn't recorded, and as I understand it, the juror said he didn't know whether he could be impartial because he said, "If it's one count, he might be able to — but five counts, he's probably guilty." I think you can rehabilitate that witness [sic]. I understand you want to excuse him, but the man coming up is the twelfth juror. I don't know what you want to do. You're going to have to go into some of this to make him understand, that some people just don't understand it. If you want me to or you to —
>
> DEFENSE COUNSEL: I move for a mistrial.
>
> THE COURT: The motion for a mistrial is denied. I think the juror just stated that he just — based on the questions that the Court asked and I can't stop him from stat-

ing what his feelings are, and I don't think that that affects anything for the record.

DEFENSE COUNSEL: I just want to make sure that they'll know what he did say, I don't want to misstate it — "Since there's five counts, he's probably guilty. One count, one may be mistaken" —

THE COURT: I don't think that's exactly what he said. I think what I said in the beginning — this is basically what he said.

DEPUTY PROSECUTOR: "If there was," — he was certain "if there was one count, he might have made mistake, but more counts than that, he's probably guilty," or something to that effect.

THE COURT: That's pretty close.

[In open court]

THE COURT: Mr. Davis, let me clear that part of it up. Did you hear what I said this morning, that as [appellant] sits here at this minute right now, he's just as innocent as you or I are innocent, and will be so until there's enough evidence put on from that witness stand to convince twelve people who fairly and impartial [sic] decide these issues? We don't deal in probables. In other words right now, he is innocent — not probably is innocent, and until evidence is introduced that could convince twelve people otherwise. Now can you follow that presumption? I'm not sure that based on what you started out with, you could or couldn't?

JUROR DAVIS: I don't think I could.

THE COURT: You are excused. Thank you, sir.

Without citation to persuasive authority, appellant summarily argues that the message of Mr. Davis's remark was clear enough to the jury panel — "too many allegations means guilt" — and, because of the resulting taint to the jury, a mistrial was warranted. Based on the record before us, we find that this argument is meritless and that no reversible error was committed by the trial court.

[redacted] A mistrial is a drastic remedy. *Rank* v. *State*, 318 Ark. 109, 883 S.W.2d 843 (1994); *Dillon* v. *State*, 317 Ark. 384, 877 S.W.2d 915 (1994). We have held that the trial court should resort to mistrial only where the error complained of is so prejudicial that justice cannot be served by continuing the trial or when the fundamental fairness of the trial itself has been manifestly affected; the trial court has wide discretion in granting or denying a motion for a mistrial and its discretion will not be disturbed except where there is an abuse of discretion or manifest prejudice to the movant. *King* v. *State*, 317 Ark. 293, 877 S.W.2d 583 (1994).

Appellant has failed to show that the denial of his motion for mistrial either constituted a manifest abuse of the trial court's discretionary authority or prejudiced appellant. The record shows that, following the bench conference in which the mistrial motion was made and denied, the trial judge immediately addressed the potential juror, Mr. Davis, in open court and restated to him the presumption of innocence. Mr. Davis candidly replied that he could not follow the presumption and was properly excused by the trial judge. No admonition from the trial court to the jurors or jury panel regarding Mr. Davis's remark or his excuse from the panel was requested by appellant. No proof is shown that the jurors or other venirepersons heard the remark.

[redacted] In this state, jurors are presumed to be unbiased. *Lair* v. *State*, 283 Ark. 237, 675 S.W.2d 361 (1984). We find that no reversible error was committed by the trial court in denying appellant's motion for a mistrial where no prejudice has been shown and venireman Davis did not serve on the jury that was ultimately selected. *Smith* v. *State*, 256 Ark. 321, 507 S.W.2d 110 (1974).

Affirmed.

Gary LANDRUM *v.* STATE of Arkansas

CR 94-1387 894 S.W.2d 933

Supreme Court of Arkansas
Opinion delivered March 20, 1995

Robert E. Irwin, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This case was first reviewed by the Arkansas Court of Appeals. *See Landrum* v. *State*, 47 Ark. App. 165, 887 S.W.2d 314 (1994). The Court of Appeals equally divided in an *en banc* decision with three judges voting to affirm and three judges voting to reverse. We granted review pursuant to Ark. Sup. Ct. R. 1-2(f).

On the evening of May 30, 1992, appellant Gary Landrum and the victim, Joseph Franklin, had a fight in James Park in Russellville. Prior to the fight, Landrum was seen waving his pocket knife and was heard by at least two witnesses to say that it had Joseph Franklin's name on it. He had the knife open and in his pocket when Franklin arrived. During the fight, Landrum stabbed Franklin in the chest with the pocket knife. Franklin died as a result of the stab wound.

Landrum was charged with first degree murder, and at the trial of the charge he asserted a defense of justification. When he took the stand in his own defense, he stated that the stabbing in the chest was unintentional though he meant to stab Franklin in the stomach. During initial cross-examination, he told the prosecutor that he usually did not carry a knife. On recross-examination the following occurred:

> PROSECUTOR: I want to be real clear on one thing. You said — you told me that you usually don't carry a knife. Is that correct?
>
> LANDRUM: Yeah, sometime. Sometime I do and sometime I don't. Sometime I can be at home and leave it and sometime I can be at home and take it with me.

After the defense rested, the prosecutor sought to present rebuttal testimony to Landrum's testimony that he usually did not carry a knife which, the prosecutor contended, opened the door to such proof. The trial court agreed. The prosecutor called

his first rebuttal witness, Belinda Faye Norman, and at that point the following ensued:

PROSECUTOR: Ms. Norman, do you know Gary Landrum?

NORMAN: Yes, sir.

PROSECUTOR: Do you know —

DEFENSE COUNSEL: Your Honor, I want to approach the Bench myself. I — I've been thinking about this.

(Side-Bar Conference, outside the hearing of the Jury)

DEFENSE COUNSEL: This goes to reputation evidence and the bad reputation; and I've not put his good reputation into evidence.

PROSECUTOR: No, but he's put in the reputation that he —

BY THE COURT: You've put in character in terms of a victim and an accused and who was the aggressor.

DEFENSE COUNSEL: Yeah; but he's talking about a character trait of carrying a weapon and I've not put anything in there showing he's a good fellow and not carry any weapon.

PROSECUTOR: He said — he said —

BY THE COURT: Well, I'll overrule that. I think he can proceed in this manner.

DEFENSE COUNSEL: Okay.

(End of Side-Bar)

PROSECUTOR: Do you know Gary Landrum?

NORMAN: Yes, sir.

PROSECUTOR: How long have you known Gary Landrum?

NORMAN: All through school and everything. We growed up together.

PROSECUTOR: Do you know Gary Landrum's reputation in the community?

NORMAN: Yes, sir, some of it.

PROSECUTOR: Do you know Gary Landrum's reputation as to whether or not he carries — he'll — he'll often carry a weapon?

DEFENSE COUNSEL: Now, Your Honor, I'm going to have to object for a different reason; and —

(Side-Bar Conference, outside the hearing of the Jury)

DEFENSE COUNSEL: — the reason this time is this is not the same type of material. This is reputation evidence; and hadn't got anything to do with actually carrying a weapon or rebuttal of whether he carries or not carries.

BY THE COURT: Are you trying to elicit from her that she knows he does carry a weapon of her own personal knowledge?

PROSECUTOR: That's right; that he carries a weapon all the time.

BY THE COURT: Why don't you ask her that rather than this other.

DEFENSE COUNSEL: I want the Court to instruct the Jury that those first questions need to be disregarded; that those are improper questions.

BY THE COURT: I sustained your objection.

(End of Side-Bar)

DEFENSE COUNSEL: Okay, but I'm going to ask the Court to admonish the Jury.

> BY THE COURT: Well, the question was not proper, and I sustained your objection.
>
> DEFENSE COUNSEL: All right.

The State proceeded to ask for reputation testimony a second time, and defense counsel objected again and was sustained. The trial court admonished the jury. Then the State queried:

> PROSECUTOR: Do you have any personal knowledge of this man ever carrying a weapon?
>
> NORMAN: A pocket knife.
>
> PROSECUTOR: Okay. So, you know Gary — Gary Landrum as a person who carries a knife?

Again, there was an objection, and the trial court sustained it and admonished the jury. The prosecutor then called his second rebuttal witness, and this colloquy occurred:

> PROSECUTOR: Do you have personal knowledge of Gary Landrum ever carrying a weapon?
>
> STEWART: Uh, huh, seen him with a weapon a couple of times, a knife that he always has in his pocket.

The jury subsequently found Landrum guilty of second degree murder. He was sentenced to 20 years in prison and fined $12,500.

Landrum urges on appeal that the trial court erred in permitting the State to call rebuttal witnesses regarding his character and reputation when he had not placed his character in issue. We initially dispose of one facet of Landrum's argument. The trial court was assiduous in sustaining defense counsel's objections to reputation testimony and in admonishing the jury that questions about general reputation would not be allowed. There, accordingly, is no basis for error on the reputation aspect.

We do conclude, however, that the trial court erred in allowing rebuttal testimony on whether Landrum ever carried a pocket knife. Our primary reason for assessing error is found in Ark. R. Evid. 404(a)(1), which reads:

> (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.

It is clear in this case that Landrum did not offer evidence of his good character or of a particular character trait, and we have stated that the defendant must first raise the character issue for any rebuttal by the State to transpire. *See Spohn* v. *State*, 310 Ark. 500, 837 S.W.2d 873 (1992), *citing McCormick on Evidence*, Vol. I § 190, p. 186 (1992). Specifically, Landrum presented no testimony to the effect that he was a good man because he carried a knife sometimes and not all of the time. The fact that he *usually* did not carry a knife or *sometimes* did not carry a knife was a fact elicited by the prosecutor on cross-examination. It runs counter to the rule for the prosecutor to extract a comment from the accused and then attempt to disparage that testimony by rebuttal evidence.

We held in a similar case that it was error for the trial court to permit rebuttal evidence that the defendant had previously pulled a knife on someone. *See Rowdean* v. *State*, 280 Ark. 146, 655 S.W.2d 413 (1983). In *Rowdean*, even though the State was attempting to rebut the defendant's assertion that she never carried a knife, we stated that this evidence was impermissible because the defendant's character was not an essential element of her claim of self-defense. Similarly, in the case before us Landrum's character had not been placed in issue and a peaceful disposition was not an essential element for his claim of self defense. *See West* v. *State*, 265 Ark. 52, 576 S.W.2d 718 (1979). The State, accordingly, was attempting to impeach him by extrinsic evidence on a collateral matter elicited on cross-examination which was clearly improper. *Sutton* v. *State*, 311 Ark. 435, 844 S.W.2d 350 (1993); *Garst* v. *Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987).

Having concluded that there was error, we turn next to the question of whether this error affected Landrum's substantial rights. *See* Ark. R. Evid. 103(a). We do not believe that it did. In response to the question of whether Landrum ever carried a weapon, Belinda Faye Norman answered: "A pocket knife."

In response to the same question, Marty Stewart said: ". . . seen him with a weapon a couple of times, a knife that he always has in his pocket." But Landrum himself had already testified that he sometimes carried a knife and that he had his knife on the night in question and had used it to stab Franklin. The rebuttal testimony, therefore, adds little to what Landrum has previously admitted.

Moreover, testimony by Marty Stewart that Landrum always carried a pocket knife with him appears of little significance and relevancy in this case. Many people carry pocket knives. The knife in question was described by one witness, Beverly Henson, as "[s]mall, like a fishing knife or pocket knife." A second witness, Michael Rhodes, confirmed that description. Had the rebuttal testimony been more significant, we would feel differently. In *West v. State, supra*, for example, we held that improper proof from rebuttal witnesses that defendant had shot an individual four years before was reversible error. And, as already referenced, in *Rowdean* v. *State, supra*, improper rebuttal testimony that the defendant had previously pulled a knife on someone else was highly prejudicial. Here, though, we are convinced that the testimony by the rebuttal witnesses had minimal impact, if any, in establishing that Landrum suffered from a bad character trait. *See Goldsmith* v. *State*, 301 Ark. 107, 782 S.W.2d 361 (1990).

We hold that the rebuttal witnesses' testimony did not affect the substantial rights of Landrum.

Affirmed.

Robert R. CORTINEZ *v.* Brenda K. BRIGHTON

94-919 894 S.W.2d 919

Supreme Court of Arkansas
Opinion delivered March 20, 1995

The Cortinez Law Firm, P.A., by: *Robert S. Tschiemer*, for appellant.

Evans Law Office, by: *Janie M. Evans*, for appellee.

ANDREE LAYTON ROAF, Justice. This case is an appeal from the denial of a request for sanctions under Ark. R. Civ. P. 11. We take jurisdiction under Ark. Sup. Ct. R. 1-2(a)8.

Robert Cortinez, appellant, was appellee Brenda Brighton's attorney in a divorce action in Garland County. On May 31, 1989, Brighton's husband quitclaimed his interest in two condominiums to Brighton and the parties were divorced June 1, 1989. There remained a dispute over the ownership of two boat slips located

near the condominiums. On September 6, 1989, the judge in the divorce proceedings held the boat slips were personal property and that Brenda Brighton was the owner of those slips. As part of her payment for attorney fees to Cortinez, Brighton had conveyed her interest in one of the Hot Springs condominiums to him on May 30, 1989. It is with that transfer that the current case begins.

After the divorce, Brighton attempted to set aside the transfer of the condominium to Cortinez but did not prevail in that attempt. A dispute then arose between Brighton and Cortinez as to the ownership of the boat slip for the condominium conveyed to Cortinez. Brighton asserted it was hers by virtue of the September 1989 order finding it to be personal property, and pointed out that the agreement to sell the condominium to Cortinez included no mention or reference to the boat slip. On November 27, 1990, Cortinez sent a letter to Brighton's attorney in which he asserted his ownership of the boat dock and threatened Brighton with criminal trespass if she "sets foot on the boat dock." Brighton moved to Pulaski County in August 1992.

On August 4, 1993, Brighton filed an unlawful detainer action in Garland County against Cortinez, which he moved to dismiss on several grounds, including statute of limitations and res judicata. The trial court denied the motion and ordered Cortinez to file an answer to the complaint. Cortinez filed an answer on November 8, 1993, in which he first raised the issue of improper venue. On January 13, 1994, Cortinez moved to dismiss on the basis that venue was improper because both parties were residents of Pulaski County. On March 8, 1994, the trial court granted the dismissal on the basis of improper venue.

On March 18, 1994, Cortinez filed a motion under Rule 11 for attorney's fees. He based his request on a claim of "bad faith" on the part of Brighton for filing suit in Garland County when she knew the property involved was personal property and that both the parties were Pulaski County residents.[1] Brighton responded that Cortinez had waived any question of venue under Ark. R. Civ. P. 12(g) by failing to raise this issue in his motion to dismiss. A hearing on Rule 11 sanctions was held on April 25, 1994. The trial court held that if any mistake had been made

[1]Appellant stated that the proper venue statute was § 16-60-116.

on the part of Brighton's attorney, the mistake was made in good faith and therefore the award of any fees to Cortinez would be denied. Cortinez appeals from that order.

Cortinez argues that the trial court misconstrued Rule 11 when it found Brighton had not acted in bad faith with respect to filing in the wrong county. The correct test for Rule 11 he argues, is not whether the error was one of good or bad faith, but whether the error could have been avoided if "reasonable inquiry" were made. Cortinez argues:

> The court, by misinterpreting Rule 11, has not grasped the purpose of Rule 11, namely that it is not intended to only discourage intentional and malicious conduct, but also negligent conduct. Here at the minimum, the appellee's conduct, and that of her attorney, would be classified as failure to reasonably inquire about the facts and the law prior to filing litigation.

[redacted] Appellant's general statement of the law on Rule 11, is essentially correct. There is no longer a subjective component to a review of attorney error. The test is an objective one: would the attorney have discovered the mistake of law or fact upon reasonable inquiry? *Ward* v. *Dapper Dan Cleaners*, 309 Ark. 192, 828 S.W.2d 833 (1992). "Good faith" enters in to the inquiry only when the law relied on is incorrect. The court then decides whether that reliance can be supported by a "good faith argument for the extension, modification, or reversal of existing law." Ark. R. Civ. P. 11.

[redacted] While there is arguably some merit to the point appellant makes on appeal, we do not address the argument as it has not been preserved for appeal. During the Rule 11 hearing, appellant alleged that appellee was well aware of appellant's residency and the personal property status of the boat slip when she filed the case in Garland County. However, his argument was limited to whether the mistake was one of good or bad faith. The following exchange between the trial court and appellant reveal the limited ground on which appellant argued to the trial court.

> Court: Is the defense saying that the argument was not made in good faith? Can there not be a mistake in good faith, thereby avoiding attorney's fees?

Appellant's attorney: Your honor, we believe that —

Court: That is a question from the court. I am not baiting you. I am just — I am looking at the rule now.

Appellant's attorney: We do not believe that the Plaintiff in this case made the argument in good faith. Your honor, the Plaintiff herself has had four or five attorneys. She is well aware of the legal system. She knew she was a Pulaski County, Arkansas resident. She knew Mr. Cortinez was a Pulaski county resident. We do not think it was made in good faith.

* * * *

Court: And let us assume just for the purposes of argument that Ms. Evins made a mistake. Let us assume that, I am not holding that, but as I read the rule, I would have to find that it was not made in good faith, and Ms. Evins was just a tool of the plaintiff to harass and so forth. I am at a loss — I would be at a loss to find that in this case because of this history of it — I had to review — this file almost encompasses the file of a part of the litigation apparently down in Judge Smitherman's court, and it appears that it has been hard fought on both sides. So the court is going to deny attorney's fees and costs, and Ms. Evins, you prepare the order.

Ms. Evins: Thank you, your honor.

Court: I just cannot find — again let us assume there was a mistake. I think if it was a mistake, it was not a mistake that was in bad faith. All right. Thank you.

That was the end of the proceedings. No further comments were made by appellant and the order filed pursuant to this hearing stated that the motion for attorney's fees was denied on the "basis of the court's ruling . . . set out in the transcript of the hearing."

A review of the above portion of the hearing makes it clear the point argued on appeal was not raised below. On appeal, appellant argues the trial court applied the wrong test — that it is not a question of good or bad faith in making the error, but rather, the question is whether the mistake would have occurred

if a reasonable inquiry had been made. Below however, this point and argument were never made to the trial court. In fact, the trial court specifically asked appellant if it would be possible to avoid attorney's fees if a mistake were made in good faith. Appellant did not disagree with this statement. Rather, appellant impliedly agreed with the trial court by simply continuing his "bad faith" argument.

[redacted] While the trial court's test was not the correct test for a Rule 11 question, that is not relevant to the question of preserving an issue for appeal. If the grounds for an objection are changed on appeal, that is, raised for the first time on appeal, the argument is waived. *Walker* v. *State*, 301 Ark. 218, 783 S.W.2d 44 (1990); *Vasquez* v. *State*, 287 Ark. 473-A, 702 S.W.2d 411 (1986). Even if there has been an error of constitutional proportion, if the objection is not properly preserved, it is waived on appeal. *Wilson* v. *State*, 272 Ark. 361, 614 S.W.2d 663 (1981); *Shepherd* v. *State*, 270 Ark. 457, 605 S.W.2d 414 (1980).

Appellant has waived the argument he now makes on appeal, and we affirm the trial court on that basis.

Affirmed.

GLAZE, J., concurs.

Demetrius "Dee Dee" EDWARDS *v.* STATE of Arkansas

CR 95-183 894 S.W.2d 937

Supreme Court of Arkansas
Opinion delivered March 20, 1995

Paul D. Selby, for appellant.

No response.

PER CURIAM. Appellant, Demetrius Edwards, by his attorney, Paul Selby, has filed a motion for rule on the clerk. His attorney admits that the record was tendered late.

We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See per curiam order dated February 5, 1979. *In re: Belated Appeals in Criminal Cases*, 265 Ark. 964; *Terry* v. *State*, 272 Ark. 243, 613 S.W.2d 90 (1981).

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

Joseph O'NEAL, et al. *v.* STATE of Arkansas

CR 95-148 896 S.W.2d 592

Supreme Court of Arkansas
Opinion delivered March 20, 1995

Joseph P. Mazzanti III, for appellant.

No response.

PER CURIAM. Petitioner Joseph O'Neal was convicted of murder in the first degree, robbery and burglary, and he was sentenced to life imprisonment in the Arkansas Department of Correction. The judgment and commitment order was entered on July 19, 1994. A timely notice of appeal was filed, and, on August 5, 1994, the trial court granted petitioner's motion for extension of time to docket appeal. The order stated the court reporter was to file the transcript within "seven months from the filing of the Notice of Appeal."

On February 22, 1995, the petitioner filed a partial record with the Clerk and filed this petition for certiorari for complete record. On March 15, 1995, the petitioner tendered the complete record. In this case the record was tendered more than seven months after the entry of the judgment. *See* Ark. R. App. P. 5(b). It is the attorney's duty to file the record on time. *Franklin* v. *State*, 318 Ark. 324, 885 S.W.2d 23 (1994). When a complete record is not available, a partial record will suffice. If the attorney will concede by affidavit within thirty days from the date of

this *per curiam* that it was his fault that the record was not timely filed, or if other good cause is shown, then the motion will be granted.

Steve ROBINSON *v.* Joe O'BRYAN

95-156 894 S.W.2d 921

Supreme Court of Arkansas
Opinion delivered March 20, 1995

Richard Quiggle, P.A., for appellant.

No response.

PER CURIAM. Appellant, Steve Robinson, by his attorney, has moved for a rule on the clerk. Robinson originally filed his case in Pulaski County Circuit Court. Joe O'Bryan, appellee, moved to dismiss the action arguing improper venue. Robinson replied, requesting a transfer of the case to Lonoke County Circuit Court. On July 28, 1993, the Pulaski County court transferred the case to Lonoke County. Lonoke County assigned the case a number, No. 93-308, and filed it.

The case rested with Lonoke County until February 1994 when O'Bryan attacked its filing there. Lonoke County sent the

case back to Pulaski County, refusing to accept the transfer. Robinson then non-suited in Pulaski County and filed his case in Lonoke County. Lonoke County assigned the case a new number, No. 94-270. O'Bryan moved to quash service, and to strike and dismiss the complaint. On November 8, 1994, Lonoke County dismissed No. 94-270, with prejudice.

Appellant states in his motion that he filed a notice of appeal on November 17, 1994, apparently from the November 8, 1994, order. However, through a scrivener's error, appellant states he used the first case number, 93-308, instead of the new number, 94-270, in the notice of appeal. Appellant noticed the error when getting the record from the Lonoke Clerk and immediately filed a second notice of appeal with the proper number, 94-270, on December 9, 1994.

The clerk in this court refused to accept the record as the December 9, 1994, notice of appeal was one day late. Appellant asks us to grant this motion, arguing that the first notice of appeal was timely filed and contained only an inadvertent error in the substitution of case numbers.

[redacted] Appellant, however, has only included in the record the untimely notice of appeal from December 9, 1994, and not the timely notice from November 17, 1994. Having failed to supply this court with a sufficient record to make a determination, the motion for rule on the clerk is denied.

Kenneth K. WATANABE and Jessica L. Watanabe
v. Ed H. WEBB and Ellinor Webb; Dixon Realty;
John W. Williams; Guaranty Title Company; and Gene Weston

95-3 894 S.W.2d 601

Supreme Court of Arkansas
Opinion delivered March 20, 1995

The Rose Law Firm, A Professional Association, by: *David L. Williams*, for appellants.

Anderson & Kilpatrick, by: *Mariam T. Hopkins*, for appellees.

PER CURIAM. Appellants Kenneth K. and Jessica L. Watanabe seek to appeal from a foreclosure decree entered on August 13, 1994 and order of confirmation on June 2, 1994, by the Garland County Chancery Court. In January and February 1995, appellees filed motions to dismiss, generally contending that the Watanabes' notice of appeal and record were untimely filed. In support of their motions, appellees rely primarily on the recent cases of *Scherz* v. *Mundaco Inv. Corp.*, 318 Ark. 595, 886 S.W.2d 631 (1994), and *Alberty* v. *Wideman*, 312 Ark. 434, 850 S.W.2d 314 (1993).

On January 31, 1995, the Watanabes responded to appellees' dismissal motions, stating that appellees' motions cannot be resolved without reaching the merits of the appeal and that the *Scherz* and *Alberty* cases are distinguishable and not controlling on the issue concerning whether the Watanabes' appeal was timely

filed. The Watanabes requested they be entitled to submit a fully developed brief. Based upon the foregoing motions and responses, we believed it would be best to delay ruling on appellees' dismissal requests until this case was submitted on its merits. On February 3, 1995, the parties were notified of our decision to submit the dismissal motions with the briefs on the merits of this case.

On February 13, 1995, the Watanabes were granted seven additional days to file their brief. Instead of filing a brief, Watanabes' counsel, Rose Law Firm, have moved for leave to withdraw because the Watanabes have failed to pay Rose Law Firm's legal bills. The Watanabes, by other counsel engaged only to respond to Rose Law Firm's motion, request Rose Law Firm's motion be denied or alternatively, ask this court to decide the pending dismissal motions before they incur further expenses required in preparing and filing a brief.

[redacted] This court passed on deciding appellees' dismissal motions because Watanabes' counsel, Rose Law Firm, asked for the opportunity to file a full brief on the procedural and other issues on appeal. Since Rose Law Firm now seeks to withdraw prior to filing a full brief in this cause, we believe it would be fairer to all parties to rule on the pending dismissal motions before deciding any subsequent or new motions, including Rose Law Firm's request to withdraw as Watanabes' counsel. Accordingly, we direct the clerk to place appellees' motions and Watanabes' responses on the regular docket so they may be submitted for decision.

Donald E. ZUCCO *v.* STATE of Arkansas

CR 94-46 894 S.W.2d 922

Supreme Court of Arkansas
Opinion delivered March 20, 1995

No response.

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

PER CURIAM. The State moves for an order of this court directing Donald E. Zucco to retain counsel forthwith to represent him in his appeal, or, alternatively, to file with this court an Affidavit and Application to proceed *in forma pauperis.* We note where the file of this matter in the Supreme Court Clerk's office reflects that Michael Knollmeyer is an attorney of record. We granted the motion of Ralph John Blagg to be relieved as counsel for appellant Zucco on February 20, 1995, in part because Michael Knollmeyer was also shown as counsel of record. As appellant Zucco still has retained counsel of record, we deem the State's motion to be moot.

Ben BRADLEY, Jr. *v.* STATE of Arkansas

CR 94-871 896 S.W.2d 425

Supreme Court of Arkansas
Opinion delivered March 27, 1995

[redacted]

Bryant & Henry, by: *Barry A. Bryant*, for appellant.

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

ROBERT H. DUDLEY, Justice. Ben Bradley, Jr., appellant, had an affair with Wanda Johnson, aged thirty-four, that lasted until she began dating Grant Perry, Sr., aged seventy-one. Wanda Johnson subsequently moved into Perry's house. On July 8, 1992, a forlorn Bradley killed Perry. Bradley was convicted of first degree murder and sentenced to life imprisonment. We affirm the judgment of conviction.

Randy Perry, the victim's son, testified that before the murder he was told that appellant and his father had gotten into an argument over Wanda Johnson and that appellant had pushed his father down. Wanda Johnson testified that about a month before the murder appellant "still wanted me to be his girlfriend" and "tried to get me back," but that she would not talk to him. Birdell Jones testified that the night Grant Perry was murdered appellant tried to talk to Wanda, but Wanda refused to converse with him.

Sarah Thompson testified that the night of the murder she and Wanda went to the Perry home at about 10:30. Wanda used a brown-handled kitchen knife to cut some Spam to make sandwiches. Perry, who had been asleep in the bedroom, got up, ate

a sandwich, and went back to the bedroom. Sarah Thompson further testified that, as she was leaving the Perry home about 11:00, she saw appellant outside. He walked her home, and during the walk to her home, expressed anger over Wanda's relationship with Perry. He called Wanda and Perry sordid names. She went inside her home, went to bed, and was awakened about midnight and told that Grant Perry, Sr. had been murdered.

Wanda Johnson testified that she went to the bedroom and went to sleep after Sarah Thompson left. She heard a noise and awakened just as appellant turned a light on in the bedroom. She clearly saw appellant standing beside the bed brandishing a brown-handled kitchen knife, the same knife she had used earlier to cut the Spam. She testified that Perry grabbed an ax that was beside the bed and turned the light off. She said that appellant knocked Perry down and began "steady stabbing him." Perry had the ax in his hand, but fell back on the bed. Appellant continued to stab and hit the victim. Wanda testified that she was cut on the leg during the struggle. She testified that the last place she saw the ax was on the floor in the bedroom. She ran from the home.

Ethel May Jones testified that somewhere around 11:00 or 11:30 appellant came to the back of her home. He was bloody and said, "I done killed Grant." She said, "You're going to the pen for life," and he replied that he did not care because Wanda "is the only one [he] ever loved." His hand was cut.

Robert Gorum, a criminal investigator, who was present when appellant was arrested later that night, said appellant's hand was bleeding. He testified as follows:

> [H]e and another fellow were sharing a lady and had gotten into an argument. The other person, I believe, Mr. Perry had pulled a knife on him. He took the knife away from him, that's how he got cut. That he stabbed him, and then he and the lady had walked down the road, and then threw the knife in the bushes.

Peter Briggs, a deputy sheriff, testified that appellant told him he threw the knife away, but did not know where it was because it was dark.

Crime scene experts and a forensic pathologist established that the victim had twenty-four stab wounds. The wounds var-

ied in size and shape and were in the left side of the face, the left and right sides of the chest, and the right leg. The fatal wound, eight inches deep, penetrated the left lung. Another cut, a long cut, went from the lower back to the upper buttock. A forensic pathologist testified that in his opinion the five wounds on Perry's fingers, hands, and arms were inflicted when he was trying to defend himself. Blood was found in the bedroom only, but for some unexplained reason the ax was found in the bathroom without any blood on it. All of the other physical evidence indicated that the victim never left his bedroom. In sum, the evidence of appellant's guilt is overwhelming.

We first discuss appellant's point of appeal involving the prosecutor's comment on his right not to testify. The trial court instructed the jury:

> A defendant has an absolute constitutional right not to testify. The fact that Ben Bradley did not testify is not evidence of guilt or innocence and under no circumstances, shall be considered by you in arriving at your verdict.

AMI Crim. 111.

In closing argument the prosector stated that, under the court's instruction, even though the defendant's right not to testify should not be considered evidence of guilt, at the same time, it should not be considered evidence of innocence. Appellant moved for a mistrial, arguing that the prosecutor had commented on his right not to testify by saying that it was not evidence of innocence. The trial court denied the motion on the ground that the State had not gone beyond the bounds of the instruction. Appellant assigns the failure to grant a mistrial as error.

The prosecutor's comment was improper. In *Miller* v. *State*, 239 Ark. 836, 394 S.W.2d 601 (1965), the trial court instructed the jury that it was the privilege of the defendants to testify or not. *Id.* at 843, 394 S.W.2d at 605. In closing, the prosecutor said, "You are instructed this is a privilege to them to either testify or not to testify. That is what the court says in that instruction." *Id.* In reversing and remanding, we wrote: "Obviously, by arguing this instruction to the jury in that manner, attention was called to the fact that defendants had not taken the stand in their own behalf. This was error." *Id.*

Although *Griffin* v. *California*, 380 U.S. 609 (1965), extended the protection of the Fifth Amendment to the states, the Arkansas Legislature has provided statutory protection of this right since 1885. *See* Craig Lambert, Note, *Veiled Reference To Failure Of Defendant To Testify Constitutes Reversible Error*, 8 U. Ark. Little Rock L.J. 747, 749 (1985-86). Act 82 of 1885, now codified as Ark. Code Ann. § 16-43-501, provides:

> On the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in this state, the person so charged shall, at his own request, but not otherwise, be a competent witness. The failure of any person so charged to make such a request shall not create a presumption against him.

Ark. Code Ann. § 16-43-501 (Repl. 1994). Early on, we held that violation of this statute would be "presumptively prejudicial." *Bridgman* v. *State*, 170 Ark. 709, 710, 280 S.W. 982, 982 (1926). However, in *Powell* v. *State*, 251 Ark. 46, 471 S.W.2d 333 (1971), we relied on the state statutory harmless error provision and found that the defendant's substantial rights were not violated by such an improper comment.

In *Chapman* v. *California*, 386 U.S. 18 (1967), the Supreme Court declared that references to a defendant's failure to testify violate the Fifth Amendment privilege against self-incrimination, but can be harmless error if it is shown beyond a reasonable doubt that the error did not influence the verdict. *Id.* at 615. Practical application of the *Chapman* test involves excising the improper remarks and examining the remaining evidence to determine if it can be shown beyond a reasonable doubt that the error did not influence the verdict. *Logan* v. *State*, 299 Ark. 266, 773 S.W.2d 413 (1989).

Here, both the eyewitness testimony and the physical evidence of appellant's guilt were overwhelming. Appellant would have been convicted without the prosecutor's comment. Accordingly, we have no hesitancy in holding that, beyond a reasonable doubt, the error did not influence the verdict. Still, appellant asks us to reverse the case because of the trial court's failure to grant a mistrial after the prosecutor made the comment. We decline to do so. The granting or denial of a mistrial lies

within the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal absent a showing of abuse. *Magar* v. *State*, 308 Ark. 380, 826 S.W.2d 221 (1992). Because the improper comment did not influence the verdict we cannot say that the trial court abused its discretion in refusing to grant a mistrial.

Appellant's next point of appeal involves seating an alternate juror in place of a seated juror. Inez Eason was seated as a juror, but, on the third day of trial and after the State had rested, the trial court received a report that Eason was riding to court each day with a spectator, Josephine Haynes, and that Haynes's son dated appellant's mother. Juror Eason had not mentioned this during voir dire. The trial court conducted an extensive hearing and, in order to avoid any appearance of impropriety, seated an alternate juror in her place. Appellant moved for a mistrial. The trial court denied the motion, and appellant assigns the ruling as error.

Appellant argues that "[t]o remove a juror once the state rests for the reason given, primarily because of an appearance of impropriety, is simply an abuse of discretion. Defendant's motion for mistrial should have been granted." Appellant cites no authority for his argument, and we are not aware of any. We hold that the trial court did not err in excusing juror Eason and seating the alternate juror in order to avoid an appearance of impropriety. *See Ruiz* v. *State*, 273 Ark. 94, 617 S.W.2d 6, *cert. denied*, 454 U.S. 1093 (1981). Since the trial court did not err in seating the alternate juror, it did not err in refusing to grant a mistrial.

Appellant assigns as error the trial court's refusal to give his requested instructions on the lesser included offenses of second degree murder and manslaughter. The trial court refused to give instructions on the lesser included offenses on the ground that there was no rational basis to support such instructions. Appellant contends that his statements to the police, which were introduced, constituted some evidence that the victim attacked him with a knife and that he took the knife from the victim before stabbing him. From that factual basis, he argues that the lesser included offense instructions should have been given because we have held that "adequate provocation can occur when the victim

is armed or is attempting to commit violence toward the defendant." *Rainey* v. *State*, 310 Ark. 419, 423-24, 837 S.W.2d 453, 455 (1992).

We need not determine if the lesser included instructions should have been given because, even if they should have, the instructions proffered by appellant were incomplete and erroneous. The proffered instruction on second degree murder included only "knowingly" causing the death of another. *See* AMI Crim. 1503; Ark. Code Ann. § 5-10-103(a)(1) (Repl. 1993). It omitted "purposefully" causing the death of another. A person also commits second degree murder if "[w]ith the purpose of causing serious physical injury to another person, he causes the death of any person." AMI Crim. 1503; Ark. Code Ann. § 5-10-103(a)(2). The question then becomes whether there was a rational basis to warrant the trial court's giving an instruction for finding that appellant acted knowingly, but not purposely, in killing Perry. To ask the question is to answer it. Since the victim was stabbed twenty-four times, with one of the wounds being eight inches deep, it is obvious that there was a rational basis for finding that appellant acted purposely, and it would have been error to give an instruction that omitted the purposeful part of the definition.

Similarly, appellant's proffered instruction on manslaughter omitted that part of AMI Crim. 1504 incorporating Ark. Code Ann. § 5-10-104(a)(1), which provides:

> (a) A person commits manslaughter if:
>
> (1) He causes the death of another person under circumstances that would be murder, except that he causes the death under the influence of extreme emotional disturbance for which there is a reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of the person in the defendant's situation under the circumstances as he believes them to be.

Ark. Code Ann. § 5-10-104(a)(1) (Repl. 1993).

Appellant next argues that the trial court erred in refusing to grant a mistrial after the State used a peremptory challenge to strike a black person from the jury panel. We do not consider that part of the point involving the failure to grant a mistrial because appellant did not request a mistrial. He only

made a challenge to the jury panel under *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

Appellant asked that the State provide a racially neutral explanation for striking Allen Morrison, one of four black persons who were potential jurors. The prosecutor replied that there was no systematic exclusion of black people, as two were excused by the court for cause, one was accepted as a juror, and the fourth, Morrison, was excused by the State. In any event, the prosecutor stated that the reason Morrison was excused was that the victim's family provided the prosecutor with a note before voir dire began which said that Morrison was a friend of appellant's family. Morrison did not disclose the friendship during voir dire, but subsequently did admit that he knew appellant's sister.

Under *Batson*, once the defendant makes a prima facie case of purposeful racial discrimination in juror challenges, the burden of proof shifts to the State to show a racially neutral explanation. The showing of a prima facie case under *Batson* is threefold. First, the defendant must show that he is a member of a cognizable racial group. *Batson*, 476 U.S. at 96. Second, he is allowed to rely on the fact that the system of peremptory challenges constitutes a jury selection practice under which it is easy to exercise discrimination if one has a mind to do so. *Id.* Finally, he must show that the facts raise an inference that the prosecutor intended to discriminate. *Id.* In ruling on a *Batson* motion, a trial court shall consider all relevant circumstances, such as a "pattern" of strikes and the prosecutor's questions and statements. *Id.* at 96-97.

If the trial court finds that the defendant has made a prima facie showing, the burden shifts to the State to provide a racially neutral explanation. *Id.* at 97. If the State's explanation is suspect, the trial court must then conduct a sensitive inquiry into the basis for each of the challenges by the State. *Colbert* v. *State*, 304 Ark. 250, 254-55, 801 S.W.2d 643, 646 (1990).

The standard of review for reversal of a trial court's *Batson* ruling is whether the court's findings are clearly against the preponderance of the evidence. *Id.* Appellant's *Batson* challenge was based solely on the peremptory challenge of the one black juror. The trial court did not find a systematic exclusion, but still asked the prosecutor to proffer his reason for striking

the prospective juror. The prosecutor then provided a racially neutral explanation which was confirmed by the juror. Thus, there was no error.

The facts involving appellant's final point of appeal are as follows. The State sought to enhance appellant's punishment under the habitual offender statute, Ark. Code Ann. § 5-4-501, and presented a prior aggravated robbery conviction. The docket sheet of the case bears the handwritten notations that appellant "waives an atty." and "[w]aives an atty. after full exp," and the judgment of conviction states that appellant waived an attorney. Appellant correctly argues that a conviction cannot be used to enhance punishment under the recidivist statutes unless the records of prior convictions show that the defendant was represented by counsel or waived counsel. *Stewart* v. *State*, 300 Ark. 147, 777 S.W.2d 844 (1989). Appellant contends that the docket sheet and judgment of conviction were insufficient to show that he had knowingly waived his right to counsel. A similar argument was thoroughly addressed and rejected in *King* v. *State*, 304 Ark. 592, 804 S.W.2d 360 (1991). In that case, we recognized that while the constitutionally protected right to counsel will not be presumed from a silent record, a record which states that a defendant waived his right to counsel, while not sufficient when arguing violation of the right, is sufficient for a prior sentence to be used for enhancement purposes. *Id.* at 595, 804 S.W.2d at 362; *see also Neble* v. *State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988). The record stated that appellant had waived his right to counsel after full explanation and, as such, was sufficient to use the conviction for enhancement purposes.

Pursuant to Rule 4-3 (h) of the Rules of the Supreme Court, we have a duty to examine the record for prejudicial erroneous rulings adverse to appellant that would cause reversal. An examination of the record has been made, and there are no erroneous rulings adverse to appellant that cause reversal.

Affirmed.

The ARKANSAS APPRAISER LICENSING AND CERTIFICATION BOARD *v.* Ralph W. BILES

94-824 895 S.W.2d 901

Supreme Court of Arkansas
Opinion delivered March 27, 1995

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

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

DAVID NEWBERN, Justice. Ralph W. Biles, the appellee, is a general appraiser certified by the Arkansas Appraiser Licensing and Certification Board. The Board placed Mr. Biles on proba-

tion for six months because it found an appraisal he had performed was deficient and in violation of its regulations. Mr. Biles appealed to the Garland Circuit Court which overturned the Board's decision, declaring it to be contrary to law and fact, arbitrary and capricious, an abuse of the Board's discretion, and not supported by substantial evidence. The Trial Court did not discuss the facts in its order or give reasons for its conclusions. We hold there was substantial evidence in support of the Board's decision. We reverse the Trial Court's decision and reinstate that of the Board.

Mr. Biles prepared an appraisal report on a parcel of land consisting of approximately 4.56 acres in Hot Springs. He was hired by the owner of the land to appraise it, apparently because of a purchase interest expressed by the United States Postal Service. The Board received a complaint concerning the appraisal and initiated an investigation. As a result, Mr. Biles was charged with violating the Uniform Standards of Professional Appraisal Practice (the Standards) which are incorporated by reference in the Board's regulations.

The Board conducted a hearing. Richard Stephens testified as an expert that he found several parts of the appraisal to be in violation of the Standards. Specifically, the appraisal did not comply with the Standards relating to analysis of the highest and best use or the market valuation, and the certification of the appraisal was inadequate. He also testified the appraisal violated the Standards due to the use of 1980 statistics despite availability of 1990 census statistics, and failure to substantiate a $70,000 projected cost for dirt removal. Finally, he found the appraisal so confusing and incomplete that he could not use the appraisal to determine the land's value.

Mr. Biles also testified at the hearing. When questioned by his attorney about an unexplained figure used in the report to adjust the value on the basis of the time it would take to sell it, he stated, "Well, we could have put two or three or four pages in the appraisal explaining all of this." Later, during cross-examination, he added "we just didn't put one [explanation] in this appraisal."

Also on cross-examination, he was asked why he employed 1980 population statistics when the 1990 statistics were avail-

able. He first responded that "those were the things that we were in the process of upgrading," apparently referring to an information system used in his office. Mr. Biles then stated he did not feel it was relevant to the value of the property because he talked about the increase in traffic flow for twenty years and over the past two years. He concluded by assuring he now includes the 1990 census information in his reports.

Mr. Biles was also asked about the estimate of $70,000 for removal of dirt and rock from the property. He answered that he personally got that estimate from the dirt contractor in writing and that it might have been logical to include such information.

The Board found the reasoning which supported the analysis, opinions, and conclusions in the appraisal was incomplete, that the test for the highest and best use was not addressed, and that the method applied in arriving at value was inadequate. The order concluded that the incompleteness of the appraisal constituted a violation of the Standards.

Any substantial evidence

The violations found by the Board were based on the Board's adoption in its Regulation I(O) of the Uniform Standards of Professional Appraisal and on the grounds for disciplinary action found in Regulation I(P). Section I(P)(1) provides that one ground for disciplinary action is the "Violation of any provision of the Arkansas Appraiser Licensing and Certification Act of 1991 or any of these regulations." Section I(P)(4) lists other grounds which include "Any actions demonstrating un-trustworthiness, incompetence, dishonesty, gross negligence, material misrepresentation, fraud or unethical conduct in any dealings subject to the Act or these regulations."

The Board made six findings of which the last four, numbered three through six, were specific findings of fact in support of its conclusion that the Standards were violated. The third finding was that "the reasoning that supports the analysis, opinions, and conclusions of the appraisal report is incomplete." According to Standards rule 1-1(b), "In developing a real property appraisal, an appraiser must . . . not commit a substantial error of omission or commission that significantly affects an appraisal." In response to the allegation about use of the dated population

statistics Mr. Biles admitted he was "in the process of upgrading" to the 1990 statistics but also testified to the effect that he had included the 1980 statistics as it was required. Another omission was that of the written estimate from the dirt removal contractor. That omission was a violation of Standard 2-2(h) and was compounded, according to Mr. Stephens, by the failure to list the contractor's name as a source for the information as required by Standard 4-3(h).

Finding number four was that, while a discussion of the highest and best use was presented in the appraisal report, it did not address the tests for highest and best use. This finding was based on the testimony of Mr. Stephens who stated that the highest and best use was discussed but that the criteria or tests for determining the highest and best use, to the extent they were included, were placed in the report in such a way as to be confusing. Inclusion of the tests is required by Standard 1-3(a).

The Board's fifth finding was that, while the appraisal report stated that the cost approach and the income capitalization approach would not be used, both approaches were discussed in an inconclusive and incomplete manner, resulting in confusion to the reader of the report, thus violating Standard 1-1(c).

The sixth finding was that the methodology used in determining valuation was inadequate.

Generally, when reviewing administrative decisions, the Court reviews the entire record to determine whether there is any substantial evidence to support the administrative agency's decision, whether it was arbitrary and capricious, and whether there was an abuse of discretion. *In re Sugarloaf Mining Co.*, 310 Ark. 772, 840 S.W.2d 172 (1992); *Arkansas ABC Bd.* v. *King*, 275 Ark. 308, 629 S.W.2d 288 (1982).

To determine whether a decision is supported by substantial evidence, the Court reviews the whole record to ascertain if it is supported by relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Wright* v. *Arkansas State Plant Bd.*, 311 Ark. 125, 842 S.W.2d 42 (1992); *Livingston* v. *Arkansas State Medical Bd.*, 288 Ark. 1, 701 S.W.2d 361 (1986); *Partlow* v. *Arkansas State Police Comm'n*, 271 Ark. 351, 609 S.W.2d. 23 (1980).

To establish an absence of substantial evidence to support the decision it must be demonstrated that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusions. *Beverly Enters.-Ark., Inc.* v. *Arkansas Health Servs.*, 308 Ark. 221, 824 S.W.2d 363 (1992). Substantial evidence is valid, legal, and persuasive evidence. *Wright* v. *Arkansas State Plant Bd., supra.*

Administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies, and this recognition accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency. *Wright* v. *Arkansas State Plant Bd., supra; First Nat'l Bank* v. *Arkansas State Bank Comm'r*, 301 Ark. 1, 781 S.W.2d 744 (1989).

In view of the specific testimony of Mr. Stephens and Mr. Biles' candid admissions that items not explained or included in his report should have been explained or included, we cannot say the Board's findings and conclusions are not supported by any substantial evidence. Nor have we any reason to hold that the Board's decision was arbitrary or capricious or contrary to law.

Reversed.

UNITED SOUTHERN ASSURANCE COMPANY
v. Harold BEARD

94-862 894 S.W.2d 948

Supreme Court of Arkansas
Opinion delivered March 27, 1995
[Rehearing denied May 1, 1995.]

Atchley, Russel, Waldrop & Hlavinka, by: *Alan Harrel*, for appellant.

Pilkinton, Pilkinton & Yocom, by: *Tony Yocom*, for appellee.

TOM GLAZE, Justice. Appellee Harold Beard owned a Freightliner tractor-trailer which was being driven by his employee, Mary Sodorff, when a multiple collision occurred on Interstate 20 near Roscoe, Texas on September 5, 1991. Beard was in the sleeper of the cab at the time. Sodorff apparently lost control of the tractor-trailer, skidded sideways and collided with a guardrail and bridge support and came to rest at a right angle to the highway. Then another tractor-trailer struck Beard's trailer, separating it from Beard's tractor-trailer. Finally, an automobile collided with the Beard trailer. As a result of the collisions, Sodorff was killed, and Beard sustained serious multiple fractures to his lumbar spine.

Beard had no workers' compensation coverage, but he had a trucker's insurance policy issued by appellant United Southern Assurance Company. Southern rejected Beard's claim under the policy, so Beard and his wife filed suit against Sodorff's estate, alleging Sodorff's negligence caused Beard's injuries. Charles M. Walker, attorney for Sodorff's estate, answered, denying liability based upon the fellow servant and joint venture doctrines.[1]

The parties agreed to try the suit to the court, which was done on January 26, 1994. In opening statement, Walker explained to the court that, by letter dated April 21, 1993, he had contacted Southern and its attorney, Albert Graves, Jr., and demanded they assume defense of the lawsuit. Walker told the trial court that, while Beard had obtained the Southern policy on his vehicle and Beard was an insured, the policy had an omnibus insurance clause allowing coverage for an employee as an additional insured.

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[1]Walker also raised workers' compensation as being Beard's exclusive remedy.

Because Walker believed Beard could be a claimant under Southern's policy, he said that he made further inquiry of Southern on June 21, 1993 and July 15, 1993, concerning whether Southern intended to defend under a reservation of rights or assumption of liability against Beard's suit, but Walker received no response.

After his comments regarding Southern, Walker then told the court that he had investigated the accident and had no evidence to present. He indicated he would have attempted to settle the Beards' claim, but Sodorff's estate had only $25,000. The Beards then put on their case, and Walker defended by cross-examining the Beards' witnesses. The trial court awarded Beard judgment against Sodorff's estate in the amount of $1.2 million, and Beard's wife was awarded $100,000.

On March 31, 1994, more than 60 days after judgment was entered in the Beards' behalf, Southern moved to intervene so it could move for relief of judgment under ARCP Rule 60(b). Southern asserted its grounds for vacating the judgment were to prevent the miscarriage of justice and related the following reasons:

(1) Southern, through its counsel, Mr. Graves, Jr., employed Walker to represent Sodorff's estate;

(2) Walker stated Southern had coverage under its liability policy when it had denied liability and if Beard recovered, Beard and Sodorff's estate would try to collect judgment against Southern;

(3) Sodorff's estate presented no evidence in defense of the Beards' claims;

(4) Walker offered no evidence at trial;

(5) Walker breached his duty to Southern (and the estate) by injecting insurance matters into the trial and failing to object to the admissibility of certain reports;

(6) Walker failed to request findings of fact or conclusions of law, move for a new trial or file a notice of appeal;

(7) Counsel for the Beards and the estate failed to notify Southern of the January 26, 1994 judgment until March 1, 1994 —after time had expired for filing a motion for new trial or a notice of appeal;

(8) Walker did not require the Beards to specify amount of damages sought before their case was submitted to the trial court;

(9) No justiciable controversy existed between the Beards and Sodorff's estate;

(10) Defenses existed that were not raised in behalf of the estate.

Counsel for both the Beards and the estate responded to Southern's motions and generally denied Southern's grounds for setting aside the January 26 judgment, stating that Southern had been notified of the Beards' suit and its trial setting, but still failed to provide a defense. Specifically, Walker denied that Southern had hired him to represent Sodorff's estate. Instead, Walker stated that the estate had money with which to pay him as counsel.

The trial court granted Southern's request to intervene and held a hearing regarding whether Southern should be granted relief from the January 26, 1994 judgment. After hearing the testimony of Albert Graves, Jr., Charles Walker and argument of counsel, the trial court denied Southern relief from the judgment. Southern appeals from that ruling.

[redacted] The trial court's ruling was correct. As previously mentioned, Southern intervened in the Beards' lawsuit after it was tried by the trial court, and attempted to gain relief from the Beards' judgment by filing a Rule 60(b) motion. Under Rule 60(b), a party may move to correct any error or mistake or to prevent the miscarriage of justice by requesting the trial court to set aside its decree or order within ninety days of its having been filed. This court has narrowly interpreted Rule 60(b) to apply only to those situations provided in Rule 60(a), namely, to correct clerical mistakes in judgments, orders or other parts of the record and errors arising from oversight or omissions. *See Pugh* v. *St. Paul Fire & Marine Ins. Co.*, 317 Ark. 304, 877 S.W.2d 577 (1994); *Ingram* v. *Wirt*, 314 Ark. 553, 864 S.W.2d 237 (1993); *Jackson* v. *Arkansas Power & Light*, 309 Ark. 572, 832 S.W.2d 224 (1992); *Phillips* v. *Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991). Here, Southern failed to assert in its Rule 60(b) motion a clerical mistake, error or omission referred to in Rule 60(a), and for that reason alone, Southern's motion should have been denied by the trial court. *Cf. Pugh*, 317 Ark. at 308, 877 S.W.2d at 579.

Southern's motion and grounds set out therein might have been proper if timely filed as a request for new trial under ARCP Rule 59(a), but such a new trial motion must be filed no later than ten days after entry of judgment. Here, Southern did not file its motion or take any action until more than sixty days after entry of the Beards' judgment. Our court has clearly stated that Rule 60 may not be used to breathe life into an otherwise defunct Rule 59 motion. *Jackson*, 309 Ark. 574, 832 S.W.2d 224; *Phillips*, 305 Ark. 365, 807 S.W.2d 923.

Southern argues that it never learned of the Beards' judgment until after the time had expired for filing a new trial motion. That apparently is true. However, it is also true that, after rejecting the Beards' claim, Southern was well aware that the Beards had filed their lawsuit against Sodorff's estate. In addition, the estate's attorney not only made several requests of Southern to assume the defense of the Beards' suit, but also he notified Southern of the trial date. Southern simply failed to respond to the estate's requests or notices. This court has emphasized that it is the duty of a litigant to keep himself informed of the progress of his case. *Midwest Timber Products Co., Inc.* v. *Self*, 230 Ark. 872, 327 S.W.2d 730 (1959); *see also RLI Ins. Co.* v. *Coe*, 306 Ark. 337, 813 S.W.2d 783 (1991) (Glaze, J. concurring). Here, Southern had ample notice and opportunity to have raised and litigated the issues at the trial below or in a timely motion for new trial rather than inappropriately trying to assert such matters in a Rule 60(b) motion. For whatever reasons, Southern failed to take action in an appropriate and timely fashion.

In conclusion, Southern recognizes this court's decision in *Phillips* where the court first narrowly interpreted Rule 60(b) to apply only to correct clerical mistakes, but it suggests our *Coe* decision, decided two months later, offers an exception under which Southern's Rule 60(b) motion could and should be considered. We disagree. While Rule 60(b) is mentioned in *Coe*, it was not argued in the context of what such a motion should cover and how it related to Rule 59(a). In addition, the RLI insurance company there filed both a new trial motion and a motion for relief from judgment, neither of which was granted. We fail to see how *Coe* helps Southern, nor can we conclude *Coe* in any way diminished the court's ruling in *Phillips* and its progeny.

Because Southern's other points for reversal depend upon its prevailing on its Rule 60(b) argument, we need not reach those additional arguments. Therefore, for the reasons above, we affirm the trial court's decision.

Robert Wayne GATLIN *v.* STATE of Arkansas

CR 94-1187 895 S.W.2d 526

Supreme Court of Arkansas
Opinion delivered March 27, 1995

[redacted]

Joe Kelly Hardin, for appellant.

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

DONALD L. CORBIN, Justice. Appellant, Robert Wayne Gatlin, appeals an order of the Hot Spring County Circuit Court convicting him of the rape of his nine-year-old daughter and sentencing him to forty years in the Arkansas Department of Correction. Appellant raises two points for reversal of the judgment. We find no error and affirm.

First, appellant argues the trial court erred in denying his motion for directed verdict. Appellant timely moved for a directed verdict on the specific ground that the state had not produced any evidence of penetration. On appeal, appellant acknowledges that the victim testified he put his penis inside her body, but argues this is insufficient evidence for the jury to determine that penetration occurred. Appellant argues there was no medical evidence presented to indicate penetration of the victim occurred, nor was there any testimony by any witness, save the victim, that penetration occurred. This argument is wholly without merit and patently contrary to the law.

On appeal from the denial of a motion for directed verdict, we view the evidence in the light most favorable to the party against whom the verdict is sought and affirm if there is substantial evidence to support the verdict. *Clark* v. *State*, 315 Ark. 602, 870 S.W.2d 372 (1994). Substantial evidence is evidence of a sufficient force and character to compel a conclusion one way or another, forcing the mind to pass beyond suspicion or conjecture. *Id.*

This court has consistently held that a victim's testimony may constitute substantial evidence to sustain a conviction of rape. *See, e.g., Franklin* v. *State*, 308 Ark. 539, 825 S.W.2d 263 (1992); *Prater* v. *State*, 307 Ark. 180, 820 S.W.2d 429 (1991).

This is true even when the rape victim is a child. *Caldwell* v. *State*, 319 Ark. 243, 891 S.W.2d 42 (1995) (citing *Winfrey* v. *State*, 293 Ark. 342, 738 S.W.2d 391 (1987)). More particularly, this court has stated that the testimony of the victim which shows penetration is enough for conviction. *Clark*, 315 Ark. 602, 870 S.W.2d 372. In addition, this court has consistently held that the rape victim's testimony need not be corroborated, *Winfrey*, 293 Ark. 342, 738 S.W.2d 391, nor is scientific evidence required. *White* v. *State*, 303 Ark. 30, 792 S.W.2d 867 (1990).

Section 5-14-103 of the Arkansas Code Annotated of 1987 defines rape 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." Section 5-14-101(9) defines "sexual intercourse" as meaning "penetration, however slight, of a vagina by a penis[.]" Section 5-14-101(1) defines "deviate sexual activity" as involving, *inter alia*, "[t]he penetration, however slight, of the anus or mouth of one person by the penis of another person[.]"

In the present case, there is substantial evidence that appellant penetrated the victim's vagina or anus or both with his penis. Indeed, as appellant acknowledges in his brief, the nine-year-old victim testified that her father, appellant, put his penis inside her body. After identifying the penis of a stuffed rabbit, the victim stated that appellant had placed his penis inside her and moved it up and down. The victim testified that appellant put his penis both inside and outside her body, that when he put his penis on the inside of her body it hurt and made her cry, and that appellant told her not to tell anybody. She stated further that appellant "put his penis in my bottom" and "hurt me real bad." She stated that he "touched her in a bad way" a lot of times, sometimes in her bedroom, in her brother's bedroom, or in the living room.

[redacted] The foregoing testimony by the child victim is substantial evidence of penetration. It is sufficient, standing alone, absent any corroboration, to sustain appellant's conviction for rape. *Fox* v. *State*, 314 Ark. 523, 863 S.W.2d 568 (1993), *cert. denied*, 114 S. Ct. 1316 (1994). The state correctly points out that corroboration of the victim's testimony exists in this case. We need not discuss it, however, as corroboration is not required.

The trial court did not err in refusing to direct a verdict for appellant.

As his second point for reversal, appellant argues the trial court erred in admitting hearsay testimonies of the victim's grandmother and appellant's mother, Wanda Jean Lightner, and of the victim's step-grandfather and appellant's stepfather, David Lightner. The Lightners both testified that, on the morning after the Lightners witnessed appellant climbing out of the top bunk where the victim lay sleeping, the victim told them, while appellant was present, that appellant "put his pee pee in her pee pee." The Lightners both testified that appellant responded to the victim's statement by saying, "Mother, do you know what you are doing to me?" The trial court admitted the foregoing testimony after ruling *in camera* that anything that was said in front of appellant was admissible.

On appeal, appellant contends the testimonies were inadmissible hearsay. The state responds that the testimonies were admissible as an adoptive admission pursuant to A.R.E. Rule 801(d)(2)(ii). Appellant acknowledges that Arkansas law allows an adoptive admission, citing Ralph Barnhart, *Statements Made Out of Court*, 15 Ark. L. Rev. 125 (1960-61), but contends the trial court's ruling is based on a peculiar rule in Arkansas that "does not exist in any books."

Rule 801(d)(2)(ii) of the Arkansas Rules of Evidence states that a statement is not hearsay if it is offered against a party and is a statement of which the party has manifested his adoption or belief in its truth. This court has previously stated that, before admitting evidence as an adoptive admission pursuant to Rule 801(d)(2)(ii), a trial court must find that sufficient foundational facts have been introduced so that the jury can reasonably infer that the party-opponent heard and understood the statement, and that, under the circumstances, the statement was such that, if the party-opponent did not believe the statement to be true, the party-opponent would normally respond. *Morris* v. *State*, 302 Ark. 532, 792 S.W.2d 288 (1990). Once a foundation has been laid, it is for the jury to determine whether the party-opponent adopted or acquiesced in the statement. *Id.*

In the present case, the testimony indicates appellant was present when the victim's out-of-court statement was made.

However, the trial court erred in ending its analysis at that point. Before admitting testimony as an adoptive admission, a trial court must find that the requisite foundational facts have been introduced. *Morris*, 302 Ark. 532, 792 S.W.2d 288. Here, the state failed to produce foundational facts showing that appellant's response to the victim's statement manifested his acquiescence thereto. In our view, "Mother, do you know what you are doing to me?" does not indicate appellant adopted the victim's statement as his own or that he believed in its truth. Therefore, the trial court erred in admitting the Lightners' hearsay testimonies.

Alternatively, the state contends that the error in admitting the hearsay was not prejudicial and therefore harmless. This court does not presume prejudice when error is alleged. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985). Rather, it is appellant's burden to produce a record that demonstrates prejudice occurred. *Id.* This court has repeatedly held that an appellant must show prejudice because we do not reverse for harmless error. *Wilson* v. *State*, 317 Ark. 548, 878 S.W.2d 755 (1994).

Appellant objected to the Lightners' testimonies on the basis of hearsay. On appeal, he makes a general citation to Rule 802 of the Arkansas Rules of Evidence and contends the testimonies were clearly hearsay and used only to bolster and reinforce the victim's statements. Trial error, even involving the Confrontation Clause, is subject to a harmless error analysis. *Watson* v. *State*, 318 Ark. 603, 887 S.W.2d 518 (1994) (citing *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) and *Winfrey* v. *State*, 293 Ark. 342, 738 S.W.2d 391 (1987)). However, appellant did not raise any constitutional objection, either below or on appeal, and has therefore waived any constitutional argument. *Killcrease* v. *State*, 310 Ark. 392, 836 S.W.2d 380 (1992). Thus, for purposes of our harmless error analysis, we need not be concerned with the constitutional standard of harmlessness beyond a reasonable doubt. *Greene* v. *State*, 317 Ark. 350, 878 S.W.2d 384 (1994).

We conclude the error in this case is harmless. As we have determined, the victim's out-of-court statement that her father "put his pee pee in her pee pee," was hearsay erroneously admitted at trial. However, the victim stated on direct examination that appellant had raped her numerous times prior to the

incident that generated the Lightners' hearsay testimonies. Thus, the victim's own testimony evidenced her rape by appellant, independent of her challenged hearsay statement to the Lightners, and thereby provided competent evidence rendering harmless the error caused by admission of the hearsay. *Cloird* v. *State*, 314 Ark. 296, 862 S.W.2d 211 (1993). Moreover, we emphasize that although the hearsay declarant, the victim, testified at trial and was subject to cross-examination by appellant, he chose to forego his opportunity to pursue the issue of statements the victim made to the Lightners. The danger of unreliability inherent in hearsay testimony is alleviated by the opportunity to cross-examine the declarant. *Idaho* v. *Wright*, 497 U.S. 805 (1990). This court has held that the Confrontation Clause is not violated by the admission of additional hearsay statements made by a declarant when that declarant testifies at trial and is subject to cross-examination. *Watson* v. *State*, 308 Ark. 444, 825 S.W.2d 569 (1992). Thus, the availability of the declarant for cross-examination also rendered harmless the error caused by the admission of the hearsay.

In summary, the substance of the challenged testimonies were admitted without error during the victim's direct examination and appellant did not take advantage of the victim's availability for cross-examination on the hearsay statements. Appellant has therefore failed to demonstrate prejudice and the error in admitting the hearsay was harmless.

The judgment of conviction is affirmed.

NEWBERN and ROAF, JJ., concur.

DAVID NEWBERN, Justice, concurring. The majority opinion is correct to a point. I write to express my reservations about the discussion of adoptive admission and harmless error.

The majority opinion recognizes the error in the Trial Court's conclusion that any statement uttered in the presence of the accused is not hearsay. It also seems to recognize that an adoptive admission may occur through the silence of the accused in the face of an accusation to which he should have responded. It then shifts, however, and it seems to base its ultimate conclusion on the statement the accused made to his mother rather than his silence, which Mr. Lightner described as "dumbfounded," after hearing the accusation of his daughter, the victim. The

emphasis here should be on that silence and failure to respond to the accusation.

The majority opinion points out that a statement, such as that uttered by the daughter, and evidence of the accused's silence in the face of that statement become admissible upon the showing of "foundational facts." *Morris* v. *State*, 302 Ark. 532, 792 S.W.2d 288 (1990). The decision to be made by the Trial Court is whether the statement in question is the sort to which a response would be expected if it were not true.

When the hearsay objection was made, the question before the Trial Court was whether Mr. and Mrs. Lightner's statements could be received, not for the truth of the matter asserted by the declarant (their granddaughter), but as a foundation for permitting testimony that the accused did not respond to it.

The ruling of the Trial Court admitting the evidence was correct, although he gave the wrong reason. The statement made by the child was without doubt of the sort to which the accused should have made a response if he considered it untrue. His silence constituted an adoptive admission. I would hold the evidence admissible on that basis.

Mr. Gatlin was on trial for a particular offense of rape to which his daughter's statement and his silence in the face of it were relevant. I would not hold it was harmless error to admit those items of evidence on the basis of the daughter's statement that similar things had occurred on other occasions. Had admission of the daughter's statement and evidence of Mr. Gatlin's silence been error, it would not have been harmless.

ROAF, J., joins in this concurrence.

Alan RING, Jr. *v.* STATE of Arkansas

94-1083 894 S.W.2d 944

Supreme Court of Arkansas
Opinion delivered March 27, 1995

John H. Bradley, for appellant.

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

DONALD L. CORBIN, Justice. Appellant, Alan Ring, Jr., brings this interlocutory appeal under Ark. Code Ann. § 9-27-318(h)

(Repl. 1993), from the Mississippi County Circuit Court's order denying his motion to transfer one count of rape to juvenile court. Jurisdiction of this interlocutory appeal is properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(12). We affirm the trial court's denial of the motion to transfer.

Appellant was fourteen years old and mildly mentally retarded when he was accused of raping a six-year-old girl in the men's restroom of the Wal-Mart store in Osceola, Arkansas, on October 2, 1993. The prosecuting attorney charged appellant in circuit court by felony information stating that appellant "did unlawfully, feloniously and knowingly, by forcible compulsion, engage in sexual intercourse with [the victim], not his spouse, who was less than fourteen (14) years old."

Appellant moved to transfer the rape charge to juvenile court. The circuit court held a hearing on the motion in which it heard testimony and received exhibits, and then entered an order denying the motion. Appellant asserts three arguments for reversal of the decision not to transfer; two of the points allege error in the admission of evidence at the hearing; the third is a challenge to the denial of the motion. We find all three assertions of error to be without merit.

First, appellant challenges the admission of a confession he gave at the Osceola Police Department. In the confession, appellant stated that he encountered the victim near the Barbie dolls in the toy department of the store. He stated that he told her he was a security guard and asked her to follow him, and that she followed him into the men's restroom where he made her bend over the toilet with her pants down and made contact with her rectum with his penis. He also stated that he told her to lie on her back on the floor while he laid on top of her and tried to enter her vagina with his penis.

Appellant made the foregoing statement to a police detective and a juvenile intake officer after signing a written waiver of his *Miranda* rights. However, appellant contends the confession was inadmissible at the transfer hearing because neither of his parents signed the written waiver of his right to counsel as is required by Ark. Code Ann. § 9-27-317(f) (Repl. 1993). Appellant had not yet been charged when he gave the confes-

sion. Thus, he relies on *Rhoades* v. *State*, 315 Ark. 658, 869 S.W.2d 698 (1994), and argues that section 9-27-317(f) applied to him and prevented admissibility of his confession at the transfer hearing.

Appellant's reliance on *Rhoades*, 315 Ark. 658, 869 S.W.2d 698, is misplaced. True, similar to appellant, Rhoades had not yet been charged in any court when he made his statement. Also similar to appellant, Rhoades was charged in circuit court. However, unlike appellant, Rhoades's case was transferred to juvenile court where he was ultimately adjudicated a delinquent. Thus, even though Rhoades had not yet been charged in circuit court when he gave the confession, because his offense was ultimately adjudicated in juvenile court, this court held that the Arkansas Juvenile Code applied to Rhoades at the time he gave his confession, such that the law enforcement officers' failure to comply with section 9-27-317 barred admission of Rhoades's confession at the adjudicatory hearing.

The state responds that *Boyd* v. *State*, 313 Ark. 171, 853 S.W.2d 263 (1993), rather than *Rhoades*, controls the present case. In *Boyd*, this court stated that when a prosecutor chooses to prosecute a juvenile in circuit court as an adult, the juvenile becomes subject to the procedures and penalties prescribed for adults. Thus, the state argues that when a juvenile is charged in circuit court, the requirement in section 9-27-317 that the juvenile's parents consent to the juvenile's waiver of right to counsel is not applicable.

The state's argument is correct. In *Boyd*, 313 Ark. 171, 853 S.W.2d 263, this court held that the Arkansas Juvenile Code does not refer to proceedings in circuit court, rather, only to proceedings in juvenile court. When *Rhoades* and *Boyd* are considered together and applied to the facts of this case,[1] they

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[1]In applying *Rhoades* and *Boyd* to this case, we observe that, unlike this case, *Rhoades* and *Boyd* were appeals from denials of motions to suppress the admission of statements during the guilt phase of trial. Unlike the present case, neither *Rhoades* nor *Boyd* involved the admissibility of a custodial statement during a transfer hearing mandated by the Arkansas Juvenile Code. Further, we observe that neither party to this appeal has briefed the significance, if any, of such a distinction. The trial court, however, observed such a distinction when it specifically stated that it was admitting the confession solely for the limited purpose of the transfer hearing and that it was not ruling on a suppression issue. Thus, the trial court expressly reserved ruling on the

imply but one conclusion: since appellant was ultimately charged in circuit court and, upon this court's affirmance of the denial of his motion to transfer, will ultimately be tried there, the failure of the law enforcement officers to obtain the consent of appellant's parents to his waiver of right to counsel, as required by section 9-27-317, does not bar admission of appellant's confession. Appellant's first argument is therefore without merit.

However, even assuming *arguendo* that error occurred in admitting the confession at the transfer hearing, appellant cannot demonstrate any prejudice as a result. In denying the transfer motion, the trial court correctly cited *Holland* v. *State*, 311 Ark. 494, 844 S.W.2d 943 (1993), holding that the seriousness and violent nature of the offense alone is a sufficient factor to support a circuit court's retention of jurisdiction in a case involving a juvenile defendant. This court has stated repeatedly that the serious and violent nature of an offense can be determined solely from a criminal information. *See, e.g., Beck* v. *State*, 317 Ark. 154, 876 S.W.2d 561 (1994). Moreover, this court has repeatedly held that rape is by definition a serious and violent offense. *See, e.g., Davis* v. *State*, 319 Ark. 613, 893 S.W.2d 768 (1995). Thus, we have no hesitation in concluding the trial court based its decision on competent evidence, the felony information, and was not prejudiced or influenced by any possible error in the admission of the confession at this stage of the proceedings.

For his second assignment of error, appellant challenges the admission of testimony by the victim's mother concerning the effect the rape had on the six-year-old girl. The mother testified that after the rape, the child had a fear of entering any bathroom, that she wet her pants just to keep from going into a bathroom, that she initially feared her brother and father, that she had crying spells at school when watching safety films, and that she had severe nightmares that progressively worsened to the point she sought counseling for the victim. Appellant contends this evidence is not relevant to any of the factors in section 9-27-318(e), and therefore was inadmissible.

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admissibility of the confession at trial as evidence of appellant's guilt. (*See Fare* v. *Michael C.*, 442 U.S. 707 (1979), *and Boyd*, 313 Ark. at 173, 853 S.W.2d at 265 for considerations required when determining the suppression of a juvenile's confession.)

The state contends this evidence is relevant to the factor of the seriousness of the offense. In essence, the state contends the impact of the crime on the victim illustrates the crime was serious. We agree. Although the challenged testimony was wholly unnecessary given the sufficiency of the felony information to determine the seriousness of the offense, it was nevertheless relevant to that factor. For the same reasons expressed in the first point of this appeal, the testimony challenged here was clearly not prejudicial. Therefore, based on the argument presented, we cannot say the trial court abused its discretion in admitting the mother's testimony.

Third, appellant challenges the decision to deny the motion to transfer the rape charge to juvenile court. The circuit court, in deciding whether to transfer a case to juvenile court, must consider the following requirements: (1) the seriousness of the offense and whether the juvenile employed violence in the commission of the offense; (2) whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and (3) the prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation. Ark. Code Ann. § 9-27-318(e) (Repl. 1993); *Slay* v. *State*, 309 Ark. 507, 832 S.W.2d 217 (1992). As the party seeking the transfer, appellant had the burden of proof to show a transfer was warranted under section 9-27-318(e). *Williams* v. *State*, 313 Ark. 451, 856 S.W.2d 4 (1993). In making its decision, the trial court is not required to give equal weight to each of the statutory factors. *Williams*, 313 Ark. 451, 856 S.W.2d 4; *Hogan* v. *State*, 311 Ark. 262, 843 S.W.2d 830 (1992). The serious and violent nature of an offense is a sufficient basis for trying a juvenile as an adult. *Beck*, 317 Ark. 154, 876 S.W.2d 561. If a trial court determines a juvenile should be tried in circuit court as an adult, its decision must be supported by clear and convincing evidence. Ark. Code Ann. § 9-27-318(f); *Williams*, 313 Ark. 451, 856 S.W.2d 4. We do not reverse a circuit court's denial of a juvenile transfer unless we determine the denial was clearly erroneous. *Id.; Vickers* v. *State*, 307 Ark. 298, 819 S.W.2d 13 (1991).

Appellant contends there was no evidence of violence in

this case, arguing there was no evidence the child was forced into the restroom, forced to remove her clothes, beaten, or threatened with a weapon. Appellant also contends that appellant's prospect for rehabilitation could not be determined because there had not yet been any attempts to rehabilitate him.

[redacted] Ruling from the bench, the trial court stated that the charge of rape itself satisfies the first statutory factor because it is a serious offense requiring the use of violence. The trial court also stated that appellant's school records indicated numerous infractions followed by suspension and that appellant's character traits and mental maturity indicated his prospect for rehabilitation was not very good. Accordingly, the trial court denied the motion to transfer to juvenile court. We cannot say these findings are clearly erroneous.

[redacted] We have repeatedly held that the crime of rape is by definition a violent offense. *See, e.g., Davis*, 319 Ark. 613, 893 S.W.2d 768. Appellant's argument that the crime of rape, in order to be classified as violent, requires additional threats or physical abuse independent of the rape is wholly without merit. This court has previously affirmed, without hesitancy, a circuit court's denial of a motion to transfer a rape case to juvenile court upon the sole factor of the serious and violent nature of the crime of rape. *Wicker* v. *State*, 310 Ark. 580, 839 S.W.2d 186 (1992). In addition, this court has affirmed a circuit court's retention of jurisdiction of a rape case against a juvenile defendant who was accused of raping a thirteen-year-old victim. *Slay*, 309 Ark. 507, 832 S.W.2d 217. Our affirmance in *Slay* was based not only on the serious and violent nature of the crime of rape, but also on the school records of the juvenile defendant Slay, which are remarkably similar to the school records admitted in the current case in that they both indicated a proclivity toward aberrant sexual behavior despite successful attempts at counseling both defendants. We see no distinction between this case and *Slay*. Furthermore, we observe that, under prior law, this court has affirmed the denial of a transfer of a rape case from circuit court to juvenile court when the juvenile was mildly retarded and the victim was a child of only eight years. *Allen* v. *State*, 253 Ark. 732, 488 S.W.2d 712 (1973). Based on these cases and their similarity to the present case, we cannot say the trial court's decision was clearly erroneous.

Accordingly, we affirm the circuit court's order denying the motion to transfer this case to juvenile court.

GLAZE, J., concurs, *see Boyd* v. *State*, 313 Ark. 171, 853 S.W.2d 263 (1993), and would consider readdressing *Boyd.*

BROWN, J., concurs.

NEWBERN and ROAF, JJ., dissent.

ROBERT L. BROWN, Justice, concurring. Because the confession of Ring may have been admissible if Ring was tried as an adult but would not have been in juvenile court, it was error to admit it for purposes of the juvenile transfer hearing. Regardless, though, the circuit judge made his ruling concerning the seriousness and violence employed in the alleged crime based on the charge brought against Ring — not his confession. As the majority opinion emphasizes, that is enough to sustain a decision not to transfer. Hence, I concur in the affirmance while recognizing the error in allowing the confession into evidence at the hearing.

DAVID NEWBERN, Justice, dissenting. It may well be the enactment of the current Juvenile Code was a bad idea. That is not for us to say. If the notion of offering special protections to juveniles in the hope of putting them on a separate track ending somewhere other than the Department of Correction has been found unworkable, it should be up to the General Assembly to declare it. In the meantime we should try to follow the Code and not weaken it to the point where it becomes virtually meaningless.

Perhaps the effect of *Boyd* v. *State*, 313 Ark. 171, 853 S.W.2d 263 (1993), on the purpose of the Juvenile Code is too insidious for recognition. Surely it can be seen, however, that the General Assembly did not intend by the enactment of Ark. Code Ann. § 9-27-317(a)(3) to prevent disclosure of the truth. It must have been enacted to protect children who are at their most vulnerable, in the face of ordinary police tactics, to suggestion and ultimately to misunderstanding which could be avoided by the presence of a parent or counselor.

Once a statement has been taken in violation of the statute, the incentive to proceed in a circuit court rather than a juvenile division of a chancery court becomes, I should think, compelling.

Only by avoiding juvenile proceedings can the State use such a statement.

While it is not my usual practice to continue a skirmish once the battle has been lost, in this instance I must again respectfully dissent for the reasons stated in the dissenting opinion in *Boyd* v. *State, supra.*

ROAF, J., joins in this dissent.

Bruce Lee SIEVERS *v.* CITY OF FORT SMITH

94-958 894 S.W.2d 940

Supreme Court of Arkansas
Opinion delivered March 27, 1995

Sam Sexton. III, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Bruce Lee Sievers was found guilty in Ft. Smith Municipal Court of driving with a suspended driver's license. At the time, he had a valid Arkansas driver's license but a suspended Oklahoma driver's license. He appealed to Sebastian County Circuit Court, and the municipal court judgment was affirmed. He has two points on appeal from the circuit court judgment. He first argues that he did not waive his right to a jury trial. The State admits error on this point and concedes that the matter should be reversed and remanded for a jury trial. We agree that the failure to provide a jury trial was error. *See* Ark. R. Crim. P. 31.2; *Winkle* v. *State*, 310 Ark. 713, 841 S.W.2d 589 (1992). Sievers also contends that the circuit court erred in not dismissing the charge and in entering a judgment of conviction based on a suspended license in Oklahoma because the Oklahoma suspension was contrary to Arkansas law. We agree with Sievers that a dismissal was appropriate under these facts, and we reverse and dismiss.

On November 7, 1993, Sievers was arrested for driving with a suspended license. At the bench trial in circuit court, Arkansas State Police Sergeant Ron Lemons testified that on that date he saw Sievers driving his car above the 55 mph speed limit. Due to other traffic on the roadway, he was unable to check Sievers's speed with his radar. He radioed State Trooper Michael Springer to "pace" Sievers and to stop him. Sergeant Lemons further advised Trooper Springer that Sievers was known to him as Jed Stewart Lineberry and that he had a suspended license in Oklahoma under one or both names. Sergeant Lemons added that he had stopped Sievers in February of 1993 on suspicion of DWI. He said that at that time Sievers did not have an Arkansas driver's license and that his Oklahoma license was shown as suspended. He testified that Sievers was again stopped in September of 1993 for reckless driving and that he had a valid Arkansas driver's license on that occasion. The status of his Oklahoma license was not checked in connection with the September stop.

Trooper Michael Springer testified next. He stated that he

stopped Sievers on November 7, 1993, when he was advised by Sergeant Lemons that Sievers was speeding and driving on a suspended Oklahoma license. He testified that after he stopped Sievers, he ascertained that his Oklahoma driver's license privileges had been suspended. He stated that Sievers did have a current and valid Arkansas driver's license. At that point the City introduced into evidence a certified copy of Sievers's Arkansas driver's license application dated March 10, 1993. On that application Sievers signed the following oath:

> OATH. This is to certify that all information on this application is true and correct and that my driving privilege is not suspended or revoked in this state or any other state nor do I hold a driver's license from any state other than Arkansas.

The application also requested the following information to which Sievers replied:

> Have you ever been licensed in any other state or country. Yes.
>
> If yes, where: OK.

He did not answer the question about whether his driver's license had ever been suspended or revoked in another state. The record does not show that he was ever charged with perjury in obtaining his Arkansas license. *See* Ark. Code Ann. § 27-16-306 (1987).

Trooper Springer testified that following the stop he checked with the Oklahoma Department of Public Safety for the driving record of Bruce Lee Sievers and Jed Stewart Lineberry. On November 15, 1993, he received documentation from the Oklahoma Department showing the current status of Jed Stewart Lineberry's license as "Driver Improvement Suspension." This document gave an expiration date of March 31, 1985. Another document from Oklahoma showed no traffic violations, accidents, or departmental actions of record after June 25, 1983. An order of suspension dated June 25, 1983, was also introduced into evidence by the City. That order notified Jed Stewart Lineberry that his driving privileges would be terminated effective July 25, 1983, and that he would be eligible for reinstatement six months from the date his license was surrendered.

He was also notified that a $25.00 reinstatement fee would be charged.

The state trooper then identified an Oklahoma traffic record on Bruce Lee Sievers which stated that his Oklahoma driver's license had been suspended on September 21, 1984. That driver's license had been used as bail and surrendered on August 27, 1984, for failure to appear. The record indicated an expiration date on the license as 00/00/00. Sievers was notified by mail on September 20, 1984, that his Oklahoma driver's license had been suspended effective September 21, 1984. Trooper Springer acknowledged that the points listed against Sievers/Lineberry on the Oklahoma records would have been over ten years old at the time of the traffic stop on November 7, 1993, and "too old to count against him" in Arkansas.

At the conclusion of the hearing, Sievers moved to dismiss the charge on several grounds, including the fact that there was no evidence of a valid suspension under Arkansas law. The court denied the motion and found Sievers guilty of driving on a suspended license. In doing so the court said:

> I don't think there's any question as to what the police officers have testified to and the documentation that they have provided to the Court here, that Mr. Sievers or Mr. Lineberry was driving on a suspended Oklahoma license. He got an Arkansas license whenever (sic) he wasn't entitled to it. Probably it wouldn't be very hard for him to clear up the Oklahoma business, since it's so old, but he just never did do it.

The court fined Sievers $100 and assessed $62.25 in costs.

Sievers contends on appeal that the trial court erred in denying his motion to dismiss. The statute making it a misdemeanor to drive on a suspended nonresident license provided at the time:

> Any person whose operator's or chauffeur's license or driving privilege as a nonresident has been cancelled, suspended, or revoked *as provided in this act* and who drives any motor vehicle upon the highways of this state while such license or privilege is cancelled, suspended, or revoked is guilty of a misdemeanor;

Ark. Code Ann. § 27-16-303(a)(1) (1987).[1] (Emphasis ours.) The term "suspend" as used in this statute means "to temporarily withdraw, by formal action, a driver's license or privilege to operate a motor vehicle on public highways, which shall be for a period specifically designated by the suspending authority." Ark. Code Ann. § 27-16-206(a) (1987). Suspensions in Arkansas may not exceed a period of one year. Ark. Code Ann. § 27-16-912 (1987).

A suspension that continues for nine or ten years is not temporary under anyone's definition and certainly exceeds the one-year limitation set out under § 27-16-912. The statute under which Sievers was cited requires that the suspension in the foreign state be in accordance with Arkansas law. Ark. Code Ann. § 27-16-303(a)(1) (1987). The prolonged suspension manifestly failed that test. The circuit court believed that it was Sievers's obligation to clear up his record in Oklahoma. However, the lengthy passage of time might also have led Sievers to believe that either his suspension in Oklahoma had expired or his Oklahoma license had expired. Certainly, the Oklahoma records speak in terms of some expiration date.

Suspensions in one state have the effect of precluding a driver from obtaining a license in other states. That is what happens in Arkansas, and recognition of foreign state suspensions is appropriate so long as those suspensions are effective for a fixed period of time. In Arkansas the suspension period may not exceed one year. Foreign state suspensions are not appropriate, though, when they exist for indefinite periods without explanation or reason, and that is the situation in the case before us. We consider it to be the foreign state's obligation to fix time periods for suspensions and expiration dates. Without any action to reinstate on the part of Sievers, at some point during the ten-year period the Oklahoma suspension should have terminated and the license should have expired or been revoked. That did not happen. Accordingly, we will not affirm a misdemeanor conviction based on an Oklahoma suspension that appears to have no end or rationale to it.

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[1]The section was amended by Act 445 of 1993, which became effective January 1, 1994. The amendment changed "operator's or chauffeur's license" to "driver's license."

Reversed and dismissed.

DUDLEY, NEWBERN, and GLAZE, JJ., dissent.

TOM GLAZE, Justice, dissenting. In dismissing this case, the majority court accepts, wholesale, appellant's version of the facts and his misstatements of the law. While this case must be reversed on the jury issue, the court is clearly wrong on the facts and law when dismissing it.

Appellant was convicted of violating Ark. Code Ann. § 27-16-303(a)(1) (Repl. 1994), which provides that "any person whose driving privilege as a nonresident has been suspended as provided in this act and who drives any motor vehicle upon the highways of this state while such privilege is suspended is guilty of a misdemeanor." The issue in this appeal is whether the record shows that, when appellant was stopped and charged under § 27-16-303(a)(1), he was driving on Arkansas highways while he had a suspended nonresident driver's license. The answer is yes.

On November 7, 1993, the officer stopped the appellant on Interstate Highway 540 in Ft. Smith. Appellant's vehicle was a red and white Corvette bearing Oklahoma tags. The officer checked appellant's license and found his Oklahoma driver's license had been suspended. Based on these facts, the officer properly charged appellant with violating § 27-16-303(a)(1). At trial, the officer identified an Oklahoma Department of Public Safety document dated November 15, 1993, reflecting appellant's "current license status" — driver improvement suspension. Under Oklahoma law, the Public Safety Department may temporarily suspend a driver's license, but the suspension cannot exceed one year. Okla. Stat. Ann. §§ 1-173(1988) and § 6-206 (1988); *see also* Okla. Stat. Ann. § 6-208 (1988). In sum, the facts and law clearly support the trial court's decision that appellant was in violation of § 27-16-303(a)(1).

The majority opinion tracts and is misled by appellant's argument and discussion, bearing on appellant's earlier Oklahoma driver's license suspensions in 1983 and 1984. These older suspensions are mere red herrings. The opinion also follows appellant's legal argument which erroneously suggests Oklahoma's law is different from Arkansas's, which provides only for temporary suspended licenses not to exceed one year. As discussed above, Oklahoma law is the same.

This court's duty on review is to view the facts in the appellee's favor and determine if the evidence supports the trial court's holding. The record clearly does. The case should be remanded for a new trial.

DUDLEY and NEWBERN, JJ., join this dissent.

Randy WILSON *v.* STATE of Arkansas

CR 94-1239 895 S.W.2d 524

Supreme Court of Arkansas
Opinion delivered March 27, 1995

Dave Wisdom Harrod, Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Randy Wilson appeals three judgments of conviction for delivery of a controlled substance (marijuana). He was sentenced to 45 years imprisonment as a habitual offender with four or more prior felonies and fined $9,000. His grounds on appeal are that the trial court erred in failing to grant him a continuance of his trial and further failed to run his sentences concurrently. His appeal is meritless, and we affirm.

Wilson's three charges stemmed from the delivery of marijuana to a confidential informant, Bobby Jenkins, on three occasions. The first two occasions occurred on May 11, 1993, and the third occurred on May 22, 1993. Wilson's defense centered

on his contention that he was simply selling marijuana back to Jenkins, who had previously sold the same marijuana to him. He urged that Jenkins was the real drug dealer and that Jenkins sold drugs to minors. Wilson further contended that he was only a marijuana user and that this was by necessity because he suffered from spina bifida and was in constant pain.

On the day of the trial — April 25, 1994 — Wilson moved for a continuance in order to produce four witnesses who he had anticipated would appear at trial voluntarily and testify about Bobby Jenkins's alleged drug dealing: Tim Swank, Mark Green, Chris Stacy, and Chris Stacy's wife. He also stated that he needed to subpoena certain minors who had either purchased drugs from Bobby Jenkins or witnessed his selling drugs. This was the fourth continuance request by Wilson. He had moved for a continuance on December 16, 1993, to enable him to hire an attorney which was granted. He had then subsequently moved for continuances in February and March 1994, which were also granted. The trial court denied the motion and issued forthwith subpoenas for Tim Swank, Mark Green, and Chris Stacy. Two of those witnesses — Tim Swank and Mark Green — testified for Wilson at trial. Wilson and his fiance, Rhonda Coggins, age 17, also testified and stated that Jenkins had sold marijuana to minors.

The jury returned guilty verdicts on the three charges and sentenced Wilson to 15 years and a fine of $3,000 on each charge. Wilson moved that the sentences run concurrently. The trial court cited Wilson's four previous felony convictions and a previous suspended sentence for delivery of controlled substances as reasons militating against concurrent sentences and ran his sentences consecutively for a total prison sentence of 45 years and fines of $9,000.

On appeal, Wilson first asserts error in the trial court's refusal to grant a continuance and urges that the testimony of the missing witnesses would have had a favorable impact for him on the outcome of the case. It is well settled that a motion for a continuance is addressed to the sound discretion of the trial court, and a decision will not be reversed absent an abuse of discretion amounting to a denial of justice. *King* v. *State*, 314 Ark. 205, 862 S.W.2d 229 (1993); *Gonzales* v. *State*, 303 Ark. 537, 798 S.W.2d 101 (1990); *Butler* v. *State*, 303 Ark. 380, 797 S.W.2d 435

(1990). The appellant bears the burden of proving that the trial court's denial of a continuance was an abuse of discretion, and that burden entails a showing of prejudice. *Dansby* v. *State*, 319 Ark. 506, 893 S.W.2d 331 (1995); *Davis* v. *State*, 318 Ark. 212, 885 S.W.2d 212 (1994); *King* v. *State, supra; Rodriguez* v. *State*, 299 Ark. 421, 773 S.W.2d 821 (1989).

Motions for continuances are governed in part by Arkansas Rule of Criminal Procedure 27.3 which provides:

> The court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.

We have denoted several factors to be considered by a trial court in deciding a continuance motion:

> (1) the diligence of the movant, (2) the probable effect of the testimony at trial, (3) the likelihood of procuring the attendance of the witness in the event of a postponement, and (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true.

Cloird v. *State*, 314 Ark. 296, 862 S.W.2d 211 (1993); *French* v. *State*, 271 Ark. 445, 609 S.W.2d 42 (1980).

We question the diligence of Wilson in failing to subpoena his witnesses and in failing to move for a continuance until the day of the trial. But, in addition, the filing of an affidavit by the movant is required under Ark. Code Ann. § 16-63-402(a) (1987). The first sentence of that subsection states:

> (a) A motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made upon affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to obtain it.

We have consistently interpreted § 16-63-402(a) as mandating an affidavit to justify a continuance due to a missing witness when the State objects to the continuance. *Dansby* v. *State, supra; Cloird* v. *State, supra; King* v. *State, supra*. We have further held

that the denial of a continuance when the motion is not in substantial compliance with § 16-63-402(a) is not an abuse of the trial court's discretion. *Marshall* v. *State*, 316 Ark. 753, 875 S.W.2d 814 (1994); *Cloird* v. *State, supra.* Here, the State objected to the continuance in this case, and Wilson filed no affidavit or verified motion in support of his motion.

Moreover, Wilson failed to prove that he was prejudiced by the trial court's refusal to grant a continuance. All the information that he sought to elicit from the absent witnesses was introduced at trial. Green's and Swink's testimony informed the jury that Bobby Jenkins had sold drugs, and Green testified that he had seen Jenkins sell marijuana to Wilson. That Jenkins sold drugs is also the point that Wilson hoped the absent witness, Chris Stacy, would make. Wilson and Coggins both testified that Jenkins had sold drugs to minors. This, too, is the information that Wilson sought to bring to the jury's attention from the absent minor witnesses. In sum, there has been no showing of prejudice by the trial court's denial of the continuance. This absence of prejudice, coupled with the failure to file an affidavit and our perceived lack of diligence on Wilson's part in preparing for trial are all reasons which sustain the trial court's decision.

Wilson's second point on appeal is that the trial court erred in finding his sentences should run consecutively rather than concurrently. It is within the province of the trial court to determine whether sentences should proceed consecutively or concurrently, and the decision is left to the sound discretion of the trial court. *Brown* v. *State*, 316 Ark. 724, 875 S.W.2d 828 (1994); *Patton* v. *State*, 281 Ark. 36, 660 S.W.2d 939 (1983); *Hinton* v. *State*, 260 Ark. 42, 537 S.W.2d 800 (1976). The exercise of that discretion will not be altered on appeal unless it is clearly shown to have been abused. *Brown* v. *State, supra.*

In the present case, the trial court cited Wilson's four previous felony convictions and his failure to avoid a continuation of drug trafficking after a prior probated sentence for the same offense. These reasons for the court's decision on the appropriate sentence to levy are eminently reasonable, and we find no basis for a conclusion that the trial court abused its discretion on this point.

Affirmed.

MAY CONSTRUCTION COMPANY, INC.
v. BENTON SCHOOL DISTRICT NO. 8

94-1138 895 S.W.2d 521

Supreme Court of Arkansas
Opinion delivered March 27, 1995

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

Boswell, Tucker & Brewster, by: *W. Lee Tucker*, for appellee.

ANDREE LAYTON ROAF, Justice. Appellant May Construction Company, Inc., (May Construction) appeals from an order denying its motion to compel arbitration. We affirm the decision of the trial court.

On February 24, 1994, appellee Benton School District No. 8 (Benton) filed a complaint against May Construction in the Circuit Court of Saline County. Benton alleged it entered into a contract in May 1991 with May Construction for the construction of a building to be used as a middle school. According to the complaint, the contract documents set out specifications for curing materials to be used as a sealer on the concrete floors. On July 12, 1991, May Construction requested the use of a substitute curing material and represented that the substitute product met or exceeded the quality level of the original product. Based upon May Construction's assurances, the architect approved the requested change.

In paragraph five of the complaint, Benton further alleged:

> 5. That after application of "Kur-N-Seal 30," the finish on the concrete floors of the building began experiencing gross and unsightly scuff marks from student traffic to the extent that the floors' *appearance became totally unacceptable* in that the sealer was magnifying all traffic in an unsightly manner. The floors became sticky in some areas and remain so at this time. That the finished product fails to comply with the plans and specification[s] set out in the contract and is totally unacceptable to Plaintiff. That notwithstanding Plaintiff's demand, Defendant has failed and refused to comply with the contract.

(Emphasis supplied.) In addition, Benton alleged May Construction negligently failed to properly apply the substituted product, negligently failed to properly clean the pre-finished floors, negligently supplied a defective product, breached its implied warranty of merchantability, and breached its expressed warranty of fitness for a particular purpose.

In response to Benton's complaint, May Construction filed a motion to stay proceedings and compel arbitration. May Construction admitted the parties entered into a contract for the construction of the building; however, May Construction contended the contract incorporated Act 260 of 1969 as amended [Uniform Arbitration Act, Ark. Code Ann. §§ 16-108-201 - 224 (1987 and Supp. 1993)] and the "General Conditions of the Contract for Construction, Document A201 of the American Institute of Architects, 1987 Edition." Pursuant to the terms of these provisions, May Construction requested Benton be compelled to submit to arbitration. Benton responded that controversies or claims relating to "aesthetic effect" are not subject to arbitration under the terms of the agreement.

The trial court found "aesthetic affect" claims are not subject to arbitration and the complaint encompasses claims relating to "aesthetic affect" of the finished product. Therefore, the trial court denied the motion to stay proceedings and compel arbitration. The sole issue on appeal is whether the trial court erred in denying May Construction's motion to compel arbitration.

We have recognized this state's strong public policy favoring arbitration. *Chem-Ash, Inc.* v. *Arkansas Power & Light Co.*, 296 Ark. 83, 751 S.W.2d 353 (1988). Further, we have written:

> The same rules of construction and interpretation apply to arbitration agreements as apply to agreements generally, thus we will seek to give effect to the intent of the parties as evidenced by the arbitration agreement itself. 5 Am. Jur. 2d § 14; and *see Prepakt Concrete Co.* v. *Whitehurst Bros.*, 261 Ark. 814, 552 S.W.2d 212 (1977). It is generally held that arbitration agreements will not be construed within the strict letter of the agreement but will include subjects within the spirit of the agreement. Doubts and ambiguities of coverage should be resolved in favor of arbitration. 5 Am. Jur. 2d § 14; Uniform Laws Annotated, Vol. 7, Uniform Arbitration Act, § 1, Note 53 (and cases cited therein).

Wessell Bros. Foundation Drilling Co. v. *Crossett Pub. School Dist., No. 52*, 287 Ark. 415, 701 S.W.2d 99 (1985). Finally, the construction and legal effect of a written contract are to be deter-

mined by the court as a question of law except where the meaning of the language depends upon disputed extrinsic evidence. *Duvall* v. *Massachusetts Indem. & Life Ins. Co.*, 295 Ark. 412, 748 S.W.2d 650 (1988).

Section 4.5.1 of the General Conditions of the Contract for Construction provides in part:

> **Controversies and Claims Subject to Arbitration.** Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, *except controversies or Claims relating to aesthetic effect* and except . . .

(Emphasis supplied.) On appeal, the appellant contends the plaintiff's complaint is based upon breach of contract rather than "aesthetic effect." We hold, however, that the plaintiff's complaint is based upon a question concerning "aesthetic effect." "Aesthetic" is defined as "pertaining to a sense of the beautiful or to the science of aesthetics." *The Random House Dictionary of the English Language* (2d ed. 1987).

If the *appearance* of the concrete floors was not "totally unacceptable" as the plaintiff contends, then there would be no claim. Granted, the plaintiff's complaint refers to May Construction's negligently supplying a defective product and breach of warranties. However, if the aesthetic effect of the floors was not unacceptable, the product would not be defective and the warranties would not be breached. The plaintiff does not contend that the floor has cracked or been damaged due to defective sealer. Rather, the plaintiff contends the floors began experiencing "unsightly scuff marks." The contract provides "controversies or Claims relating to aesthetic effect" are not subject to arbitration.

Finally, the appellant has not abstracted the complete contract, nor is it in the record. Therefore, contrary to the appellant's argument, we do not know whether Benton contracted "to make the floor beautiful." It is the appellant's burden to bring

up a record sufficient to demonstrate error. *Young* v. *Young*, 316 Ark. 456, 872 S.W.2d 856 (1994). When an appellant fails to demonstrate error we will affirm. *Id.*

Affirmed.

BROWN, J., not participating.

Robert L. WRIGHT and Robert A. Wright
v. Bonnie EDDINGER

94-816 894 S.W.2d 937

Supreme Court of Arkansas
Opinion delivered March 27, 1995
[Rehearing denied April 24, 1995.]

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

Easley, Hicky & Clive, by: *B. Michael Easley*, for appellant.

ANDREE LAYTON ROAF, Justice. This case involves the construction and interpretation of the Arkansas Rules of Civil Procedure. The principal point on appeal is whether under ARCP Rule 41(a) a trial court may grant a request for voluntary nonsuit where the trial court has announced its decision to grant the defendants' motions for summary judgment but the order has not been entered. We hold the granting of a voluntary nonsuit after final submission of the case is within the trial court's discretion. In accordance, we hold the trial court did not abuse its discretion and affirm the granting of the appellee's voluntary nonsuit.

On March 3, 1990, appellee Bonnie Eddinger was involved in an automobile collision in West Memphis, Arkansas. The driver of the other vehicle was appellant Robert Allen Wright. The accident report listed "Robert Wright" as operator and reported his address as 921 Rosewood, West Memphis, Arkansas. On March 3, 1993, the appellee filed a complaint in the Circuit Court of Crittenden County against "Robert Wright" and an insurance company. The complaint and summons named "Robert Wright"

and were mailed certified to 921 Rosewood, West Memphis. However, process was served upon appellant Robert L. Wright, the father of the Robert Wright who was driving the vehicle. Robert L. Wright filed a timely answer admitting jurisdiction and that the accident occurred; however, he denied that "this defendant was in any way negligent with regard to the occurrence." On July 6, 1993, several days after expiration of the time which appellee had to obtain proper service pursuant to ARCP Rule 4(i), Robert L. Wright moved for summary judgment on the basis that he was not the operator of the vehicle identified in the plaintiff's complaint. He acknowledged that his son, Robert A. Wright, was the operator of the vehicle.

On July 30, 1993, the appellee amended her complaint to include Robert Allen Wright of Nashville, Tennessee, as a defendant based on information provided by Robert L. Wright in discovery. Robert A. Wright filed a timely answer, and, on August 24, 1994, he also moved for summary judgment, on the basis that the action was barred by the statute of limitations. The same attorney represented both father and son.

A hearing was held on March 10, 1994, and the appellants' motions for summary judgment were argued to the trial court. During the hearing, counsel for the appellee conceded Robert L. Wright was not the correct "Robert Wright." Consequently, the trial judge stated he would grant the motion for summary judgment dismissing Robert L. Wright from the complaint. During the remainder of the hearing, the court entertained arguments regarding Robert Allen Wright's motion for summary judgment. At the conclusion of the hearing, the trial court indicated "I'm going to grant your motion for summary judgment." However, on March 18, 1994, the appellee filed a "Supplemental Memorandum Brief Resisting Defendant's Motion for Summary Judgment" in which she argued summary judgment was not proper and, in the alternative, requested a voluntary nonsuit pursuant to ARCP Rule 41(a). The appellants filed a response to Eddinger's memorandum on March 22, 1994.

The trial court granted the appellee's request to nonsuit without prejudice, and an Order of Nonsuit was entered on April 14, 1994. The trial court never entered any orders granting the summary judgments. Subsequently, the appellants moved to set aside

the order of nonsuit; however, after conducting a hearing, the trial court denied the motion.

On appeal, the appellants submit: (1) the circuit court erred in permitting the plaintiff to nonsuit her complaint after announcing that summary judgment would be entered in favor of the defendants but before the orders for summary judgment were entered, and (2) the circuit court erred by abusing any discretion it might have had in permitting the plaintiff to take a voluntary nonsuit after announcing that summary judgment was being entered on the plaintiff's complaint.

Arkansas Rule of Civil Procedure 41 provides in part:

> (a) **Voluntary dismissal: Effect Thereof.** Subject to the provisions of Rule 23(d) and Rule 66, 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 where the trial is by the court, provided, however, that such dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, . . .

We have held that the privilege to take a voluntary nonsuit is an absolute right prior to final submission to a jury or to the court sitting as a jury. *Lemon* v. *Laws*, 305 Ark. 143, 806 S.W.2d 1 (1991); *Whetstone* v. *Chadduck*, 316 Ark. 330, 871 S.W.2d 583 (1994); *Duty* v. *Watkins*, 298 Ark. 437, 768 S.W.2d 526 (1989).

Accordingly, we must first determine whether the nonsuit occurred before the "final submission of the case." If the nonsuit was requested before the final submission of the case, then the voluntary nonsuit was an absolute right. If the nonsuit was requested after final submission of the case, then we must determine whether it was within the trial court's discretion to grant a nonsuit under the instant circumstances.

We have noted that a case is not submitted until the argument is closed and the case submitted to the jury or the Court. *Haller* v. *Haller*, 234 Ark. 984, 356 S.W.2d 9 (1962); *See also Mutual Benefit Health & Accident Assoc.* v. *Tilley*, 174 Ark. 932, 298 S.W. 215 (1927). In *Duty* v. *Watkins, supra*, a hearing was held in reference to a defendant's motion to dismiss the com-

plaint for failure to answer discovery requests. The plaintiff appeared at the hearing and requested a nonsuit under ARCP 41(a); however, the trial court granted the defendant's motion to dismiss. We held a nonsuit should have been granted where the "case had not been finally submitted because, although the case had come to a hearing, the argument was not yet closed."

In *Mutual Benefit Health & Accident Assoc.* v. *Tilley, supra*, we affirmed the trial court's finding that a nonsuit was requested before final submission of the case. This Court stated the relevant facts as follows:

> At the *close of the testimony* the court indicated to the attorney for the appellee [plaintiff] that the proof was not sufficient to justify a recovery, and thereupon the attorney for the appellee asked leave to take a nonsuit, which leave the court granted, and dismissed the action without prejudice.

(Emphasis supplied.) In affirming the trial court's decision to grant the nonsuit, the Court wrote:

> Here, notwithstanding the court had indicated to the counsel for the plaintiff that the court did not think the proof sufficient to justify a recovery, counsel for plaintiff still had the right to ask permission to argue his client's cause before the court; and there is nothing in the record to show that the court, if asked, would have denied him this right and privilege. If counsel had availed himself of this right and privilege, he might have been able to convince the court that its view of the testimony before hearing the argument of counsel was erroneous and thus induced the court to find in favor of his client. Instead of taking this course, counsel for plaintiff elected to take a nonsuit, which he had a right to do.

In the instant case, the appellee contends the argument had not been concluded because she filed a Supplemental Memorandum in the "nature of a motion for reconsideration." However, under the appellee's theory, the losing party could simply submit a brief after the trial court's ruling and contend the case was never finally submitted. Further, there is no indication in the record that the trial court requested further argument. The hear-

ing had concluded and counsel had made its argument to the court. Although the case was submitted on motions for summary judgment, an adverse ruling to the plaintiff would finally dispose of the case. Consequently, we hold the case had been submitted to the court. *See Duty, supra.*

Even assuming the case was submitted, we hold the trial court did not abuse its discretion in granting the voluntary nonsuit. After final submission, the motion for voluntary nonsuit is within the discretion of the trial court. *Haller* v. *Haller*, 234 Ark. 984, 356 S.W.2d 9 (1962) (interpreting Ark. Stat. Ann. § 27-1405 (superseded)); *Fortuna* v. *Achor*, 254 Ark. 1035, 497 S.W.2d 251 (1973); *Raymond* v. *Young*, 211 Ark. 577, 201 S.W.2d 583 (1947); D. Newbern, *Arkansas Civil Prac. & Proc.*, §§ 22-2 and 22-3 (2d. ed. 1993). Although these decisions were based on superseded statutes, we have recognized that the superseded statutes were virtually identical to Rule 41(a) and the cases construing Rule 41(a) have interpreted it the same way the superseded statute was interpreted. *Duty* v. *Watkins, supra; Lemon* v. *Laws, supra*; D. Newbern, *Arkansas Civil Prac. & Proc.*, §§ 22-2 and 22-3 (2d. ed. 1993).

[redacted] The appellants principally contend "the court abused its discretion since it is not apparent from the record that any good purpose would be served by such action and since the Plaintiff failed to show good cause as to why the Plaintiff delayed in seeking to nonsuit her Complaint." However, the appellants have the burden of demonstrating the trial court abused its discretion. *See Jones* v. *State*, 317 Ark. 131, 876 S.W.2d 262 (1994); *Burnett* v. *State*, 299 Ark. 553, 776 S.W.2d 327 (1989). Under the unique circumstances presented, we cannot conclude the trial court abused its discretion.

[redacted] Finally, the appellee contends in her brief that ARCP Rule 11 sanctions should be assessed against the counsel for the appellants. The appellee submits she sought Rule 11 sanctions below; however, the trial court did not grant the request. Because the appellee seeks affirmative relief, she is precluded from raising this argument on appeal since she did not file a cross appeal. *See Edwards* v. *Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993).

In addition, the appellee filed a motion with this Court requesting Rule 11 sanctions. The Rules of Civil Procedure gov-

ern only the procedure in the circuit, chancery, and probate courts; therefore, we do not consider the appellee's motion for Rule 11 sanctions. *See* ARCP Rule 1; *Widmer* v. *Touhey*, 297 Ark. 85, 759 S.W.2d 562 (1988) (Glaze, J., concurring).

Affirmed.

GLAZE, and BROWN, JJ., concur.

Christine M. JONES *v.* Jerry A. JONES

CA 94-1022 896 S.W.2d 431

Supreme Court of Arkansas
Opinion delivered March 27, 1995

The Perroni Law Firm, by: *Samuel A. Perroni*, for appellant.

Helen Rice Grinder, for appellee.

PER CURIAM. Jerry A. Jones, the appellee, by motion asked the Court of Appeals to allow him to submit a brief of 40 pages, 15 pages in excess of the 25-page limit for argument found in Rules of the Supreme Court and Court of Appeals 4-1(a). The Court of Appeals denied the motion.

Mr. Jones then submitted a brief the argument section of

which was within the 25-page limit. Christine M. Jones, the appellant, moved before the Court of Appeals to strike the brief because the type was 16 point rather than the 10 point specified by Rule 4-1(a). The Court of Appeals certified the motion to this Court because it requires interpretation of the Rule.

The pertinent part of Rule 4-1(a) presently reads as follows: "If a standard typewriter is used, type shall be no smaller than 10 point, i.e., 10 characters to the inch. If a computer or word processor is used, the type shall be no smaller than a 10 pitch font."

In our consideration of this matter, we have learned that a 10 pitch font may be used to produce characters so small that far more than 10 may be placed in a one-inch space. We are amending our Rule by a separate *per curiam* order of this date to specify, in pertinent part: "The style of print shall be either mono-spaced, measured in characters per inch, not to exceed 10 characters per inch, or produced in a proportional serif font, measured in point sizes, not to be less than 12 points."

We overrule the motion to strike Mr. Jones's brief because it complied with the Rule as written when the brief was submitted. We appreciate the Court of Appeals having brought this matter to our attention and trust the revision of the rule will prevent its recurrence.

GLAZE, J., not participating.

Ivan Floyd PIPKIN *v.* STATE of Arkansas

CR 94-515 896 S.W.2d 432

Supreme Court of Arkansas
Opinion delivered March 27, 1995

PER CURIAM. The procedural background in this matter is set forth in our *per curiam* opinion delivered on January 30, 1995. *Pipkin* v. *State*, 319 Ark. 371, 892 S.W.2d 241 (1995). Attorney A. Wayne Davis, counsel for appellant Ivan Floyd Pipkin, was cited to appear before this court on February 6, 1995, to show cause why he should not be held in contempt for failing to file the abstract and brief in his client's case and for failing to pay the $500 fine levied in our *per curiam* opinion of January 9, 1995. *See Pipkin* v. *State*, 319 Ark. 237, 892 S.W.2d 240 (1995). Mr. Davis did not appear on February 6, 1995.

The Clerk of the Arkansas Supreme Court, in a letter dated March 8, 1995, informed Mr. Davis of the outstanding January 30 *per curiam* order and advised him that he was directed to appear on March 13, 1995, and show cause why he should not be held in contempt for failure to file briefs in the *Pipkin* appeal. During his appearance before this court on March 13, 1995, Mr. Davis stated that he had paid the $500 fine but acknowledged that he still had not filed the appellate brief.

The following exchange occurred between Chief Justice Jack Holt, Jr., and Mr. Davis on Monday, March 13, 1995:

> *Chief Justice Holt*: All right, let's go on to the second issue. The fine has been paid; what about the brief?
>
> *Mr. Davis*: The brief will be filed not later — I will not be able to rest until it is done — it should be filed by Wednesday [March 15], not later than Friday [March 17]. It is with much humility and embarrassment that I am out here again, and I will not be able to rest until I get this brief finished — and it is substantially finished. What I've done is that I decided to add another point to the — all the abstracts are done.
>
> *Chief Justice Holt*: Did you not tell Judge Cracraft [the Master] back in December that it would be in in a few days?
>
> *Mr. Davis*: That is correct. I did, and, Your Honor, at the time I thought I would be able to complete that, but there was some circumstances created there that necessitated me leaving the state, and I just simply could not — and we started this jury trial at the end of January — first of Feb-

> ruary — February 2nd. At that time, I thought I — it was reasonable for me to anticipate being completed by that time, and some things happened.
>
> *Chief Justice Holt*: Did you make any attempt to notify anyone or make any motions for continuance?
>
> *Mr. Davis*: No. After the hearing with Judge Cracraft, I visited with Mr. Steen [the Clerk], and I was going to bring the brief in.

Mr. Davis failed to file the brief on either March 15 or March 17, the dates he indicated at his show-cause hearing. Indeed, as of this date, the brief in question has not been filed.

Before a person may be held in contempt for disobeying a court order, that order must be couched in definite terms with respect to the duties imposed upon him, and the command must be expressed rather than implied. *McCullough* v. *Lessenberry*, 300 Ark. 426, 780 S.W.2d 9 (1989). The duties imposed upon Mr. Davis in our *per curiam* orders were precise in expression. Therefore, pursuant to the authority granted by Ark. Code Ann. § 16-10-108(a)(3) (Repl. 1994), we declare Mr. Davis to be guilty of criminal contempt for his willful and continued disobedience of this court's *per curiam* orders directing him to file the abstract and brief in the above-styled criminal appeal.

It has long been held that the right to punish for contempt is inherent in all courts. *Edwards* v. *Jameson*, 284 Ark. 60, 679 S.W.2d 195 (1984); *Neel* v. *State*, 9 Ark. 259, 50 Am. Dec. 209 (1849). We hereby order Mr. Davis to be imprisoned for five (5) days for criminal contempt. Accordingly, we direct the Arkansas State Police to take immediate custody of Mr. Davis and to deliver him forthwith to the Pulaski County Regional Detention Facility.

GLAZE, J., not participating.

Robert STUBBS *v.* STATE of Arkansas

CR 95-240 896 S.W.2d 430

Supreme Court of Arkansas
Opinion delivered March 27, 1995

Bill Luppen, for appellant.

No response.

PER CURIAM. The appellant, Robert Stubbs, has filed a motion for rule on the clerk. His attorney, Bill Luppen, admits that the record was prematurely and untimely filed due to a mistake on his part. We find that such admission of fault by an attorney in a criminal case is good cause to grant the motion. *See Tarry* v. *State*, 288 Ark. 172, 702 S.W.2d 904 (1986).

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

DUDLEY, J., not participating.

Christopher Lindsey WATKINS *v.* STATE of Arkansas

CR 94-659 895 S.W.2d 532

Supreme Court of Arkansas
Opinion delivered April 3, 1995

Evelyn L. Moorehead, for appellant.

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

JACK HOLT, JR., Chief Justice. The appellant, Christopher Lindsey Watkins, raises two points for reversal in this appeal from his conviction of the offense of attempted murder. He argues that the trial court erred in (1) not declaring Acts 535 and 551 of 1993 unconstitutional and (2) not allowing cross-examination of a witness for the prosecution on a previous criminal history involving theft. Neither issue has merit, the first having been recently addressed in *Williams* v. *State*, 318 Ark. 846, 887 S.W.2d 530 (1994), and reiterated in *Diffee* v. *State*, 319 Ark. 669, 894 S.W.2d 564 (1995) (rev'd on other grounds). We therefore affirm the judgment of the trial court.

It should be noted at the outset that this court has jurisdiction in the present matter, despite the fact that the appellant's term of incarceration is thirty years, because the constitutionality of an act of the General Assembly was called into question. Ark. Sup. Ct. R. 1-2(a)(3).

Facts

Shortly after 4:00 p.m. on Friday, September 25, 1992, Teresa Sims, a secretary at Parkview High School in Little Rock, heard the front-office intercom buzz. When she responded, she heard a scream from a classroom. Ms. Sims alerted the school security officer, Jill Makowsky, and the two went to investigate. Ms. Sims reached the classroom first and, looking through the window of the locked door, saw the appellant, Christopher Watkins, standing over someone who was lying on the floor. She noticed blood "all over the floor and some on the person."

When Ms. Makowsky arrived at the classroom, she pulled on the bolted door and ordered Watkins to open it. Watkins refused, saying, "Go around. The other door's open." Ms. Makowsky found no other entrance into the classroom. Meanwhile, at Ms. Makowsky's direction, Ms. Sims left to call 911.

The lights in the classroom had been turned off, but Ms.

Makowsky was able to see a teacher, Debbie Fulbright, on the floor and a pocket knife cupped in Watkins's hand. She then went to the cafeteria where the football team was meeting and sought assistance. One of the adults returned with her to the classroom, from which Watkins was emerging. Ms. Makowsky instructed him to leave and watched him walk "real calmly" around a wall and up a hallway.

At that point, Ms. Makowsky ran into the classroom and spoke to Mrs. Fulbright, who was lying in blood. The assistant principal, Anne Hansen, appeared, and she and Ms. Makowsky asked Mrs. Fulbright who had stabbed her. Mrs. Fulbright stated that Chris Watkins had done it because he had received a "behavioral document." Ms. Hansen and Ms. Makowsky kept talking to her until the emergency services arrived. During that period, Mrs. Fulbright continued to repeat the name "Chris."

Mrs. Fulbright was subsequently diagnosed in a hospital emergency room as being in a state of "profound shock," having sustained multiple knife wounds and having lost about half of her blood volume. Approximately five or six hours of surgery were required that night and additional surgery the following week.

Before this incident occurred, James Alden, a Parkview student, also received from Mrs. Fulbright a "behavioral document" similar to that given Watkins. He testified that Watkins had showed him a knife after they had received their behavioral documents and had told him that he was going to stab Mrs. Fulbright.

Watkins was arrested on the same day of the attack and was charged by information with the felony offense of criminal attempt to commit murder in the first degree, pursuant to Ark. Code Ann. § 5-3-201 (Repl. 1993). Prior to Watkins's initial trial, the Arkansas General Assembly met in regular session and passed Acts 535 and 551, identical legislation setting forth new sentencing guidelines and procedures in felony criminal cases. Under the new acts, a bifurcated sentencing procedure was mandated after January 1, 1994, for a period extending to June 30, 1997, replacing the previous unitary system in which punishment was fixed by the jury at the same time that guilt was determined.

In December 1993, Watkins was tried under the earlier uni-

tary procedure. A mistrial was declared due to a hung jury. In mid-February 1994, after the effective date of Acts 535 and 551, a second trial was conducted. During that trial, Watkins filed a motion requesting the trial court to find Act 535 of 1993, as codified at Ark. Code Ann. § 5-4-103 (Repl. 1993) and Ark. Code Ann. § 16-97-101 *et seq.* (Supp. 1993), unconstitutional, arguing, among other things, that, by making the bifurcation process applicable to offenses occurring before its effective date, the act violates the *ex post facto* requirements of Article I, § 9(3) of the United States Constitution and Article 2, § 17 of the Arkansas Constitution; that, by allowing victim-impact statements, the act violates the requirements of *Payne* v. *Tennessee*, 111 S.Ct. 2597 (1991); and that the bifurcation process violates the Due Process and Equal Protection Clauses of the United States and Arkansas Constitutions. The trial court denied the motion.

In the second trial, the jury found Watkins guilty of attempted first-degree murder. During the penalty phase, the jury received victim-impact testimony and other evidence and fixed Watkins's sentence at thirty years. From that judgment, this appeal arises.

I. Constitutionality of Act 535 and 551 of 1993

On Friday, February 18, 1994, the second day of trial, Watkins filed a written motion requesting the trial court to declare Act 535 of 1993 unconstitutional. The trial court denied the motion. It is Watkins's position on appeal that the bifurcation procedures set forth in Acts 535 and 551 were applied retroactively to him; that the attempted first-degree murder occurred on September 25, 1992; and that the bifurcated procedure did not become effective in Arkansas circuit courts until January 1, 1994.

The trial court found that the motion was untimely and, further, that the Attorney General had not been notified and that the motion had no merit. Granted, the effective date of the legislation accounts for the fact that the motion was not filed at the time of the first trial. The change in the law, however, cannot afford extenuation for Watkins's failure to file his motion at the earliest opportunity.

At the very outset of the first day of trial, Thursday, February 17, 1993, the trial court conducted a proceeding under the heading of "Bill of Exceptions" in which witnesses and other

trial-related matters were discussed at length. Watkins had ample opportunity at that point to make his motion concerning the constitutionality of Act 535, yet he announced that he was ready for trial. He elected to wait until the second day of trial, Friday, February 18, 1993, to file his motion and alerted the court of its pendency only on the third day of trial, Tuesday, February 22, 1993.[1] An issue must be presented to the trial court at the earliest opportunity in order to preserve it for appeal. *Fuller* v. *State*, 316 Ark. 341, 872 S.W.2d 54 (1994).

We hold that the motion in question was untimely and that the trial court did not err in denying it. For this reason, it is unnecessary for us to address the subpoints relating to *ex post facto* application, due process, equal protection, and victim-impact evidence.

II. Witness's previous criminal history

At trial, James Alden, a Parkview student who, along with Watkins, received a behavioral document from Mrs. Fulbright on September 25, 1992, testified that, after the two had been written up, "Chris told me that he was going to stab Mrs. Fulbright, but I didn't believe him. And then he showed me a knife." Alden stated that Watkins had "said like he was going to stab other teachers and stuff like that before" and that he didn't believe he was serious, even after he displayed the knife.

Subsequently, outside the hearing of the jury, defense counsel proffered information, through voir dire of the witness, that Alden had stolen a gun:

Q Have you ever stolen a gun?

A Yes, ma'am. But I'm not proud of that.

Q Okay. Have you ever lied about it?

A To my mom and other people.

The trial court declined to allow counsel to cross-examine Alden about the stolen gun, ruling that Ark. R. Evid. 608(b) does not permit the introduction of proof by extrinsic evidence of specific

[1]No court session was held on Monday, February 21, 1993, a holiday.

instances of the conduct of a witness for the purpose of attacking or supporting credibility other than conviction of a crime as provided by Rule 609.

Under Ark. R. Evid. 609(a), it is provided that

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment.

According to Watkins, his counsel should have been able, under Rule 609(a), to ask Alden whether he had ever stolen a gun. Yet nowhere in the record does there appear proof that Alden had been convicted of an offense entailing one year or more imprisonment or involving dishonesty or false statement, a prerequisite under Rule 609(a).

Further, Watkins's effort to cross-examine Alden was denied specifically on the basis of Rule 608(b), which focuses on the character of the witness for truthfulness or untruthfulness. Whether Alden had previously stolen a gun was not probative of truthfulness. *See Rhodes* v. *State*, 276 Ark. 203, 634 S.W.2d 107 (1982), where we held that an absence of respect for the property rights of others, though an undesirable trait, does not directly indicate an impairment of the trait of truthfulness. The trial court did not err in refusing to permit cross-examination of Alden with respect to the previous theft of a gun.

Affirmed.

Susan Jayne BOHANNON *v.*
ARKANSAS STATE BOARD OF NURSING

94-1092 895 S.W.2d 923

Supreme Court of Arkansas
Opinion delivered April 3, 1995

Law Office of Connie Mitchell, by: *Connie Mitchell*, for appellant.

Winston Bryant, Att'y Gen., by: *John D. Harris*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant is a registered nurse who was charged by the Arkansas State Board of Nursing with violating Ark. Code Ann. § 17-86-309(a)(4) and (6) (Repl. 1992) as being "habitually intemperate or . . . addicted to the use of habit forming drugs" and "guilty of unprofessional conduct." The Board heard extensive testimony and concluded that appellant diverted controlled substances to herself and then falsified medical records to reflect that the drugs had been given to patients at both Bates Memorial Hospital in Bentonville and Eureka Springs Memorial Hospital. The Board suspended her license for three years and set out conditions for reinstatement.

Appellant appealed the Board's decision to circuit court. The circuit court affirmed the Board's ruling, and appellant appeals. We affirm the Board's ruling.

I.

Appellant's abstract is flagrantly deficient. *See* Ark. Sup. Ct. R. 4-2(b)(2). It does not contain a summarization of the pleadings or the Board's findings of fact and conclusions of law. Her abstract of the pleadings is as follows: "On May 27, 1993, the Arkansas State Board of Nursing sent its Order and Notice of Hearing to Susan Jayne Bohannon seeking to suspend and/or revoke her nursing license for alleged violations of Ark. Stat. [sic] Ann. § 17-86-309(a)(4) and (a)(6)."

Her abstract of the Board's order is as follows:

> After a hearing which occurred on August 11, 1993, on August 17, 1993 the Arkansas State Board of Nursing entered its Order suspending Susan Jayne Bohannon's nurs-

> ing license in Arkansas. The Arkansas State Board of Nursing ordered that Susan Jayne Bohannon's nursing license in Arkansas be suspended for three years with conditions placed on reinstatement.

The findings of fact made by the Board are not abstracted.

We have held that a summary of the pleadings and the judgment appealed from are the bare essentials of an abstract. *Logan County* v. *Tritt*, 302 Ark. 81, 787 S.W.2d 239 (1990); *Jolly* v. *Hartje*, 294 Ark. 16, 740 S.W.2d 143 (1987). Appellant has failed to provide this. Yet, one of her points of appeal contains the following argument: "The Board's decision merely makes conclusory statements in violation of statutory authority."

The rules provide that the abstract shall consist of "an *impartial* condensation, without comment or emphasis" and that testimony be abstracted in first person. Ark. Sup. Ct. R. 4-2(a)(6) (emphasis added). Neither requirement has been met. The testimony provided is in third person, and it includes only those parts of the testimony that support appellant's arguments. For example, the abstracted testimony of Salena Wright, Nurse Manager of the Emergency Department at Bates Memorial Hospital, merely states that appellant notified the Director of Nursing that drug vials had been tampered with and that Ms.Wright had no personal knowledge of who diverted drugs at the hospital. Yet, Ms. Wright's testimony contains references to appellant's job performance and her refusal to submit to drug testing, and both of these facts bear directly on the propriety of the Board's decision.

The abstract of testimony incorporates arguments within the supposed testimony. For example, the testimony of Jim Bona is abstracted as follows:

> Mr. Bona read a report attached as Exhibit 2. The report contained hearsay which was objected to. Attachment 3 Report of Chemist was admitted without allowing cross-examination, Chapter 11, Section 10 (j) of the Rules of the Board and contained hearsay within hearsay. The report contained statements from persons present to testify, and Attachment 11 contained information that was irrelevant. Reports on patients were included that were identified by initials only thereby denying Susan Jayne Bohannon the right to cross-examination.

Another example is the following interjection of argument within supposed abstract of Beverly Terrell's testimony:

> Ms. Terrell's boss was seated in the Board Room and had been called by the attorney for the Board and the witness had ridden in the same vehicle to Little Rock with her boss and another witness for the attorney for the Board.

[redacted] In *Haynes* v. *State*, 314 Ark. 354, 862 S.W.2d 275 (1993), we said such similarly selective abstracting constituted "egregious acts of omission and commission [which] go beyond mere oversight and constitute a gross violation of Rule 4-2(a)(6)." *Id.* at 357, 862 S.W.2d at 277. However, we addressed the merits because the State supplemented the abstract. *Id.* Similarly, in this case appellee Board has supplied a supplemental abstract of the testimony, but has not included a summary of pleadings or of the Board's order. Since appellant's abstract is flagrantly deficient, we summarily affirm all points of appeal except the point involving sufficiency of the evidence, and we determine that point only because the Board chose to supply a supplemental abstract which sets out the testimony involving that point.

II.

[redacted] We now turn to the only point we reach — whether the Board's decision was supported by substantial evidence. Judicial review of decisions of the Arkansas State Board of Nursing is governed by the Arkansas Administrative Procedure Act pursuant to Ark. Code Ann. § 25-15-212 (Repl. 1992). If there is any substantial evidence to support the agency's decision, the reviewing court will not reverse. *Arkansas Contractors Licensing Bd.* v. *Butler Constr. Co.*, 295 Ark. 223, 748 S.W.2d 129 (1988). Substantial evidence is valid, legal, and persuasive evidence that a reasonable mind might accept to support a conclusion and force the mind to pass beyond speculation and conjecture. *Woodyard* v. *Arkansas Diversified Ins. Co.*, 268 Ark. 94, 594 S.W.2d 13 (1980). To prove an absence of substantial evidence, appellant must show that fair-minded persons could not reach the same conclusion. *Arkansas Health Planning & Dev. Agency* v. *Hot Spring County Memorial Hosp.*, 291 Ark. 186, 723 S.W.2d 363 (1987). The question is not whether the testimony would have supported a contrary finding, but whether it would support the finding that was made. *Arkansas Highway and Transp. Dept.* v.

McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). It is the prerogative of the agency to believe or disbelieve any witness and to decide what weight to accord the evidence. *Robinson* v. *Ed Williams Constr. Co.*, 38 Ark. App. 90, 828 S.W.2d 860 (1992).

Appellant was charged with violating Ark. Code Ann. § 17-86-309(a)(4) and (6) as being "habitually intemperate or . . . addicted to the use of habit forming drugs" and "guilty of unprofessional conduct" based upon the following:

> 1. During but not limited to July 1992, while employed by Bates Memorial Hospital, Bentonville, Arkansas, [she] did make false or failed to correct documentation as to the administration of narcotics.
>
> 2. During the aforementioned time, [she] did divert controlled substances such as Demerol from her employer.
>
> 3. Prior to employment at Bates Hospital, respondent was employed at Eureka Springs Hospital, where she did make false or failed to make correct documentation as to the administration of narcotics.

In support of the allegations, the Board heard the following evidence. Jim Bona, an investigator for the Arkansas Department of Health, testified that on July 1, 1992, Rick DeFreece, Director of Pharmacy at Bates Memorial Hospital, submitted seven vials of meperidine hydrochloride (Demerol) for quantitative analysis. All seven vials were obtained from the emergency room controlled drug supply. The Arkansas Department of Health Toxicology Laboratory report found that all seven vials were adulterated. Subsequently, audit procedures were put in place, and inventories were checked by the hospital pharmacy at least once, and more often twice daily.

On July 7, 1992, the pharmacy director found three vials of Demerol from a medicine cart on the medical/surgical unit that appeared to have been tampered with in the same manner as those from the emergency room. These vials were submitted to the Toxicology Laboratory for testing, and it was determined that one of the vials was adulterated.

Hospital records and testimony from Salena Wright, Nurse Manager of the Emergency Department, indicated that appellant

worked in the emergency department until June 30, 1992, at which time she was transferred to the medical/surgical unit. Ms. Wright stated that appellant was transferred because she was not performing well in the emergency room and was having problems getting along with physicians and other nurses. Hospital records indicated that appellant was the only employee to sign out Demerol in the emergency department and the medical/surgical unit on the dates in question.

Ms. Wright stated that appellant had been assigned to care for patient "D.D." just before she resigned from Bates on July 7, 1992. D.D. came to the emergency room with acute abdominal pain and was given an injection of Demerol. D.D. was admitted to the medical/surgical unit at 5:00 a.m. on July 6, 1992, free of pain. Ms. Wright cared for the patient and charted that she was pain free throughout the day. Appellant took over the care of D.D. at 7:00 p.m. that evening. On July 7, Ms. Wright discovered that appellant had charted an injection of Demerol at 7:50 p.m. on July 6 and at 5:00 a.m. on July 7. Ms. Wright asked D.D. if she had received anything for pain, and the patient told her that she had complained of a headache and received two pills, but that was all.

After this incident, Ms. Wright did a retrospective review of other patients for whom appellant had cared. She found that appellant had cared for another patient on July 1, 1992, who had been unresponsive. Although there was no change in the patient's condition, the medication administration charts, signed by appellant, reflected that she gave Demerol at 8:10 p.m. on July 1, and again at 2:00, 3:00, and 6:00 a.m. on July 2. There was no indication of irritability or restlessness to warrant pain medication. It was the only Demerol the patient was given throughout her stay at the hospital.

Ms. Wright and Marian Fowler, Director of Human Resources, both testified that appellant had been very candid about being a recovering substance abuser when she applied at the hospital. Ms. Fowler stated that appellant agreed to submit to random drug tests throughout her tenure at the hospital as a part of the process for nurses in recovery. On July 7, 1992, Ms. Fowler and Ms. Wright asked appellant to submit to a drug test. At first appellant agreed, but became increasingly agitated and irritated

and stated that she thought she was being "set up." However, after three trips to the bathroom in a supposedly unsuccessful attempt to collect a urine specimen, appellant refused to take the test and stated that she was resigning from her employment.

Prior to her employment at Bates Memorial, appellant worked at Eureka Springs Memorial Hospital for twenty-one days. Testimony from administrators there provided ample evidence of faulty documentation and circumstantial evidence of drug use.

Sherry Gerster, Director of Nursing at Eureka Springs Memorial, testified that on her first day of employment, April 1, 1992, appellant was assigned a patient who was taking Demerol every three hours. Appellant signed out seventy-five milligrams of Demerol from the pharmacy, but did not document the need or action for the medication in her nurse's notes. On April 7, 1992, appellant was assigned to care for a patient for whom Demerol had been prescribed, but who did not receive any except when appellant was on duty. On April 8, appellant took care of this same patient and documented giving Demerol at 12:15 p.m., but did not document in her nurse's notes the reason it was given. In addition, while the medication and treatment documentation states that the drug was given at 12:15 p.m., the drug was not signed out on the controlled administration record until 12:40 p.m. At 3:15 p.m. on that same day, it was documented in the medication and treatment record that the patient was complaining of back pain and was given fifty milligrams of Demerol. However, nothing is documented in the nursing notes, and the Demerol was not signed out on the controlled drug administration record until 6:15 p.m.

Ms. Gerster stated that appellant was caring for another patient on the same shift that day who had been prescribed seventy-five milligrams of Demerol and twenty-five milligrams of Phenergan. At 3:15 p.m., appellant was given orders by a physician to give the medication, and such is documented in the medication and treatment record and in the nurse's notes. However, the controlled drug administration record reveals that appellant signed out one-hundred milligrams of Demerol to this patient and administered all of it.

Further, Ms. Gerster testified that appellant documented having given a postoperative patient seventy-five milligrams of

Demerol twenty minutes before she was to be discharged from the hospital. Ms. Gerster stated that this was in violation of hospital policy.

Ms. Gerster also testified that appellant took care of an outpatient surgery patient whom another nurse observed and recorded at 11:20 a.m. as having no nausea and eating ice chips. At 1:00 p.m, appellant documented that he complained of pain and nausea, vomited twice, and was given seventy-five milligrams of Demerol. However, at 1:10 p.m, it was documented that he was discharged in good spirits and in no acute distress. The hospital's discharge criteria mandate that a patient will not be discharged if he is nauseated or vomiting.

Finally, Ms. Gerster stated that on April 9, appellant cared for a patient for whom Demerol had been prescribed to be given as needed for pain. Although the patient was not in distress at 7:30 a.m., fifty milligrams of Demerol was signed out on the controlled drug record for her at 8:12 a.m. and again at 4:00 p.m. There was only one entry in the medication and treatment record for a dose of fifty milligrams of Demerol with no time recorded, but there were entries for doses of fifty milligrams of Demerol and twenty-five milligrams of Phenergan; one at 8:00 a.m. and one at 4:00 p.m.

Tina Long, who was Assistant Director of Nursing at Eureka Springs Hospital while appellant was employed there, testified that she observed appellant leaving the hospital with the keys to the narcotics cabinet. The keys are not supposed to leave the hospital. Ms. Long confronted appellant and reminded her that the keys were not to leave the hospital. Appellant replied that she had been hoping Ms. Long would not find out that she had taken the keys.

Ms. Long also stated that on April 21, 1992, appellant worked a twelve-hour shift, from 7:00 a.m. to 7:00 p.m. At 3:00 p.m., appellant was given the narcotics keys. Ms. Long received an electronic page at 7:00 p.m. from another employee who had checked the narcotics cabinet and suspected tampering. The employee stated that she had not handled the drugs. Ms. Long and the employee discovered that a seventy-five milligram vial of Demerol appeared to have been adulterated. They found a hub cover from a hypodermic needle in the employee bathroom right

after appellant had been there. Ms. Long called appellant's home at 8:10 p.m. to ask her to come in for a drug screen, but reached an answering machine and did not leave a message. Appellant was scheduled to work another twelve-hour shift on April 22, but called in sick.

In summary, there is substantial evidence to support the Board's finding that appellant diverted drugs from her employers at Bates Memorial Hospital and at Eureka Springs Memorial Hospital and made false documentation about those drugs at both facilities. This also constituted substantial evidence to support the finding that appellant acted in an unprofessional manner. Accordingly, we affirm the ruling of the Board.

HOLT, C.J., not participating.

Greg QUINNEY, individually and
D/B/A GQ Inspection Service, Inc.
v. John M. PITTMAN and Carolyn H. Pittman

94-787 895 S.W.2d 538

Supreme Court of Arkansas
Opinion delivered April 3, 1995

[redacted]

[redacted]

The Gill Law Firm, by: *Victor A. Fleming*, for appellant.

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

ROBERT H. DUDLEY, Justice. The primary issue in this appeal is whether venue of this constructive fraud case lay in Monroe County. The trial court correctly ruled that the action was properly brought in Monroe County, and we affirm.

There is no serious dispute about where and when the determinative facts occurred. In the first part of 1992, John and Carolyn Pittman, plaintiffs, resided in Phillips County. John Pittman served as a chancellor of the First Judicial District, and Phillips County is one of the five counties in the district. Judge Pittman was elected to the Arkansas Court of Appeals for a term beginning January 1, 1993.

On July 16, 1992, after Judge Pittman was elected to the court of appeals, the Pittmans entered into a contract for the purchase of a home in Pulaski County, where the court of appeals is located. The contract was conditioned upon the sale of their home in Phillips County and also upon an inspection for defects in the home in Pulaski County.

On July 18, 1992, the Pittmans entered into a contract, styled a "service agreement," for inspection of the home by GQ Inspection Service. Greg Quinney, defendant, did business under the trade name of GQ Inspection Service. The discussions about the service agreement took place in Pulaski County, and the document was executed in Pulaski County. All subsequent statements and acts by GQ were made or done in Pulaski County.

The Pittmans did not know that GQ had previously inspected the home for another couple, who were also prospective purchasers, and had found that a major defect existed under the home. As a result of GQ's discovery of the major defect, the other couple withdrew from their agreement to buy the home. The sellers' real estate agent, Betty Fureigh, expressed displeasure with GQ. Gregory Quinney, GQ's owner, admitted that Betty Fureigh was "mad" about the report. Testimony showed that inde-

pendent home inspectors rely on real estate agents for referral business.

On July 18, the same date the service agreement was made, Lance Lefler, an employee of GQ, inspected the house. The Pittmans were present, but John Pittman was physically unable to crawl under the house. Lefler issued a written report to the Pittmans indicating some areas of dry rot and other problems under the house. The report was made to the Pittmans in Pulaski County.

On July 21, GQ sent a letter to Betty Fureigh, the real estate agent representing the sellers. Fureigh was upset over Lefler's report. Quinney reassured Fureigh that the damage under the house was not extensive. The Pittmans did not see the letter until after filing suit.

On July 28, the Pittmans called Lefler for a reinspection. He orally reported to them, in Pulaski County, that the repairs that had been made were satisfactorily completed. There was conflicting testimony as to whether Lefler informed the Pittmans that additional repair work was necessary.

On August 4, the Pittmans moved out of their home in Phillips County. On August 5, Carolyn Pittman and the children moved into the home in Pulaski County.

On August 4, Lefler was called back to inspect the house. On August 7, 1992, the Pittmans and GQ signed a "Memorandum of Agreement Regarding Inspection and Repairs at 7 Foxhunt Trail." This is the last act involving the Pittmans and GQ, and all of these acts took place in Pulaski County.

On August 14, John Pittman moved into a recreational cabin the family owned in Monroe County. Monroe County is also within the First Judicial District. John Pittman intended to reside in the cabin in the judicial district for the remaining weeks of his term as chancellor. On about half of the weekends he drove to Pulaski County to be with his family, and on other weekends his family came to Monroe County to see him. He spent all of the week nights and half of the weekends at the cabin. He had a telephone and all utilities, as well as a computer, some office equipment, and some of the court reporter's equipment there. He registered to vote in Monroe County.

On August 20, 1992, the Pittmans paid for the house in Pulaski County, received a warranty deed to it, and executed a mortgage to the lender. The loan closing was conducted in Pulaski County. Proof showed that the Pittmans, at least in part, relied on the GQ report and subsequent reinspections in purchasing the home. Shortly thereafter, the Pittmans learned that there was a real danger of the first floor collapsing and that the only acceptable repair of the house would involve the removal and replacement of all first floor joists, beams, supporting beams, subflooring and flooring, as well as extensive support, all at a cost of approximately $150,000.

On September 25, 1992, the Pittmans filed suit in Monroe County for constructive fraud against Gregory Quinney d\b\a GQ Inspection Service, Inc., the sellers of the home, the sellers' real estate agent and the agency for whom she worked, and a termite inspection service. None of the other defendants had committed any act in Monroe County. The Pittmans subsequently settled with all of the defendants except GQ. In late December 1992, Judge Pittman moved to Pulaski County in order to serve on the court of appeals, beginning in January 1993.

GQ Inspection Service moved to dismiss the complaint on the ground that venue did not properly lie in Monroe County. GQ argued that the applicable statute required a suit for constructive fraud to be filed in the county of the defendant's residence or where the allegedly fraudulent acts were committed, which was Pulaski County. Alternatively, GQ argued that even if the statutes did not so require, the Pittmans could not file suit in Monroe County because neither of them was a resident of that county for venue purposes. The trial judge ruled that venue was properly fixed in Monroe County under Ark. Code Ann. § 16-60-113(b) (1987) because John Pittman resided in that county at the time suit was filed. The case went to trial, and a Monroe County jury found GQ guilty of constructive fraud and returned a verdict of $120,000.00. After the settlements are taken into account, GQ will be required to pay $30,000.00 under the judgment. On appeal, GQ repeats each of its venue arguments.

[redacted] We first address GQ's statutory argument. Venue is fixed by statute. Since statehood, the General Assembly has provided that the basic rule of venue is that a defendant must be

sued in the county where he lives or is summoned. Ark. Revised Stat. ch. 116, § 4 (1838); Ark. Code Ann. § 16-60-116 (1987); *First South, P.A.* v. *Yates*, 286 Ark. 82, 689 S.W.2d 532 (1985). The Pittmans' suit alleged a constructive fraud. We have consistently held that the venue statutes do not allow a plaintiff to file suit for economic damages as the result of a fraud in a county when the only connection with that county is the plaintiff's residence. See *First South, P.A.*, 286 Ark. 82, 689 S.W.2d 532, for a complete history of the statutes and our cases.

However, in 1985, the General Assembly enacted Act 921, which is codified as Ark. Code Ann. § 16-60-113(b) (1987). It is our fundamental duty, of course, to give effect to the legislative purpose set by the venue statutes. Subsection (b) of section 16-60-113 currently provides as follows:

> Any action for any type of fraud may be brought in the county where any one (1) plaintiff resides or any one (1) defendant is located, in the county where one (1) or more of the acts utilized to induce, perpetuate or conceal the fraud was performed, or the county from which an act or one (1) or more of the fraudulent acts or part of a scheme to defraud was originated or was communicated from or into by telephone, mail, or other means orally or in writing.

In listing the alternative venues for fraud, the General Assembly followed the recognized rule of grammar that a list of items followed by commas and ending with the word "or" between the final two items shall be read in the disjunctive. *See Hughey* v. *State*, 310 Ark. 721, 840 S.W.2d 183 (1992). The current statute thus provides three separate venues for fraud:

> (1) the county where one plaintiff resides or one defendant is located;
>
> (2) the county where one or more of the fraudulent acts occurred; or
>
> (3) the county where the fraud originated or from which it was communicated.

The statute is clear: "Any action for any type of fraud may be brought in the county where any one (1) plaintiff resides. . . ." Ark. Code Ann. § 16-60-113(b) (1987). The statute

uses the present tense by providing that suit may be brought where one of the plaintiffs "resides." It does not use the past tense, or refer to the county of residence "at the time the cause of action arose," as does the first subsection of the statute, subsection (a). The distinction between subsections (a) and (b) of section 16-60-113 was obviously intentional. It allows a plaintiff to file suit for fraud in the county of his residence at the time of the filing of the complaint, no matter where the fraud occurred.

GQ argues that the title and emergency clause of the 1985 amendment do not mention that an action for fraud can be brought in the county where one of the plaintiffs resides, and we should look to the title and emergency clause to determine the true legislative intent. When the meaning of a statute is ambiguous, we will look at either the title or the emergency clause, or both, in order to determine legislative intent, but when the language of a statute is certain and the intent obvious from that language, we need not resort to a search of the title or emergency clause. *American Casualty Co.* v. *Mason*, 312 Ark. 166, 848 S.W.2d 392 (1993). The statute at issue is certain. In summary, the trial court correctly ruled that the 1985 act changed the law so that an action for fraud could be brought in Monroe County, the county where one of the plaintiffs resided at the time the suit was filed.

GQ fleetingly contends that Ark. Code Ann. § 16-60-113(b) does not apply to actions for constructive fraud. The statute provides that it applies to "[a]ny action for *any* type of fraud." *Id.* (emphasis added). We have previously held that the meaning of the statute is obvious, and it applies to actions for constructive fraud. *Evans Indus. Coatings, Inc.* v. *Chancery Court*, 315 Ark. 728, 870 S.W.2d 701 (1994).

GQ next argues that, even if the statute allows a fraud action to be brought in the county where one of the plaintiffs resides, John Pittman did not reside in Monroe County. In *Goodwin* v. *Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989), when faced with the same issue, we examined our past cases involving the residence of a plaintiff under Ark. Code Ann. § 16-60-112(a) (1987). The language of that statute and the statute at issue are comparable. We concluded that the General Assembly was aware of the difference between the words "residency" and

"domicile," was aware of the fact that a person might have a residence in one county and his domicile in another, and deliberately chose to use the word "residency." "Residency" means the place of actual abode, not a home which one expects to occupy at some future time. *Id.* at 479, 780 S.W.2d at 520. There is no valid reason to make a distinction between the statute at issue in that case and the statute at issue in this case. Thus, we hold that the statute allows a suit for fraud to be filed at the place of actual abode of one of the plaintiffs. John Pittman's actual abode was in Monroe County at the time he filed the suit.

[redacted] GQ additionally argues that, even if the statute provides that the action can be brought in the county where one of the plaintiffs resides and even if John Pittman was a resident of Monroe County, he did not reside there when the cause of action accrued; therefore, venue was improper in Monroe County. The statute at issue, subsection (b) of section 16-60-113, provides that a cause of action for fraud can be brought in the county where "any one (1) plaintiff resides." The statute uses the present tense, which indicates residency at the time the suit is filed. GQ's argument below, and its argument on appeal, both involve cases construing another statute, Ark. Code Ann. § 16-60-112 (1987). That statute, unlike the one currently at issue, provides that venue for personal injury action lies "in the county where the person injured or killed resided *at the time of injury.*" *Id.* § 16-60-112(a) (emphasis added). That statute, 16-60-112, does fix the time of residency "at the time of injury," but the General Assembly chose not to use that language in the statute now before us, 16-60-113(b), and instead provided that suit can be brought in the county where "any one (1) plaintiff resides."

[redacted] As a subpart of this argument, GQ argues that any fraud it might have committed was completed by August 7, 1992, the date the Pittmans and GQ signed the "Memorandum of Agreement Regarding Inspection and Repairs at 7 Foxhunt Trail." GQ's abstract does not reflect that this argument was raised during the pretrial hearing on GQ's motion to dismiss for lack of venue and at trial the Pittmans testified without objection that they relied on all of GQ's representations in their purchase of the home on August 14, 1992. In addition, the jurors were instructed, without objection, that they were to determine whether the Pittmans suffered damages as a result of their purchase of the house in

reliance on misrepresentations by GQ. Thus, this argument was not raised at the trial level, and we will not consider a matter raised for the first time on appeal. *Pledger* v. *C.B. Form Co.*, 316 Ark. 22, 871 S.W.2d 333 (1994).

GQ next contends that the trial court erred in refusing to grant a directed verdict in its favor. A motion for a directed verdict is a challenge to the sufficiency of the evidence. Our standard in reviewing the sufficiency of the evidence is well settled: (1) The evidence is viewed in a light most favorable to the appellee; (2) the jury's finding will be upheld if there is any substantial evidence to support it; and (3) substantial evidence is that of sufficient force and character to induce the mind of the factfinder past speculation and conjecture. *Allred* v. *Demuth*, 319 Ark. 62, 64, 890 S.W.2d 578 (1994). GQ moved for a directed verdict on the specific ground that there was no justifiable reliance by the Pittmans on its representations. The trial court correctly denied the motion.

It was undisputed that the Pittmans employed GQ to inspect the home before they decided to purchase it. Lance Lefler, an employee of GQ, inspected the home on two occasions. There was a dispute over the contents of Lefler's statements to the Pittmans. John Pittman testified that Lefler indicated on his second visit that the repair work had been completed properly. Pittman testified that he and his wife relied on this statement in making a commitment to the sellers to accept the repairs as satisfactory. He also stated that he overheard a conversation between Lefler and Betty Fureigh, the real estate agent for the seller, discussing the reinspection and Lefler said that only a few boards needed to be replaced. Carolyn Pittman testified that on Lefler's second inspection he indicated that the repairs that had been made were satisfactory and only a few boards still needed to be replaced. This testimony, while disputed by GQ, amounted to substantial evidence to support the jury's finding of fact. It is the province of the finder of fact to weigh the credibility of witnesses. *Maloy* v. *Stuttgart Memorial Hosp.*, 316 Ark. 447, 872 S.W.2d 401 (1994). GQ makes other arguments about insufficiency of the evidence, but because those arguments were not brought to the attention of the trial court, we do not consider them.

GQ's next assignment of error is that the trial court erred in allowing into evidence a letter from Greg Quinney, GQ's owner, written to Betty Fureigh, the sellers' real estate agent. The letter states, in pertinent part, that "the additional damage not reported in the initial inspection [for the previous prospective purchaser] is not extensive" and that the "repair work for the dry rotted joists is satisfactory." The ruling admitting the letter occurred as follows. A witness for the Pittmans, an architect, testified: "If I were doing an inspection for a homeowner I would have said something more than what was stated in the GQ report. I would have been direct about the extensiveness of the damage involved. It is widespread, over the entire house. And I think I would have been a little clearer on where the damage was and the extent of the damage." The Pittmans' attorney started to ask the next question and then said only, "We have a letter here." GQ's attorney objected and stated in part: "It [the letter] has the potential to be a prior inconsistent statement, and we have not objected to it being a part of the record. However, unless Mr. Donovan [Pittmans' attorney] can show otherwise, it was not material or relevant to any issue that this witness is going to testify to and is not in evidence yet. I can see where it would be admissible to impeach Mr. Quinney's credibility, but since it did not come up prior to closing, it does not appear that the information contained in it —[.]" At this point the trial court overruled the objection. GQ's attorney stated that the Pittmans would use the letter to show that Greg Quinney was saying one thing while his employee was saying another.

On appeal GQ argues that the Pittmans did not rely on the letter, and, therefore, it was immaterial. In its reply brief GQ argues that the trial court did not conduct an A.R.E. Rule 403 weighing of probative value against unfair prejudice. Neither of these arguments was made to the trial court. At trial, GQ admitted that the letter would be admissible for impeachment. Its relevancy argument was that the letter was not relevant to the testimony of the architect. In short, GQ's argument to the trial court was that the letter was admissible, but not through the testimony of the architect. However, GQ does not pursue that argument on appeal. Rather, on appeal GQ argues that the Pittmans did not rely on the letter, and there was no Rule 403 weighing. Because these arguments are raised for the first time on appeal, we do not consider them.

GQ's next point of appeal is that "[t]he court erred in disallowing GQ to use and argue a comparative fault defense to the jury and in failing to give a comparative fault instruction." The trial judge ruled that the action was for constructive fraud and that the comparative fault statute, Ark. Code Ann. § 16-64-122 (Supp. 1993), applies to "actions for damages for . . . injury to property in which recovery is predicated upon fault" and that this was neither an action for "injury to property," nor was it an action involving "fault" as that word is defined in the statute. Subsequently, GQ did not proffer any comparative fault instructions that it might have wanted given. A party cannot complain about the failure to give an instruction when he did not proffer the instruction. ARCP Rule 51; *Precision Steel Warehouse, Inc.* v. *Anderson-Martin Mach. Co.*, 313 Ark. 258, 854 S.W.2d 321 (1993).

Finally, GQ contends that the trial court erred in granting a directed verdict against its counterclaim. GQ filed a counterclaim that refers to the contract between the Pittmans and GQ and then alleges:

> The claim against GQ is itself a breach in that it alleges GQ's inspection was exactly that which the language quoted above from Exhibit A [the contract] says it was not.
>
> Counterdefendant's breach of contract by naming GQ herein has caused GQ damages in the form of legal fees and lost earnings and going to trial as a defendant herein will cause GQ further legal fees and lost earnings. Upon prevailing herein, GQ should be entitled to all costs, plus attorney's fees.

In its argument, GQ contends that the Pittmans breached the contract with GQ by filing the constructive fraud action because the contract provided that GQ's inspection services "are not deemed to be a warranty." GQ cites no authority for upholding the counterclaim, nor does it make a convincing argument for reversal on the point, and we see no apparent merit in the argument. When an appellant neither cites authority, nor makes a convincing argument, and where it is not apparent without further research that the point is well taken, the appellate court will affirm. *Mikel* v. *Hubbard*, 317 Ark. 125, 876 S.W.2d 558 (1994).

Affirmed.

Special Justice GEORGIA ELROD joins in this opinion.

NEWBERN, J., not participating.

Everick MONK *v.* STATE of Arkansas

CR 94-1416 895 S.W.2d 904

Supreme Court of Arkansas
Opinion delivered April 3, 1995

William R. Simpson, Jr., Public Defender, by: *C. Joseph Cordi, Jr.*, Deputy Public Defender, for appellant.

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

DAVID NEWBERN, Justice. Everick Monk was convicted of rape, burglary, and robbery. He was sentenced to forty years imprisonment. He contends the evidence was insufficient to support the conviction and that evidence of pretrial identifications of him by the victim should have been suppressed. He also contends it was error to admit into evidence an envelope and its contents, bearing his name and fingerprints, which the victim allegedly found in her apartment after the commission of the crimes. We hold the identification testimony and the physical evidence were admissible and the evidence was sufficient to sustain the conviction.

In the middle of the afternoon on November 26, 1993, the 74-year-old victim heard a knock on the front door of her apartment in the Albert Pike Hotel in Little Rock. When she opened the door, a man forced his way into her apartment and repeatedly hit her with "his open hand." She attempted to get away from him, and he continued to hit her until they reached her bedroom. Once they were in the bedroom, the intruder stuck his finger in her vagina and forced her to engage in fellatio. After the attack, he demanded money and took $20.

After the intruder had left her apartment, the victim noticed an envelope that did not belong there. She testified it was a white,

long, oblong envelope with some writing on the outside. She said that she laid it on the table and did not alter its contents in any way. Although she was too afraid and upset to call anyone other than her daughter on the evening following the incident, she did call 911 the next morning. When the police arrived, she gave Officer Mark Little the envelope.

Approximately four days passed between the report of the incident and a visit by the victim to the police station to view a photo lineup. During that period Detective Oberle developed Everick Monk as a suspect from the name "Monk Everick" on the food stamp notice contained in the envelope. During the delay that resulted from his attempts to obtain a photograph of Mr. Monk, Detective Oberle spoke with the victim's daughter about the investigation. He testified the daughter called him every day and he was reasonably sure she knew the delay was caused by his efforts to obtain the photograph.

Once he obtained the photograph, Detective Oberle asked the victim to come to the police station to view a lineup of photographs. In the presence of her daughter and the detective, the victim picked out two "look-alikes." One of them was Everick Monk. Although Detective Oberle did not say anything to the victim concerning the identity of anyone in the photographs, he said he might have told the victim's daughter, after the victim had picked it as a "look alike," that the number 2 photograph depicted Everick Monk, the suspect.

Mr. Monk was arrested on December 10, 1993. On December 23, 1993, Detective Oberle called the victim back to the police station to view a physical lineup. Mr. Monk was the only person from the photospread who also appeared in the physical lineup. In addition, the detective testified that the victim knew Mr. Monk had been arrested and would be in the lineup. Detective Oberle testified that after a very brief time of viewing the men in the lineup, the victim positively identified Mr. Monk as her attacker. After she made her identification, the detective told the victim that "she got the right one, or picked the right guy that we had arrested."

Prior to trial Mr. Monk moved to suppress both identifications. During a hearing in April 1993 the victim made a positive in-court identification of Mr. Monk as the perpetrator; however,

at a hearing held in August 1993 on a second motion to suppress the victim testified she was not sure the man in the courtroom on the day of the first hearing was her attacker. She said that on the way home after the first hearing she had asked her daughter if the man in the courtroom was the same man that she had picked from the lineups.

Ultimately, the victim admitted on cross-examination during the trial that she was not sure the man in the courtroom during the hearing in April was the same man who was in her apartment on that afternoon in November. She also testified she "could not be sure or correct in pointing out any individual who may have been in my house."

At the trial, the victim did not identify Mr. Monk as the person who had attacked her. Detective Oberle testified concerning her pre-trial identifications of Mr. Monk from the photospread and the physical lineup. In addition, the State sought to introduce the envelope and contents the victim allegedly found on her bedroom floor after the attack. Although Mr. Monk objected to the admission of the envelope on the basis of authenticity, the Trial Court allowed it to be introduced.

Mr. Monk moved for a directed verdict at the close of the State's case-in-chief, contending the State failed to prove that he was the perpetrator. The motion was denied. At the close of all the evidence, the motion was renewed by counsel who said, "Your Honor, I renew all my previous objections, including specifically the Motion for Directed Verdict based on the same argument that I made at the close of the State's case."

1. Sufficiency of the evidence

To preserve the question of the sufficiency of the evidence, a motion for directed verdict must be made at the close of the State's evidence and at the close of the case. Ark. R. Crim. P. 36.21(b). The motion must be specific and apprise the Trial Court of the ground asserted for granting the motion. *Penn* v. *State*, 319 Ark. 739, 894 S.W.2d 597 (1995); *Jones* v. *State*, 318 Ark. 704, 889 S.W.2d 706 (1994). A general motion will not do. *Davis* v. *State*, 319 Ark. 460, 892 S.W.2d 472 (1995).

Mr. Monk's initial motion for directed verdict was to the effect that there had been no testimony identifying him as the cul-

prit. In response, the Trial Court pointed out Detective Oberle's testimony concerning the pretrial identifications by the victim. Mr. Monk's counsel then renewed his motion to suppress that testimony as well as his objection to the admissibility of the envelope and contents.

While we have some doubts about the sufficiency of the renewal of the directed verdict motion at the close of the case, we need not decide the case on the basis of the content of that motion. The sufficiency of the evidence question became, through counsel's discussion with the Trial Court, no more than renewal of his earlier evidentiary objections. We thus can dispose of the case by resolving the issues presented in those objections.

2. Extra-judicial identification

Mr. Monk argues that both the photo lineup and the physical lineup procedures were unnecessarily, and unconstitutionally, suggestive. Prior to discussing those procedures, however, we note that Mr. Monk has cited *Synoground* v. *State*, 260 Ark. 756, 543 S.W.2d 935 (1976), for the proposition that identity cannot ordinarily be established by evidence of an extrajudicial identification as original evidence. The decision in the *Synoground* case was based on *Trimble* v. *State*, 227 Ark. 867, 302 S.W.2d 83 (1957), in which we held that evidence of extrajudicial identification could not be used to buttress unimpeached testimony of a witness making an in-court identification.

We have strong doubts whether those cases apply here in view of the fact that the victim made no in-court identification subsequent to the omnibus hearing, and her identification at the omnibus hearing was certainly impeached. In any event, the objection raised at the trial was not on the basis of the rationale expressed in the *Synoground* and *Trimble* cases, so we need not consider it here. *Penn* v. *State, supra; Campbell* v. *State*, 319 Ark. 332, 891 S.W.2d 55 (1995).

From the constitutional perspective, the admissibility of testimony concerning pretrial identification is determined on standards similar to those applied to identification testimony offered in court. *See Neil* v. *Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 381 (1972). A pretrial identification violates the Due Process

Clause when there are suggestive elements in the identification procedure that make it all but inevitable that the victim will identify one person as the criminal. *Bishop* v. *State*, 310 Ark. 479, 839 S.W.2d 6 (1992). Even if the identification technique used was impermissibly suggestive, however, testimony concerning it is admissible if the identification was reliable. *Manson* v. *Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1977); *Bishop* v. *State, supra.*

The factors to be considered in the determination of reliability are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the prior description; (4) the level of certainty; and (5) the time lapse between the crime and the confrontation. We do not reverse a ruling on the admissibility of an identification unless it is clearly erroneous, and we do not inject ourselves into the process of determining reliability unless there is a very substantial likelihood of irreparable misidentification. *Bishop* v. *State, supra.*

a. The photospread

With respect to the photospread, it is argued that, due to the communication between Detective Oberle and the victim's daughter, the victim knew prior to viewing the photographs that one of the pictures would be of a man suspected of the crimes. Mr. Monk contends that increased the odds of his picture being selected from the lineup. In other words, he argues the victim's knowledge foreclosed the possibility that she would not find anyone in the lineup she could identify as her assailant.

In *Hayes* v. *State*, 311 Ark. 645, 846 S.W.2d 182 (1993), we held it not absolutely impermissible to tell a witness a suspect was in a lineup, for the witness must realize that she would not be called to view the lineup if a suspect were not present. Rather, what the witness has been told is only one factor to be considered.

Considering the totality of the circumstances, it is doubtful that any knowledge the victim may have had about a suspect being in the lineup caused her to identify Mr. Monk as a look-alike mistakenly. The photospread provided in the abstract of the record of trial reveals that all of the men in the lineup were

African-American and each had facial hair similar to the description the victim gave to the police.

[redacted] Detective Oberle testified he did not say anything to the victim which would have led to the identification. Mr. Monk argues the photo lineup here was more suggestive than the one we approved in *Hayes* v. *State, supra*, because Detective Oberle privately indicated to the victim's daughter that Mr. Monk was the suspect. As noted above, however, that conversation appears to have taken place after the victim had identified the look-alikes. There was nothing unconstitutionally suggestive about the photo lineup, and thus the testimony concerning it was admissible.

b. The physical lineup

Mr. Monk contends the physical lineup was unduly suggestive because the victim, again through her daughter, had access to information concerning the identity of the perpetrator. In addition, he contends the procedure was suggestive because he was the only person from the photospread who also appeared in the physical lineup.

While it is possible the daughter could have told the victim that the victim had picked the suspect in the photospread, the only "evidence" Mr. Monk was able to present on the point was the victim's rather swift positive identification at the physical lineup. It is doubtful that the physical lineup was rendered impermissibly suggestive by the fact that Mr. Monk was the only man from the photospread to reappear in the second identification procedure. Detective Oberle testified that the men who appeared in the photospread were merely "fillers," and that the use of their pictures did not necessarily indicate they were all in custody. Thus, he said that when the time came for the victim to view the physical lineup, he had to use fillers who were already in custody.

Clearly, the appearance of different men in the second procedure was unavoidable. We observe from a picture of the physical lineup that the fillers all had similar physical characteristics to those of Everick Monk.

No case has been cited in which we have dealt squarely with the question whether a less than positive, or look-alike, identification taints a subsequent identification as the result of the viewer's familiarity upon seeing in the flesh a person whose picture

she has previously been shown. In *State* v. *Neslo*, 433 So.2d 73 (La. 1983), a case similar to this one, the Louisiana Supreme Court considered the problem. Two victim-witnesses selected Neslo and another person in a photo lineup as persons who "resembled" the man who shot and shot at them and killed their friend. Later the victim-witnesses were shown a physical lineup including Neslo, and again two persons, one of them Neslo, were selected but not positively identified. Still later, the same lineup was reassembled, and the victim-witnesses identified Neslo as someone who looked like their assailant.

In holding that the identification of Mr. Neslo was not unduly suggestive, the Louisiana Supreme Court said the procedure used was proper and indeed followed that suggested in *Manson* v. *Brathwaite, supra.* Emphasis was placed on the fact that in neither the photo lineup nor the physical one was there anything which made Mr. Neslo stand out. There was further discussion about the opportunity of the witnesses to view the suspect at the time the crime was committed, and both victim-witnesses said they were not influenced by the prior photo lineup in their reactions to the physical lineup. While no such testimony was given in Mr. Monk's trial, that is not very significant. The point is that the Louisiana Supreme Court was unwilling, as are we, to say that a progressive identification procedure which proceeds from photographs to physical is, *per se*, unduly suggestive.

Of course, the jury had before it evidence that Mr. Monk's picture had been seen by the victim prior to the physical lineup in which he appeared. It also had before it evidence that the victim had in effect withdrawn the positive identifications she had made at the physical lineup and at the omnibus hearing thus reverting to a stance of uncertainty. In these circumstances the jury was placed in a position to evaluate the weakness or strength of the identification testimony, and we cannot say the Trial Court abused his discretion in admitting the evidence.

3. The envelope and contents

The problem here is that the victim did not identify the envelope and contents at the trial as the one she found in her bedroom after the crimes were committed. We must determine if this physical evidence was properly authenticated and thus admissible.

In evidentiary determinations, a trial court has wide discretion. *Utley* v. *State*, 308 Ark. 622, 826 S.W.2d 268 (1992). We will not reverse a trial court's ruling concerning the admissibility of evidence unless there is an abuse of discretion. Rule 901(a) of the Arkansas Rules of Evidence provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." Subsection (b) of the Rule provides, in part, as follows:

> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) Testimony of a witness with knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be.

* * *

The victim testified that after the intruder left her apartment, she found the strange envelope on her bedroom floor where a significant portion of the attack occurred. She described it as a long white envelope with some writing on the outside. She stated she placed it on a table and then gave it to the police when they arrived at her apartment the following morning. She testified on cross-examination that there was only one intruder involved in the incident, which would foreclose the possibility of the envelope belonging to another suspect. Her testimony shows that the letter was not in her apartment before the attack and that she found it in her apartment immediately afterward.

Officer Little testified that when he arrived at the apartment the victim presented him with a white, long envelope that had writing on the outside. He said the envelope was in his possession from the time he received it from the victim until he stored it in the property room at the police station. At the trial, he identified the envelope and testified that the serial numbers placed on it for identity purposes at the property room matched. Officer Little testified that, to his knowledge, no one had tampered with the envelope or its contents other than those officers who tested it for fingerprints. A fingerprinting specialist with the Little Rock Police

Department testified that the fingerprints from the envelope matched those on Everick Monk's print card.

Given the testimony of those witnesses, we cannot say the Trial Court abused his discretion in concluding the identity of the envelope and its contents was sufficiently established as that found by the victim in her apartment. That evidence contributed materially to overall strength and sufficiency of the evidence identifying Mr. Monk as the assailant.

Affirmed.

Anita ZARUBA *v.* Levi PHILLIPS, Cindy George, and Jack Mace as Members of the Board of Election Commission of Carroll County, Arkansas; Shirley Doss, Clerk, Carroll County; Don Wilson and Jr. Hill

94-1190 895 S.W.2d 544

Supreme Court of Arkansas
Opinion delivered April 3, 1995

Murphy & Carlisle, by: *Marshall N. Carlisle*, for appellant.

Kenneth Elser, Deputy Prosecuting Attorney, for appellees.

DAVID NEWBERN, Justice. Anita Zaruba, the appellant, is a registered voter and taxpayer residing in Omega Township, Carroll County. She sought to enjoin the appellees, who are mem-

bers of the County Election Commission, and other county officials from conducting a local option (wet-dry) election in Omega Township. She contended those petitioning for the election had not presented a sufficient number of signatures prior to the deadline 60 days before the proposed election. The petition was certified by the County Clerk, and the election was held November 8, 1994. The drys won 110 to 32. We hold the Chancellor properly dismissed Ms. Zaruba's claim for lack of jurisdiction of the subject matter.

Ms. Zaruba claimed the Chancellor had jurisdiction because her claim was founded upon Ark. Const. Art. 16, § 13, which deals with illegal exactions. Her theory was that public funding of the election would constitute an illegal exaction.

[redacted] The illegal exaction issue cannot even be approached without first deciding the sufficiency of the petition. The issue of the sufficiency of the petition for a local option election is one over which chancery court has no jurisdiction. *McFerrin* v. *Knight*, 265 Ark. 658, 580 S.W.2d 463 (1979). We affirm the decision and decline to remand for transfer to the Circuit Court because the sufficiency of the petition cannot be questioned after the election has been held. *Herrington* v. *Hall*, 238 Ark. 156, 381 S.W.2d 529 (1964).

Affirmed.

John BROWN *v.* STATE of Arkansas

CR 94-1395 895 S.W.2d 909

Supreme Court of Arkansas
Opinion delivered April 3, 1995

William R. Simpson, Jr., Public Defender by: *Kent C. Krause*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant John Brown appeals from convictions on two counts of aggravated robbery and one count of theft. His sentences total forty years imprisonment. Brown raises three points for reversal, but none has merit.

In his first argument, Brown challenges certain state evidence as being inadmissible hearsay. At trial, state witness, Charlotte Clark, testified that on November 26, 1993, she was working as a cashier at Delta Express in Little Rock, when a man entered the store demanding money. The man had his hand in his pants, and Clark had the impression he had a weapon. She further related that, Anjuanita Cunningham, another store clerk, refused the man's demands, and as the man left, he threatened to return to blow up the store. Clark said that Cunningham saw the man enter an old grey and silver Buick, and while watching him drive away, she called out the Buick's license plate to Clark, who wrote its numbers down on a piece of paper. During her direct testimony, Clark identified State's Exhibit 1 as being the slip of paper bearing the license plate numbers given her by Cunningham and Brown's counsel objected, stating the exhibit was inadmissible hearsay. The trial court overruled Brown's objection. On appeal, Brown urges the exhibit should have been excluded because it contained Cunningham's, not Clark's, perceptions which were written down by Clark, and Brown was unable to cross examine Cunningham regarding her reliability since she was not a witness.[1]

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[1]We note that Brown never contends Cunningham was unavailable as a witness.

Clark's oral description of the license plate on the robber's vehicle as it left the scene was admissible under A.R.E. Rule 803(1) as a present sense impression. In *Marx* v. *State*, 291 Ark. 325, 724 S.W.2d 456 (1987), the court discussed Rule 803(1) as follows:

> A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." A.R.E. Rule 803(1). A present sense impression must describe or explain the event the declarant is perceiving. D. Binder, *Hearsay Handbook*, 2nd Ed. § 101 (1983). The statement must be made while the event or condition is being perceived by the declarant. 4 Weinstein, *Evidence*, § 803(1)[01] (1985). The statement is required to be contemporaneous or near contemporaneous with the event. Binder, *supra.*

Here, Cunningham's contemporaneous statement describing the robber's actions, car and license plate numbers upon his leaving the crime scene falls within the present sense impression exception to the hearsay rule. Thus, the trial court did not abuse its discretion in allowing Clark's testimony relating Cunningham's descriptions and perceptions made at the time of the crimes.

Brown's second point concerns his pretrial motion in limine which requested the exclusion of anticipated trial testimony that officers had found marijuana at Brown's residence at the time of his apprehension. Brown argued simply that such testimony was irrelevant. The trial court agreed, and the state offered to caution witnesses not to mention the subject. Nonetheless, Officer Andy Garrett testified to Brown's arrest and the search of his residence, and when he mentioned finding two articles of Brown's clothing in the closet, the prosecutor asked the officer what he did with them. Garrett replied:

> I took these in custody and I stored them at the LRPD property department there until trial. I also found a small bag of green vegetable matter inside the green jeans, and which I also found $4.00 and some change like loose coins, assorted U.S. coins, inside the jeans.

Brown requested a mistrial which was denied, and on appeal, he argues the trial court's ruling was prejudicial error because Garrett's testimony was irrelevant and was introduced merely for the purpose of showing Brown to be a man of bad character in violation of A.R.E. Rule 404(b).

Trial courts are granted wide latitude of discretion in granting or denying a motion for mistrial, and the court's decision will not be reversed except for an abuse of that discretion or manifest prejudice to the complaining party. *Stanley* v. *State*, 317 Ark. 32, 875 S.W.2d 493 (1994). Among the factors we consider on appeal are whether the prosecutor deliberately induced a prejudicial response and whether an admonition to the jury could have cured any resulting prejudice. *Id.* Here, the prosecutor's questioning cannot be said to have elicited Garrett's reference to having found "a small bag of vegetable matter," and after Garrett's nonresponsive answer, Brown never requested a cautionary instruction or admonition to the jury. In these circumstances, we cannot say the trial court abused its discretion in denying Brown's motion for mistrial.

Finally, Brown contends that, while the trial court correctly gave the lesser included instruction on robbery, it erred by failing to also instruct the jury on attempted aggravated robbery. Brown failed to proffer any such instruction and consequently, that argument is not preserved for appellate review. *Stewart* v. *State*, 316 Ark. 153, 870 S.W.2d 752 (1994).

For the reasons above, we affirm.

MARTIN FARM ENTERPRISES, INC. *v.* Jerry HAYES

94-868 895 S.W.2d 535

Supreme Court of Arkansas
Opinion delivered April 3, 1995

Womack, Landis, Phelps, McNeill & McDaniel, by: *G. S. Brant Perkins*, for appellant.

J. Scott Davidson, for appellee.

DONALD L. CORBIN, Justice. Appellant, Martin Farm Enterprises, Inc., as third party plaintiff, appeals an order of the Cleburne County Circuit Court granting the motion for summary judgment of appellee, Jerry Hayes, as third party defendant, and dismissing with prejudice appellant's third party complaint for indemnity and contribution. Our jurisdiction of the appeal is proper, pursuant to Ark. Sup. Ct. R. 1-2(a)(16) and (d), respectively, because it raises a question about the law of torts and was certified to this court by the court of appeals. The gravamen of appellant's argument is that the trial court erred in dismissing the third party complaint "with prejudice" rather than "without prejudice." We agree and reverse.

A review of the procedural history of this case is helpful. The primary action in this case was filed on July 23, 1992 by Carolyn E. Phillips, *et vir.* (collectively "Phillips") against appellant and Collier Farms, Inc. On September 3, 1992, Phillips was granted a voluntary nonsuit as to Collier Farms, Inc. because it was an improper party to the action. On the same date, she filed an amendment to her complaint substituting Franklin Collier d/b/a Collier Farms ("Collier") as appellant's co-defendant in the

primary action. Phillips sought damages for her personal injuries, medical expenses, and loss of income which, she alleged, resulted from her consumption of meat, eggs and milk produced by certain of her farm animals which had consumed feed contaminated by unlawful amounts of the chemical heptachlor. Phillips alleged that the defective feed had been supplied by Collier to appellant, who then sold it to Phillips.

Appellant's initial responsive pleading, filed on September 14, 1992, included a third party complaint against appellee, which read as follows:

> 10. By way of third party complaint, [appellant] states that all the feed which [appellant] purchased was supplied from [appellee.] If said feed was defective, then [appellant] is entitled to indemnity and/or contribution based upon the Arkansas Products Liability Act, A.C.A. § 16-116-107.

Appellee, as third party defendant, timely filed a motion to dismiss both the third party complaint and the primary complaint, or, in the alternative, for judgment on the pleadings. Appellee argued that both complaints against him were barred by the applicable statute of limitations, and, as to the third party complaint only, he argued that section 16-116-107 did not afford appellant a claim for indemnity against him.

Thereafter appellee moved for summary judgment as to both complaints. Appellee argued that he was entitled to judgment as a matter of law because the complaints against him were barred by the applicable statute of limitations. As to the third party complaint only, he argued that, because he had no liability to Phillips, inasmuch as her complaint against him was time-barred, likewise no "common liability" existed *vis-a-vis* appellee and appellant to Phillips, and, therefore, appellant had no right to contribution from appellee pursuant to the Uniform Contribution Among Tortfeasors Act, Ark. Code Ann. §§ 16-61-201 to -210 (1987).

Summary judgment motions were also filed by Collier and appellant in the primary action wherein each defendant argued that Phillips had failed to show the cause of her injuries. By orders filed on February 22, 1994 and March 8, 1994, the circuit court granted the summary judgment motions of Collier and

appellant for lack of causation, and dismissed the complaint against them without prejudice. The record on appeal does not reflect whether Phillips refiled her complaint.

By order filed on February 15, 1994 and refiled on May 4, 1994, the circuit court granted appellee's summary judgment motions and dismissed the complaints against him with prejudice. This appeal arises from the May 4, 1994 order with respect to the dismissal of the third party complaint only. No other appeal has been taken by any party.

On appeal, appellant argues that the circuit court's error in granting appellee's summary judgment motion and dismissing the third party complaint with prejudice was two-fold. First, the trial court's reasons for granting the motion were erroneous. Second, dismissal of the third party complaint with prejudice was error because the dismissal of the primary complaint rendered the third party complaint moot. Because we agree with appellant's second argument and reverse the circuit court's judgment, we do not address appellant's first argument.

[redacted] A claim for contribution among tortfeasors is a derivative or conditional action in that the contribution-claimant, *e.g.*, the third party plaintiff (defendant), is not entitled to a money judgment against the party from whom contribution is sought, *e.g.*, the third party defendant, until the third party plaintiff has paid more than his pro rata share of their common liability. Section 16-61-202(2). Under section 16-61-207(1), however, the third party plaintiff is not required to wait until he has paid the judgment to implead in the primary action other persons who are or may be jointly liable for the tort, but may move for leave as a third party plaintiff "to serve a summons and complaint upon a person not a party to the action who is or may be liable as a joint tortfeasor to him or to the plaintiff for all or part of the plaintiff's claim against him."

[redacted] The purpose of section 16-61-207(1) is expressed in the prefatory note of the National Conference of Commissioners on Uniform State Laws (1939 Act), as follows:

> This Subsection enables one or more of several joint tortfeasors sued by the injured person to add as third-party defendants any fellow joint tortfeasors whom they believe

> to have been also responsible for the tort complained of and to litigate against them in the injured person's action any claims for contribution. In this way, the interests of justice may be promoted by obviating the necessity of a separate action for contribution. It should be noted that this Section does not affect in any way the substantive law of contribution concerning the accrual of a cause of action for contribution as set forth in Section 2, Subsection (2) (A.C.A. § 16-61-202(2)), above. It merely provides for a litigation, in advance, of those issues upon which the claim for a money judgment for contribution will ultimately depend. A cross-claimant (third-party plaintiff) who is successful on his cross-claim for contribution cannot procure a money judgment for contribution unless he has paid more than his pro rata share of any judgment liability he may have sustained to the injured person, in accordance with the provisions of Section 2, Subsection (2) (A.C.A. § 16-61-202(2)) of this Act.

Although the commissioners' interpretation of the statute is not binding upon this court, we have stated that it is highly persuasive and should be adopted in the absence of clear error or a conflict with settled policy of this state. *Shultz* v. *Young*, 205 Ark. 533, 169 S.W.2d 648 (1943).

Similarly, a claim for indemnity is a derivative or conditional action in that it is an action by one who is compelled to pay money which ought to be paid by another to recover the sums so paid. *Carpetland of N.W. Ark., Inc.* v. *Howard*, 304 Ark. 420, 803 S.W.2d 512 (1991).

In the present case, when appellant's summary judgment motion in the primary case was granted and the complaint against it was dismissed, appellant's derivative third party complaint against appellee necessarily became moot. *Faser* v. *Sears, Roebuck & Co.*, 674 F.2d 856 (11th Cir. 1982). Said another way, as a result of the dismissal of the complaint against appellant, there no longer existed any legal action to determine appellant's liability to Phillips. Thus, any judgment rendered on appellant's third party complaint would have no practical effect upon a then existing legal controversy; therefore, the third party complaint became moot. *Stair* v. *Phillips*, 315 Ark. 429, 867 S.W.2d 453 (1993).

[redacted] This court has previously stated that it is not convinced that summary judgment is the proper way to dispose of a case that is moot. *Covell* v. *Bailey*, 296 Ark. 397, 757 S.W.2d 543 (1988) (substituting an order of dismissal, on *de novo* review, for the chancellor's order of summary judgment disposing of a moot case). In the present case, the circuit court granted appellee's summary judgment motion and dismissed appellant's third party complaint with prejudice, which operated as a final adjudication on the merits and a bar to subsequent suits on the same cause of action. *Magness* v. *McEntire*, 305 Ark. 503, 808 S.W.2d 783 (1991). This disposition was error. A moot case presents no justiciable issue for determination by the court. *Sebastian County Ass'n for Retarded Citizens and Indep. Living, Inc.* v. *Board of Zoning Adjustment of the City of Fort Smith*, 265 Ark. 175, 577 S.W.2d 394 (1979). Once the third party complaint became moot, appellee's summary judgment motion, with respect to the third party complaint, should have been denied without addressing its merits, *Faser*, 674 F.2d 856, and the third party complaint dismissed without prejudice on the grounds of mootness of the issues, lack of jurisdiction and non-justiciable nature of the issues as presented. *See Board of Zoning Adjustment*, Ark. R. Civ. P. 12(h)(3).

We reverse the circuit court's judgment and remand with directions to enter an order consistent with this opinion.

Jeffrey WILLIAMS *v.* STATE of Arkansas

CR 94-352 895 S.W.2d 913

Supreme Court of Arkansas
Opinion delivered April 3, 1995
[Rehearing granted July 3, 1995.]

Hood & Conner, by: *Jeff R. Conner*, for appellant.

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

DONALD L. CORBIN, Justice. Appellant, Jeffrey Williams, appeals the judgment of the Washington County Circuit Court, filed October 14, 1993, convicting him of one count of refusal to submit to arrest, a Class B misdemeanor, Ark. Code Ann. § 5-54-103(b) (Repl. 1993), and sentencing him to a $500.00 fine, court costs, and ninety days in the Washington County jail, conditionally suspending the fine and jail term. We have jurisdiction of this appeal pursuant to Ark. Sup. Ct. R. 1-2(a)(3) and (d), respectively, because appellant questions the constitutionality of section 5-54-103, and because the appeal was certified to this court by the court of appeals. Appellant asserts four points of error. We find no merit and affirm the judgment.

FACTS

On October 23, 1992, Governor Bill Clinton, the Democratic Presidential candidate, appeared at a rally in support of his campaign in Fayetteville on the campus of the University of Arkansas.

The rally was attended by a crowd of approximately 10,000 persons, among them a group of approximately 40 supporters, of the Republican incumbent, President George Bush. Appellant was one of these Republican supporters.

During the rally, University of Arkansas Police Department ("UAPD") Officer Michael Daub was approached by a Clinton staff worker who said "There's a fight" and directed Daub to an area near the press table and speakers' platform. In that area, Daub saw several persons, holding "Bush/Quayle" signs, jumping up and down. Daub observed appellant forcibly and violently knocking the people who stood in front of him with his body as he jumped up and down. Daub stated that appellant "was almost foaming at the mouth," that the people in front of him "were about ready to take him on," and that Daub was afraid there would be a large fight and perhaps a riot at the rally.

Daub advised appellant not to push anyone, but appellant continued to do so and replied "I have freedom of speech." Daub ordered appellant to leave, but appellant did not obey. Daub radioed for backup, and, shortly thereafter, was joined by two UAPD officers, Sgt. John Reid and Lt. Gary Crain, and Deputy Harris of the Washington County Sheriff's Patrol. Upon arrival at the scene, Reid observed the disturbance. Reid saw appellant standing near Daub, screaming about his rights, and shouting Republican slogans. Reid observed pushing going on in the crowd around appellant. Upon arrival at the scene, Crain also observed the disturbance. Crain saw appellant jumping up and down and bumping into people.

Reid and Crain each advised appellant that he was under arrest and ordered him to move out of the area. Appellant began to leave, then changed his mind and slumped to a sitting position on the ground. Daub and Harris unsuccessfully attempted to pick up appellant. Crain interceded and applied a "pain compliance" technique, intended to motivate appellant to leave on his own power, which was accomplished by Crain first steadying appellant's head in the crook of Crain's arm (described by appellant as a "headlock"), then applying pressure with his thumb to a nerve below appellant's ear. Appellant stood up and walked a few steps. Crain advised appellant to leave the area, or he would apply the pressure again. Appellant walked with the officers to

a patrol car where he was examined for weapons and handcuffed for transport. Appellant stated he understood the officers who told him to leave were law enforcement officials, but did not realize he was or might be under arrest until Crain put him into the "headlock."

Appellant was found guilty of refusal to submit to arrest by the Fayetteville Municipal Court, and appealed his case to the Washington County Circuit Court where a non-jury trial was conducted on September 16, 1993. At trial, Officers Daub, Crain and Reid testified for the prosecution; appellant, five other Republican supporters who attended the rally, and a journalist who had photographed portions of the incident testified for the defense. Conflicting evidence was introduced regarding whether and when appellant was placed under arrest for disorderly conduct, and whether and when he refused to submit to that arrest.

At the conclusion of the trial, the circuit court judge delivered his findings of fact from the bench. The trial court stated that appellant "ha[d] every right in the world" to be at the rally and was exercising constitutionally guaranteed rights. The trial court held that the real issue, however, was whether appellant violated section 5-54-103, a "very simple statute." The court found that the evidence was overwhelming that appellant knew the UAPD officers were police officers. The trial court found that the proof as to the only remaining issue, that is, whether appellant submitted to arrest, was disputed, and the trial court concluded the issue was one of credibility. The trial court found that, in the totality of the circumstances, appellant "simply for whatever reason chose to ignore the police officers." The trial court pronounced appellant guilty of refusal to submit to arrest, and, on October 14, 1993, filed the order of guilt and sentence from which this appeal is taken.

ARGUMENT

Appellant presents four points for reversing his conviction for failure to submit to arrest:

> (1) the trial court erred in refusing to consider his constitutional challenges to section 5-54-103,
>
> (2) the trial court erred in refusing to admit evidence

regarding the illegality of appellant's arrest for disorderly conduct,

(3) the trial court erred in refusing to permit appellant to use a videotape of the incident in cross-examination, and in refusing to allow narration of the videotape, and

(4) section 5-54-103 is unconstitutional as written and as applied to appellant because it denied him his constitutional rights.

The heart of appellant's appeal is grounded in the constitutional challenges to section 5-54-103 which he raises in his fourth and final point. It is implicit in each of appellant's first two points that he is assuming section 5-54-103 is unconstitutional to establish any prejudice to him as a result of the trial errors posited in those points. Therefore, we first proceed to a consideration of appellant's constitutional arguments.

CONSTITUTIONAL ARGUMENTS

The statutory subsection at issue, section 5-54-103(b), reads as follows:

(b)(1) A person commits the offense of refusal to submit to arrest if he knowingly refuses to submit to arrest by a person known by him to be a law enforcement officer effecting an arrest;

(2) "Refusal," as used in this subsection, means active or passive refusal;

(3) *It is no defense to a prosecution under this subsection that the law enforcement officer lacked legal authority to make the arrest, provided he was acting under color of his official authority;*

(4) Refusal to submit to arrest is a Class B misdemeanor. [Emphasis added.]

Appellant argues that section 5-54-103(b) is unconstitutional, as written and as applied in this case, under the First and Fourth Amendments of the federal Constitution, and under Article II, Section 6 of the Arkansas Constitution. The gist of appellant's argument is that the statute mandated his submission to an

illegal arrest during his participation at a political rally, and, therefore, violated his Fourth Amendment right against unreasonable seizures of his person, and his state and federal constitutional rights to freedom of speech.

We do not address appellant's Fourth Amendment argument which he raises for the first time on appeal. *Claiborne* v. *State*, 319 Ark. 537, 892 S.W.2d 511 (1995). Even constitutional arguments which are not raised before the trial court are not properly preserved for our review and are waived on appeal. *Id.; Wetherington* v. *State*, 319 Ark. 37, 889 S.W.2d 34 (1994).

Appellant cites *Wright* v. *Georgia*, 373 U.S. 284 (1963), for the proposition that the state cannot constitutionally punish a person for refusing to obey a police officer's order which itself violates the constitution, and urges that *Wright* is controlling of this case. In *Wright*, "six young Negroes, were convicted of breach of the peace for peacefully playing basketball in a public park[.]" *Id.* at 285. The testimony of the arresting officers themselves, in that case, was that the arrests were based solely upon their intention to enforce racial discrimination in the park. The Supreme Court reversed the convictions as violative of the Equal Protection Clause of the Fourteenth Amendment and as unconstitutionally vague.

On the record before us, we do not agree that *Wright* is controlling of this case. The *Wright* decision is clearly distinguishable in two respects. First, the petitioners in *Wright* did not resist or refuse to submit to their arrests; consequently, the Court did not address the issues raised in this case. Second, the record does not show that appellant's arrest was based solely upon the arresting officers' intention to impermissibly interfere with appellant's First Amendment rights[1]. *Cf. Livingston* v. *State*, 610 So. 2d 696 (Fla. Dist. Ct. App. 1992) (reversing conviction for disorderly conduct where the underlying arrest was illegally based solely on defendant's use of protected First Amendment speech).

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[1]We here note that, for purposes of this appeal only, appellee concedes that appellant's underlying arrest for disorderly conduct was illegal for lack of probable cause. However, even assuming, *arguendo*, that his arrest was illegal for that reason, appellant refers us to no decision in which a court has recognized that a conviction for refusal to submit to an arrest which was illegal for lack of probable cause, unconstitutionally violated the arrestee's *freedom of speech* rights.

[redacted] Although, as the trial court found, appellant had a right to be at the rally exercising his constitutional rights, the record shows that the UAPD officers also had a colorable basis for their warrantless arrest of appellant where his disorderly conduct was committed in their presence. Ark. R. Crim. P. 4.1(a)(iii). The testimony of the arresting officers does not indicate that the arrest was based solely upon their intention to chill appellant's rights to freedom of speech. Indeed, the record shows that the UAPD officers did no more than discharge their duty by defusing a potentially dangerous situation before it could escalate into violence.

Appellant cites a federal district court case, *United States ex rel. Kilheffer* v. *Plowfield*, 409 F. Supp. 677 (E.D. Pa. 1976), in which the petitioner for habeas corpus had been convicted by a Pennsylvania state court of obstructing an officer in the execution of process when the petitioner gathered with other youths in a public park, insulted police officers, protested police orders to disperse, and then resisted his arrest for disorderly conduct. The petitioner argued that his conviction violated his federal constitutional rights, including freedom of speech. The district court framed the issue before it as, assuming without deciding that the arrest was unlawful, did the petitioner have a federal constitutional right to resist an unlawful arrest? In denying the petition, the district court held "that at least absent unusual circumstances there exists no such federal constitutional right." *Id.* at 680 (citing *United States ex rel. Horelick* v. *Criminal Court*, 366 F. Supp. 1140 (S.D.N.Y. 1973) *rev'd on other grounds*, 507 F.2d 37 (2d Cir. 1974)). The federal court summarily disposed of the petitioner's freedom of speech argument by observing that the state court had concluded the petitioner's conduct was not protected by the First Amendment.

The proposition for which appellant cites *Kilheffer* is that a federal constitutional right to resist an unlawful arrest remains in certain limited circumstances, *e.g.*, when the arrest is flagrantly abusive because the arrestee is engaging in an indisputably lawful activity and his resistance is so carefully calculated as to render negligible the risk that physical force need be used. Appellant's characterization is inaccurate because the *Kilheffer* court merely observed, in dictum, that it may be that a right to resist an unlawful arrest should be recognized in such circumstances.

In the *Horelick* decision cited by the *Kilheffer* court, a habeas corpus petitioner there argued, as does appellant, that his conviction for resisting arrest could not stand because the underlying arrest was unlawful, and resisting it simply constituted disobedience to an unlawful order, which the Supreme Court has held, *e.g., Wright*, 373 U.S. 284, in some circumstances at least, cannot constitutionally be punished. In rejecting this argument, the *Horelick* court noted that, although various constitutional bases for such a right have been suggested, none has been accepted by the courts. The *Horelick* petitioner's First Amendment rights were not argued specifically.

The *Horelick* court contrasted cases such as *Wright*, in which it was held the petitioner could not be punished for refusal to obey an unconstitutional police *order*, with cases such as the one before it, in which the petitioner argued he could not be punished for refusal to obey an unconstitutional *arrest*. The district court stated:

> The question remains, however, whether resistance to an unlawful *arrest* more closely resembles refusal to obey an unlawful police order, which is not punishable, than disobedience of a constitutionally defective court order, which the Court has held *is* punishable by contempt. *Walker* v. *Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967)[2].
>
> An unlawful arrest, like both a police order and a court order, can result in immediate interference with enjoyment of constitutional rights. *It differs, however, from the former and resembles the latter in that an unlawfully arrested person like an unlawfully restrained one has open to him an opportunity to vindicate his rights in court. . . . Put oth-*

[2]In *Walker*, the City of Birmingham obtained a temporary injunction restraining the petitioners from participating in a mass street parade without a permit as required by city ordinance. After the petitioners marched in violation of the injunction, a contempt hearing was held. The petitioners sought to attack the injunction, among other reasons, as an unconstitutional restraint upon free speech. The state court had refused to consider the constitutional arguments, ruling the only issues before it were whether it had jurisdiction to issue the injunction and whether petitioner had knowingly violated it. The Supreme Court affirmed the state court, holding that the petitioners could not bypass orderly judicial review of the injunction before disobeying it.

> *erwise, the arrest and the court order have built into them the potential of submitting the dispute to the impartial determination of courts of law (including the appellate courts).* [Emphasis added.]

Horelick, 366 F. Supp. at 1151. The *Horelick* court concluded that *Walker* controlled its decision, not *Wright*, and held that the petitioner's resisting arrest conviction was proper because he had no constitutional right to resist the arrest and because the common-law right to resist arrest had been preempted by New York state law.

Similarly, Arkansas has statutorily restricted the common-law right to resist arrest, even if the arrest is illegal. The policy reasons for this modification are stated in the commentary to Arkansas Statutes Annotated § 41-2803 (now section 5-54-103(a)), adopted in 1975[3], which provides, in pertinent part as follows:

> At common law a person could use reasonable nonlethal force in resisting an unlawful arrest. . . . Subsection 41-2803(3) [providing that illegal arrest is no defense to a charge of resisting] aligns Arkansas with Alaska, California, Delaware, Illinois and New Jersey in modifying this traditional rule. See, Annot., 44 A.L.R. 3rd 1078 (1972). A private citizen cannot use force to resist an arrest by one who he knows is a law enforcement officer performing his duties, regardless whether the officer had authority to make the arrest. *The place to litigate the legality of an arrest is in a court, not the streets.* The principle embodied in subsection (3) is repeated in § 41-512 — justification: use of physical force in resisting arrest prohibited. As discussed in the *Commentary to § 41-512*, neither that section nor this one applies when the illegality of the arrest stems from use of excessive force by the officer. [Emphasis added.]

See also Kilheffer, 409 F. Supp. 677, 680-82 and *Horelick*, 366 F. Supp. 1140, 1150-51 (discussing the modern trend to modify the common-law right to resist unlawful arrest).

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[3]Subsection 5-54-103(b) was added in 1987, without additional legislative commentary.

Consistent with the legislative purpose for section 5-54-103, appellant's remedy for any violation of his constitutional rights stemming from his arrest was to submit his dispute to the impartial determination of a court of law, including, if appropriate, an action for damages. *Kilheffer*, 409 F. Supp. 677. His remedy was not to refuse to submit to his arrest.

Our statutes are presumed to be constitutional, and all doubt is resolved in favor of the statute's constitutionality. *Beck* v. *State*, 317 Ark. 154, 876 S.W.2d 561 (1994); *Stone* v. *State*, 254 Ark. 1011, 498 S.W.2d 634 (1973). Appellant has the burden of proving that section 5-54-103(b) is unconstitutional. *Beck*, 317 Ark. 154, 876 S.W.2d 561. On this record, we find that appellant has not carried his burden of proving that section 5-54-103(b) unconstitutionally violated his freedom of speech rights, as it is written or as it was applied in this case.

OTHER ARGUMENTS

In light of our holding that appellant has failed to prove his constitutional argument, we summarily dispose of appellant's first and second points on appeal, each of which relied upon the success of appellant's constitutional attack on section 5-54-103 to establish that he suffered any prejudice as a result of the trial errors alleged in those first two points.

Appellant's third point for reversal relates to a videotape, approximately nine minutes in duration, depicting portions of the sequence of events at the Clinton rally which resulted in appellant's arrest. The videotape was filmed by a defense witness, Micah Neal, who testified that he stood only a few feet from appellant at the rally. The videotape also included an audio track.

During Neal's direct testimony, the videotape was admitted into evidence, and the trial judge stated that he would view the videotape at the conclusion of all testimonial evidence. The trial judge stated that the videotape "will speak for itself," and that he would not permit additional narration as the tape was viewed. At the conclusion of the testimony of the final defense witness, the trial judge viewed the videotape, without narration.

Appellant argues that it was error to preclude narration of the videotape. We do not address this argument because the abstract shows that no corresponding objection was made in

the trial court, hence appellant has failed to preserve the argument for appeal.

Finally, appellant argues the trial court erred in ruling that appellant could not use the videotape for further cross-examination or in examining recalled witnesses, and that the trial judge erred in refusing to permit him to make a proffer of the excluded evidence. The record shows that, at the conclusion of the testimony of the final defense witness, appellant's counsel stated that the defense had no other witnesses, excepting those who might be recalled after the trial judge viewed the videotape. Appellant's counsel also stated he would like to have an opportunity to use the videotape during further cross-examination of the UAPD officers. Appellee's counsel interjected that the prosecution would be calling no additional witnesses, thus there would be no further cross-examination for appellant. The trial judge instructed appellant's counsel that the defense would not be permitted to call any witnesses after the trial judge viewed the videotape. Appellant's counsel stated that he had no further questions for the witness, whereupon the trial judge called a recess and viewed the videotape. The defense then rested.

The following colloquy ensued:

> MR. CONNER [APPELLANT'S COUNSEL]: I want to make a proffer at this point for the record what would have happened had I been allowed to show additional — show this tape again in the presence of additional witnesses, what evidence that would have brought out, and I offer it, I proffer it at this point. That's all I have.
>
> THE COURT: Well, are you saying you have a witness that can look at this tape and basically point out certain subliminal things that I haven't seen or may not be able to see?
>
> MR. CONNER: Yes, sir. Absolutely. Absolutely.
>
> THE COURT: Who is that witness?
>
> MR. CONNER: There's a number of them, Judge.
>
> THE COURT: Well, I mean, who?
>
> MR. CONNER: Well, the officers, all three officers,

Mr. Williams and the other people who show — you can't tell who they are, but they can say, "That's me and here's what's happening at this point." That's all I'm saying is if I would be allowed to do that, that's what the evidence would show.

THE COURT: Mr. Conner, I know of no procedure that's been approved by any court that would permit that. Now, I've viewed the tape and I'm going to consider that tape in making my decision and I think I heard what the audio portions of it stated and I think I was able — the monitor is some fifteen feet from me here, it's a clear monitor. I was able to see what the tape depicted. And I've certainly heard numerous witness testify as to what occurred out there. And the issues still in my judgment are rather simple.

MR. CONNER: Yes, sir. I wasn't attempting to argue your ruling. I was just trying to make a proffer.

THE COURT: I understand what you're doing and I'm not taking it as argument or anything, but I'm not going to permit you to do it.

This court has stated that a proffer of evidence is governed by Rule 103 of the Arkansas Rules of Evidence. *Arkansas Valley Elec. Coop. Corp.* v. *Davis*, 304 Ark. 70, 800 S.W.2d 420 (1990) (citing *Jones* v. *Jones*, 22 Ark. App. 267, 739 S.W.2d 171 (1987)). In *Jones*, our court of appeals considered an issue of first impression in this state, that is, whether a trial court may properly refuse a proffer of excluded evidence, and quoted persuasive authority from the New Mexico Supreme Court which held that the right to proffer excluded evidence is "almost absolute." *Jones*, 22 Ark. App. 267, 270, 739 S.W.2d 171, 172 (quoting *State* v. *Shaw*, 90 N.M. 540, 565 P.2d 1057 (1977)). The *Jones* court held that under certain circumstances, a trial court may be justified in rejecting a proffer and noted those examples given by the *Shaw* court, *e.g.*, when the proffer is untimely or the tendered proof is clearly repetitious.

The trial court in this case did not permit appellant to make a complete proffer of the excluded evidence, that is, the commentary from the witness stand of each recalled witness as

he or she viewed the videotape. However, the record shows that the trial court was sufficiently advised of the nature of this excluded evidence to permit it to intelligently consider appellant's request. Implicit in the trial judge's ruling is his determination that the excluded evidence was cumulative or repetitious, in light of the fact that ten witnesses, including the three UAPD officers specifically identified in appellant's limited proffer, had testified as to the events depicted in the videotape, and the trial judge, as the fact finder, had viewed the videotape. On this record, we find the trial court committed no clear error.

Affirmed.

DUDLEY and BROWN, JJ., dissent.

ROBERT H. DUDLEY, Justice, dissenting. In October of 1992, just before the general election, Governor Bill Clinton, then the nominee of the Democratic Party for President of the United States, appeared at a campaign rally on the campus of the University of Arkansas. Appellant Williams, with some members of the Arkansas College Republicans, attended the rally and displayed "Bush\Quayle" signs. Appellant was ordered to leave by an officer of the University of Arkansas Police Department. He refused. Two officers advised appellant that he was under arrest for disorderly conduct and ordered him to move out of the area. He sat down and "went limp." He was physically removed from the scene and was charged with disorderly conduct and refusal to submit to arrest.

He was found guilty in municipal court and appealed to circuit court. In circuit court he was found guilty of refusal to submit to arrest. He appeals to this court. The majority opinion affirms the conviction for refusal to submit to arrest even though appellant was not allowed to fully present his First Amendment defense to the charge.

At the beginning of the trial in circuit court, appellant's counsel stated that he wished to challenge the "refusal to submit to arrest" statute, Ark. Code Ann. § 5-54-103 (Repl. 1993), because as it applied to appellant, it violated the First Amendment. The city attorney responded that the constitutional challenge was untimely because it had not been raised by motion ten days prior to trial. *See* A.R.Cr.P. Rule 16.2(b). The circuit court took

the matter under advisement and later refused to consider the constitutional challenge because it was not timely brought. The ruling was in error for two reasons. If the ruling was based on rule 16.2(b), it was in error because that rule establishes that a motion to suppress evidence must be filed ten days before the trial date. The motion was not one to suppress evidence. Rather, it was an argument that appellant had a fundamental right of free speech under the Constitution of the United States and that right, so long as lawfully exercised, was dominant over the state statute, which, as applied, was unconstitutional. Moreover, appellant's attorney had notified the city attorney of the defense months earlier, and appellant timely raised the issue at trial. .

As a result of the trial court's ruling, appellant was not allowed to put on proof that supposedly would show that all he did was hold up a "Bush/Quayle" sign in exercise of his right to free expression. The trial court ruled that it "was irrelevant whether Mr. Williams was merely holding a sign and doing nothing else wrong or not violating any law or regulation prior to his arrest." The trial court's ruling was based only on the applicable parts of Ark. Code Ann. § 5-54-103, which are:

> (b)(1) A person commits the offense of refusal to submit to arrest if he knowingly refuses to submit to arrest by a person known by him to be a law enforcement officer effecting an arrest; . . .
>
> (3) It is no defense to a prosecution under this subsection that the law enforcement officer lacked legal authority to make the arrest, provided he was acting under color or his official authority.

Id. § 5-54-103(b)(1) & (3).

It is undisputed appellant refused to submit to arrest and that the university police were acting under color of official authority.

The Attorney General seeks to avoid a remand for proof on the constitutional question by conceding that the arrest of appellant "was illegal because the police lacked probable cause" to arrest appellant for disorderly conduct. The majority opinion accepts the Attorney General's argument and, in a far-reaching opinion, holds that even when a policeman patently violates a citizen's First Amendment rights, the citizen must voluntarily

submit to that violation or be convicted of a crime. I respectfully dissent. The real question is whether a citizen ought to be *convicted of a crime* solely for refusing to submit to a patently unlawful deprivation of his First Amendment rights.

The common law right to resist unlawful arrest has fallen into disfavor with the General Assembly and most citizens, as well it should, for practical reasons. Today a person wrongfully arrested can make bail, utilize numerous procedural safeguards, pursue remedies, and initiate civil damage actions against the police officer and the offending government. There is the civilized notion that the place to settle a dispute over the validity of an arrest is in a court of law, and not on the campus of a university or out in the streets. However, to assert that adequate legal remedies now exist to redress false arrests is to misconstrue the rationale behind the right. The right does not exist to encourage citizens to resist arrest, but rather to protect from punishment those who passively resist representatives of the government from illegally taking away *fundamental* rights. Even when one wholeheartedly accepts the philosophy that unlawful arrests should be dealt with in a civil manner, *there still exist a few occasions when fundamental rights guaranteed under the Constitution are patently at risk and stand to be forever lost. Under those limited circumstances it is in violation of the Constitution to convict a person for refusal to submit to an illegal arrest when that nonviolent refusal was essential to the vindication of those rights. See* Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 Yale L.J. 1128 (1969).

The crime of which appellant stands convicted is *refusal to submit to arrest*, section 5-54-103(b)(1), and not *resisting arrest*, section 5-54-103(a)(1). The crime of resisting arrest involves affirmative physical force and violence and creates a substantial risk to all in the immediate area. It is the common law right to actively "resist arrest" which has fallen into disfavor. Today's notion of civility dictates that one cannot resist police by affirmative physical force even for the illegal deprivation of one's fundamental rights. Quite different, the "refusal to submit" in this case was passively sitting down and "going limp" while the policeman wrongly deprived appellant of his right of free speech.

Freedom of speech is fundamental to the functioning of a

democracy. It is a fundamental right guaranteed by the First Amendment. In the limited category of fundamental rights cases, refusal to submit to an illegal abridgement of one's freedom of speech, *without being convicted of a crime*, can be essential to the vindication of the right. To dramatize the fallacy of the reasoning of the majority opinion, assume that the policeman, instead of illegally arresting appellant, illegally arrested now President Clinton for exercising his right of free speech, but President Clinton "refused to submit" to the illegal arrest. The speech at the rally would be forever lost, and, egregiously, under the majority opinion, President Clinton would be subject to punishment for refusing to submit to a patent violation of his fundamental right. Aside from that dramatic hypothetical example, the paradigm case is the one in which the right to refuse to submit is exposed by a typical street incident: A policeman sees a group of men on a corner and tells them to move on. One refuses. In order to maintain his authority, the policeman illegally arrests the man. He refuses to submit and will be convicted of a crime for that refusal to submit. *See* Chevigny, *supra*. Another case might be the policeman who walks into a newspaper plant and tells the manager to stop the press. The manager refuses. The policeman illegally arrests the manager. He refuses to submit to the oppression and will be convicted of the crime of refusal to submit. As a matter of principle in a democratic society, it is unconscionable to convict a citizen, no matter what his or her status, for refusing to submit to the illegal deprivation of his right of free speech.

> The flaw in the statutes and court decisions which purport to abolish the right to resist is that they create a situation where the citizen is trapped by the legal system. If he obeys a patently arbitrary arrest, he has submitted to oppression, and if he resists, he may be convicted for his resistance. Surely there can be no more embittering experience of the criminal process than such a conviction. The freedom to refuse to obey a patently unlawful arrest is essential to the integrity of a government which purports to be one of laws, and not of men. Unless it is desirable to kill the impulse to resist arbitrary authority, the rule that such an arrest is a provocation to resist must remain fundamental.

Chevigny, *supra*, at 1147.

The "refusal to submit" to the illegal denial of one's fundamental right of speech may be essential to the vindication of that right. As noted by one author:

> First amendment rights, in particular, may need such protection. The police frequently arrest political demonstrators even though the demonstrators are acting lawfully. These arrests are often patently illegal, and mild resistance is not uncommon. Resistance, such as going limp, is part of the effort to continue the lawful demonstration. Arrests under these circumstances may be highly provocative, but provocation is not the issue here; reasonable resistance should be legitimated in order to protect the first amendment freedom. Were there no right to resist such arrests, the resisting arrest statute would afford the police an easy tool for curbing the exercise of first amendment rights. Whenever a lawful arrest for demonstrating might be barred by the first amendment, the simplest thing for the police to do would be to arrest the demonstrators unlawfully. The demonstration would then be terminated with little risk of consequences to the police; those who resisted could be convicted of obstructing an officer, while those who submitted would necessarily cease the conduct found offensive by the authorities. As applied to warrantless arrests which patently violate first amendment rights, therefore, any statute which limits the common law right to resist should be held unconstitutional.

Chevigny, *supra*, at 1138.

The Supreme Court of the United States has expressly held that an accused cannot be *punished* for violating an illegal and arbitrary police order. In *Wright* v. *Georgia*, 373 U.S. 284 (1963), six young black males were playing basketball in a public park customarily used only by whites. The police ordered the young blacks to leave the park. One asked the officer, "[b]y what authority," but did not create a disturbance as they were transported to police headquarters. *Id.* at 286. They were charged and convicted of assembling "for the purpose of disturbing the public peace" and *not dispersing at the command of the officers*. There was no evidence of disorderly conduct or any activity which might be thought to violate a breach of the peace statute. The Supreme

Court reversed, and in the pertinent part of the unanimous opinion, wrote:

> Three possible bases for petitioners' convictions are suggested. First, it is said that failure to obey the command of a police officer constitutes a traditional form of breach of the peace. Obviously, however, *one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution.* The command of the officers in this case was doubly a violation of petitioners' constitutional rights. It was obviously based, according to the testimony of the arresting officers themselves, upon their intention to enforce racial discrimination in the park. For this reason the order violated the Equal Protection Clause of the Fourteenth Amendment. See *New Orleans Park Improvement Assn.* v. *Detiege*, 358 U.S. 54, affirming 252 F.2d 122. The command was also violative of petitioners' rights because, as will be seen, the other asserted basis for the order — the possibility of disorder by others — could not justify exclusion of the petitioners from the park. *Thus petitioners could not constitutionally be convicted for refusing to obey the officers.* If petitioners were held guilty of violating the Georgia statute because they disobeyed the officers, this case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute. Cf. *Winters* v. *New York*, 333 U.S. 507; *Stromberg* v. *California*, 283 U.S. 359; see also *Cole* v. *Arkansas*, 333 U.S. 196.

Id. at 291-92 (emphasis added).

The majority opinion endeavors to distinguish *Wright* from the case at bar by stating:

> First, the petitioners in *Wright* did not resist or refuse to submit to their arrests; consequently, the Court did not address the issues raised in this case. Second, the record does not show that appellant's arrest was based solely upon

> the arresting officers' intention to impermissibly interfere with appellant's First Amendment rights.

The supposed distinguishing factors can only be inferred by conjecture because the trial court refused to allow appellant to present his evidence that allegedly would have shown that he just held up a "Bush/Quayle" sign and, after the illegal police order, only sat down and "went limp." The trial court ruled that appellant did not raise his constitutional defenses in a timely manner, and, under the applicable statute, the trial court ruled that it "was irrelevant whether Mr. Williams was merely holding a sign and doing nothing else wrong or not violating any law or regulation prior to this arrest."

Wright is directly in point and has been held to be in point by other courts. Using similar reasoning, the Supreme Court of Florida held that even though Florida had a "resisting arrest" statute, a conviction under that statute must be reversed when the act of the officer was illegal. *Licata* v. *State*, 24 So. 2d 98 (Fla. 1945); *see also Livingston* v. *State*, 610 So. 2d 696 (Fla. Dist. Ct. App. 1992).

The majority opinion also cites *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), but that case involved an injunction issued by a court. Process issued by a court stands in a fundamentally different position from an illegal police command. The federal district court in *United States ex rel. Horelick* v. *Criminal Court*, 366 F. Supp. 1140 (S.D.N.Y. 1973), *rev'd on other grounds*, 507 F.2d 37 (2d Cir. 1974), cogently set out the differences as follows:

> *Undeniably, the Court has held that a person cannot be punished for refusal to obey a police order which violates his constitutional rights.* [Emphasis added.] *See, e.g., Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 86 S. Ct. 211, 15 L. Ed. 2d 176 (1965); *Wright* v. *Georgia*, 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed. 2d 349 (1963). The question remains, however, whether resistance to an unlawful *arrest* more closely resembles refusal to obey an unlawful police order, which is not punishable, than disobedience of a constitutionally defective court order, which the Court has held *is* punishable by contempt. *Walker* v. *Birmingham*, 388 U.S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210 (1967).

> An unlawful arrest, like both a police order and a court order, can result in immediate interference with enjoyment of constitutional rights. It differs, however, from the former and resembles the latter in that an unlawfully arrested person like an unlawfully restrained one has open to him an opportunity to vindicate his rights in court. These rights are not irrevocably compromised by initial compliance as they are in the case of the person who obeys a police order and who, as a result, forever loses his chance to contest it by allowing the policeman the final say. Put otherwise, the arrest and the court order have built into them the potential of submitting the dispute to the impartial determination of the courts of law (including the appellate courts). *The unlawful police order, on the other hand, if obeyed, makes the policeman the final arbiter.* [Emphasis added.] This distinction persuades us that Horelick's situation is controlled not by *Shuttlesworth* and *Wright*, but by *Walker.*

Id. at 1151.

In summary, it is fundamentally correct to excuse a citizen who passively refuses to submit to an unlawful police action that takes away his First Amendment rights. The purpose of excusing that person is not to encourage violence in the streets, but to preserve the sense of personal liberty that is inherent in the right to reject illegal commands. To permit police officials to illegally provoke citizens into committing the crime of "refusing to submit" to an unlawful arrest creates a trap for citizens which must, in the long run, injure the integrity of the judicial system and damage the democracy. I would remand this case so that the constitutional issue might be developed by the parties and considered by the circuit court. For these reasons, I respectfully dissent from the majority opinion.

ROBERT L. BROWN, Justice, dissenting. I join in much of Justice Dudley's dissent and write to emphasize that the trial court erred in failing to address the constitutional issues of Mr. Williams' political free speech. It is not for this court to develop the facts and the law surrounding that issue, but that is exactly what the majority opinion does. Here, the State concedes that the arrest was illegal. Like Justice Dudley, I would remand the matter for the trial court's consideration and resolution of the First Amendment issue.

SUPPLEMENTAL OPINION UPON
GRANTING REHEARING
JULY 3, 1995

901 S.W.2d 831

1. APPEAL & ERROR — TRIAL COURT SHOULD HAVE ALLOWED APPELLANT OPPORTUNITY TO PRESENT TESTIMONY ON WHETHER PROBABLE CAUSE EXISTED AT THE TIME OF HIS INITIAL ARREST — REQUEST FOR A REMAND TO THE LOWER COURT FOR A FULL DEVELOPMENT OF THE FACTS GRANTED. — Where the trial court failed to afford appellant the opportunity to present relevant testimony on whether probable cause existed at the time of his initial arrest, the appellant's request for a remand to the lower court for a full development of the facts was granted.
2. APPEAL & ERROR — EXPLANATORY TESTIMONY CONCERNING A VIDEOTAPE NOT ALLOWED — TESTIMONY PROPERLY EXCLUDED AT TRIAL. — The trial court's denial of appellant's request to present explanatory testimony related to a videotape which had been introduced into evidence was not in error.

Petition for Rehearing granted.

Jeff R. Conner, for appellant.

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

TOM GLAZE, Justice. In his original brief in this appeal, Jeffrey Williams argued in his second point for reversal that the trial court erred in refusing to admit his testimony bearing on the illegality of his arrest for disorderly conduct. Specifically, Williams contended he was denied an opportunity to present testimony on whether probable cause existed at the time of his initial arrest. The trial court declared such testimony was irrelevant. Following that ruling, the trial court also denied Williams the opportunity to proffer testimony concerning the probable cause issue. The thrust of Williams' argument on this point was that the trial court's rulings frustrated his attempt to show he was doing nothing wrong before the officers ordered him to leave, and no basis existed for the charge of disorderly conduct. In sum, Williams asserted that the "trumped up" disorderly conduct charge was merely used by the officers to remove him and "bootstrap" themselves into obtaining a conviction for refusal to submit to arrest.

In our original review of this cause, we mistakenly failed to address Williams' second point as described above. Williams suggests our opinion improperly considered the officers' testimonies concerning the probable cause issue even though the trial court had refused him the opportunity to develop evidence on that issue. While Williams' arguments, constitutional and otherwise, seem to overlap and appear confusing in some respects, we are convinced of two things. First, the trial court was wrong in not affording Williams the opportunity to present testimony on whether probable cause existed at the time of his initial arrest. Such testimony was relevant. If probable cause did, in fact, exist, Williams' constitutional arguments are arguably preempted even if those arguments had been timely preserved. Second, the trial court compounded its error by denying Williams the opportunity to proffer testimony bearing on the probable cause issue. *See* Ark. R. Evid. 103(a)(2).

In view of the above, we grant Williams' request for a remand to the lower court for a full development of the facts. If the constitutional issues argued by Williams are viable after further development of relevant testimony in this cause, the trial court may then address them.

One additional point needs mentioning since this matter will require further evidentiary proceedings on remand. Concerning this court's original opinion as it involved Williams' request to present explanatory testimony related to a videotape which had been introduced into evidence, we reiterate our holding that the trial court did not err in excluding such testimony. *See Williams* v. *State*, 320 Ark. at 211, 222-223, 895 S.W.2d 913 (1995).

For the foregoing reasons, we grant Williams' petition for rehearing.

FORD MOTOR CREDIT COMPANY *v.* TWIN CITY BANK

94-1114 895 S.W.2d 545

Supreme Court of Arkansas
Opinion delivered April 3, 1995

Smith & Nixon, by: *W. Robert Nixon, Jr.*, for appellant.

The Rose Law Firm, A Professional Association, by: *Herbert C. Rule III* and *Steve D. Durand*, for appellee.

ROBERT L. BROWN, Justice. This case involves a dispute over the cash collateral of a debtor in bankruptcy (One Moore Ford, Inc.) and the claims to that cash collateral by two secured creditors — appellant Ford Motor Credit Company and appellee Twin City Bank ("TCB"). The trial court granted summary judgment in favor of one secured creditor, TCB. We conclude, however, that a material issue of fact remains to be decided, and we reverse the order of summary judgment and remand the matter for trial.

Prior to bankruptcy, Ford Motor Credit provided a wholesale line of credit for One Moore Ford, a car dealership in North Little Rock, and advanced the purchase money for its inventory of vehicles. Under this "floor plan" arrangement, One Moore Ford was expected to repay Ford Motor Credit after the retail sale of each vehicle by sending a check to the credit company for the amount advanced for the vehicle plus accrued interest. On or about December 17, 1990, checks payable to Ford Motor Credit and drawn by One Moore Ford on its account at TCB were returned due to insufficient funds. On or about December 20, 1990, One Moore Ford and Ford Motor Credit reached an oral agreement whereby One Moore Ford would continue to sell the vehicle inventory under the floor plan arrangement with a Ford Motor Credit representative on the dealership's premises. That representative would collect the amount advanced plus accrued interest for each sale. The surplus proceeds for the sale would then be available to One Moore Ford for use as operating expenses. On December 26, 1990, One Moore Ford set up an account at

Eagle Bank & Trust for the purpose of depositing the surplus proceeds. Claude Hill, former branch manager of Ford Motor Credit, stated in his deposition that the credit company agreed during December 1990 to allow One Moore Ford to retain the surplus proceeds from the sale of its vehicles. The reasons for the agreement were to provide One Moore Ford with operating capital and to prevent the liquidation of the business. Stan Lockhart, the current branch manager at Ford Motor Credit, corroborated this assessment in his deposition.

On January 14, 1991, One Moore Ford filed a petition for bankruptcy relief under Chapter 11 of the U.S. Bankruptcy Code and continued to operate the dealership as a debtor-in-possession. On January 16, 1991, One Moore Ford established a new bank account at Eagle Bank as a debtor-in-possession and transferred the balance of surplus proceeds, now cash collateral for the debtor's estate, from the previous Eagle Bank account into the new account. One Moore Ford, as debtor-in-possession, continued to deposit the surplus proceeds into this new account.

On January 16, 1991, Ford Motor Credit filed a motion in bankruptcy court to limit the use of cash collateral, including the surplus proceeds in the Eagle Bank account. By Agreed Order filed January 18, 1991, One Moore Ford and Ford Motor Credit agreed, and the bankruptcy court ordered, that the cash collateral would be handled in the manner approved by the parties in December 1990 before the petition in bankruptcy. Pertinent parts of that Agreed Order read:

> The debtor and Ford Motor Credit Company have agreed that Ford Credit is entitled to continue to have its cash collateral handled in the manner that had been jointly approved by the parties prior to filing the petition for debtor relief. The following procedure shall continue until changed by court order.
>
> 1. Ford Motor Credit Company's cash collateral, consists [of] contracts purchased by it from the debtor, generated by sale of wholesale inventory of automobiles.
>
> 2. Ford Credit shall be permitted to keep a representative on the debtor's premises to assure that Ford Credit receives the portion of proceeds of any sale to which it is

> entitled, the amount necessary to discharge the secured debt on each individual unit;

Also, on January 18, 1991, the bankruptcy court granted One Moore Ford's motion to allow use of cash collateral for payment of payroll, payroll taxes, and purchase of parts. In its order, the bankruptcy court approved One Moore Ford's using TCB's cash collateral for payroll and payroll taxes ($25,000) and for the purchase of parts ($25,000). The bankruptcy court further authorized One Moore Ford to use $23,000 of the cash collateral of Ford Motor Credit held on deposit at Eagle Bank:

> The Debtor is further authorized to use cash collateral of Ford Motor Credit Company subject to the terms and provisions of an Agreed Order by and between the Debtor and Ford Motor Credit Company submitted contemporaneous herewith. Such cash collateral that the Debtor may use shall be defined as the Debtor's portion of the sale proceeds derived from purchase of contracts by Ford Motor Credit Company from Debtor. For purposes of this Order, Debtor shall use $23,000.00 of funds currently held on deposit at Eagle Bank.

One Moore Ford next entered into an agreement for post-petition financing with TCB, and the bankruptcy court conditionally approved the agreement on January 25, 1991. The court found that One Moore Ford could incur secured debt in an amount not to exceed the lesser of cash generated from operations or $1,691,000. Pertinent parts of that approved financing agreement read:

> 6.2 *Costs and Expenses to be Funded; Monthly Budget.* (a) TCB shall advance funds to the Debtor to pay the reasonable and necessary costs and expenses incurred by it in connection with the preservation and disposition of accounts receivable, all inventory, . . . equipment and other property of the Debtor in which TCB has a valid, perfected and enforceable security interest.
>
> . . . .
>
> 9.1 *Liens; Security Interests.* . . . The security interest of TCB shall be superior to the claims of all other creditors except for the pre-petition perfected claims of Ford

> Motor Credit Corp. with respect to MOORE FORD's vehicle inventory and proceeds and except for any pre-petition perfected interests in Borrower's real property.

From January 25, 1991, until February 21, 1991, One Moore Ford, at the direction of TCB, transferred $185,000 of the cash collateral held in the Eagle Bank debtor-in-possession account, which were surplus proceeds from its vehicle sales, to its debtor-in-possession account at TCB. TCB did not notify Ford Motor Credit or obtain its permission for these transfers. Also, on February 21, 1991, One Moore Ford made a direct deposit of $8,000 into the TCB account: $7,000 was a cashier's check and $1,000 was cash. There appears to be no dispute that the funds transferred from Eagle Bank to TCB were subsequently used to pay One Moore Ford's operating expenses. One Moore Ford eventually converted its Chapter 11 bankruptcy to a Chapter 7 liquidation. According to the proof presented in this matter, TCB is left with an unpaid debt of $750,000, and Ford Motor Credit is owed $1,841,032.

On September 18, 1991, Ford Motor Credit filed a complaint against TCB in Pulaski County Circuit Court and alleged conversion of its cash collateral held on deposit at Eagle Bank. Later, on April 2, 1993, Ford Motor Credit amended its complaint to allege that TCB converted its cash collateral when it demanded that One Moore Ford transfer the cash collateral in the Eagle Bank account to the TCB account. On February 18, 1994, Ford Motor Credit filed a third amendment to its complaint, alleging the total amount of the conversion to be $193,000.

On December 22, 1993, TCB moved for summary judgment on grounds that One Moore Ford had used the cash collateral at issue solely for operating expenses and that Ford Motor Credit had consented to the use of those funds for that purpose. On February 22, 1994, Ford Motor Credit filed its own motion for summary judgment and asserted that it was entitled to judgment for conversion against TCB as a matter of law. The circuit court conducted a hearing on the two motions on February 28, 1994, and following the hearing granted summary judgment to TCB. In doing so, the court found that Ford Motor Credit had consented to One Moore Ford's use of the Eagle Bank cash collateral for operating expenses under the Agreed Order and that Ford Motor

Credit had sustained no damages to support an action for conversion because TCB had used the funds in dispute for the operating expenses of One Moore Ford which benefited both secured creditors.

Ford Motor Credit mounts three arguments for reversal: (1) TCB was not entitled to summary judgment as a matter of law because of its conversion of Ford Motor Credit's cash collateral; (2) the circuit court abused its discretion in denying summary judgment to Ford Motor Credit; and (3) an issue of material fact remains to be decided on whether Ford Motor Credit consented to use of its cash collateral for One Moore Ford's operating expenses. We agree that an issue of material fact does remain over whether Ford Motor Credit consented to TCB's use of these funds.

Our oft-stated standard for review of a summary judgment is whether the evidentiary items presented by the moving party in support of the motion left a question of material fact unanswered and, if not, whether the moving party is entitled to summary judgment as a matter of law. *Oglesby* v. *Baptist Medical System*, 319 Ark. 280, 891 S.W.2d 48 (1995); *Forrest City Machine Works* v. *Mosbacher*, 312 Ark. 578, 851 S.W.2d 443 (1993). The burden of sustaining the motion is on the moving party. *Id.* All proof must be viewed in the light most favorable to the party resisting the motion, and all doubts and inferences must be resolved against the moving party. *Id.* However, when the movant makes a *prima facie* showing of entitlement, the respondent must meet proof with proof by showing genuine issue as to a material fact. *Brunt* v. *Food 4 Less, Inc.*, 318 Ark. 427, 885 S.W.2d 894 (1994); *Wyatt* v. *St. Paul Fire & Marine Insurance Co.*, 315 Ark. 547, 868 S.W.2d 505 (1994).

TCB vigorously contends in support of affirming its order for summary judgment that Ford Motor Credit consented to the use of the Eagle Bank cash collateral post-petition for payment of One Moore Ford's operating expenses and that those proceeds were indeed used for that purpose only. It points to the Agreed Order where One Moore Ford and Ford Motor Credit agreed that the credit company was "entitled to continue to have its cash collateral handled in the manner that had been jointly approved by the parties prior to filing the petition for debtor relief." Further-

more, the Agreed Order provided that Ford Motor Credit could keep a representative on the debtor's premises to ensure that it received "the portion of proceeds of any sale to which it is entitled, the amount necessary to discharge the secured debt on each individual unit." According to TCB, that order conclusively evidences Ford Motor Credit's consent.

Ford Motor Credit urges on the other hand that it never consented to blanket use of the Eagle Bank cash collateral for operating expenses post-petition and premises its countervailing argument on several factors. It argues that the Agreed Order may refer to a pre-petition procedure for depositing funds in the Eagle Bank account, but nowhere does it authorize use of that cash collateral for One Moore Ford's operating expenses. Ford Motor Credit also points to the Bankruptcy Code which requires either consent by all interested entities or court authorization before cash collateral can be used. 11 U.S.C. § 363(c)(2) (1988). Ford Motor Credit further underscores the fact that the second order of January 18, 1991, authorized using only a fixed amount of the Eagle Bank funds for operating expenses — $23,000. That order does not state or otherwise indicate that it would be blanket or continued authority for use of this cash collateral beyond the specified amount. Ford Motor Credit contends that it consented to One Moore Ford's use of the $23,000 on that one occasion because One Moore Ford had not yet secured post-petition financing with TCB. According to Ford Motor Credit, once One Moore Ford secured financing from TCB on January 25, 1991, the obligation to pay operating expenses became TCB's and the Eagle Bank cash collateral could not be invaded. Indeed, Ford Motor Credit refers to the precise language in the January 25, 1991 Financing Order that its perfected claims in vehicle inventory and proceeds would be superior.

[redacted] We agree that when read together the two January 18 orders are unclear and inconclusive on whether Ford Motor Credit consented to use of the Eagle Bank cash collateral for operating expenses post-petition. Indeed, the circuit court recognized an ambiguity in the orders, though the parties did not, when it stated:

> The problem I have, though, is that there's an ambiguity with the agreed order and the order allowing use of collateral for payment. We have two affidavits from two gen-

> tlemen who had an agreement with One Moore Ford to apparently use the funds as operating expenses. There's nothing that I can see that's been filed that said that there was an agreement after January the 18th. And the January . . . 18th order is ambiguous in that it states that they are entitled to continue to have its cash collateral handled in the same manner that had been jointly approved by the parties prior to filing the petition. . . . I don't know if there's a factual issue, though, that we need to decide, and that is what this agreed upon order means. It is not clear. If it in fact means that they continued to use the funds for operating expenses, then I would grant the motion for summary judgment.

It is difficult for this court to conclude that a question of material fact surrounding Ford Motor Credit's consent to its cash collateral does not exist when the circuit court alludes to the lack of clarity and an ambiguity in the two controlling bankruptcy court orders. When an ambiguity exists in contract language, for example, clearly it becomes a matter for resolution by the trier of fact. *See, e.g., Keller* v. *Safeco Ins. Co.*, 317 Ark. 308, 877 S.W.2d 90 (1994); *McNair* v. *McNair*, 316 Ark. 299, 870 S.W.2d 756 (1994).

Moreover, a bankruptcy petition changes the relationship of all affected entities, and here there is conflicting proof on the use of the Eagle Bank funds post-petition. TCB presents the affidavits and depositions of Ford Motor Credit branch managers Claude Hill and Stan Lockhart, One Moore Ford attorney Geoffrey Treece, and then TCB Executive Vice President Robert Birch in support of its case that Ford Motor Credit consented to the use of its cash collateral for One Moore Ford's operating expenses. Ford Motor Credit counters this proof with the affidavits and depositions of Lockhart, Birch, and One Moore Ford Chief Accountant Terry Mercing that it never consented to the transfer of the Eagle Bank cash collateral to TCB. Lockhart in particular testified to this by affidavit, and Birch admitted that he saw no reason to seek Ford Motor Credit's permission to transfer the Eagle Bank cash collateral. Thus, not only were the two orders of January 18, 1991, unclear and conflicting on the issue of consent, but the affidavits and depositions submitted by the parties conflict on the extent that Ford Motor Credit knew that TCB

was using the Eagle Bank cash collateral post-petition. Ordinarily, cross motions for summary judgment might eliminate all factual issues. But TCB and Ford Motor Credit are diametrically opposed on the factual issue of consent.

We, accordingly, hold that whether Ford Motor Credit consented to a general use of its cash collateral at Eagle Bank for One Moore Ford's operating expenses after the bankruptcy petition was filed is an issue of material fact that remains to be determined. Nor do we believe that the issue can be resolved simply as a matter of law by reference to the bankruptcy orders for reasons already discussed. Manifestly, if Ford Motor Credit did not consent to the use of its cash collateral and it was wrongfully spent, damage to the credit company would be the result. Nevertheless, we do not reach the issue of whether a conversion in fact transpired in this opinion.

We reverse the order of summary judgment and remand for a trial on the merits. With regard to the remand, we turn to the request of Ford Motor Credit that a different circuit judge try the case due to the fact that the current circuit judge has made a decision on the consent and damage issues. Ford Motor Credit contends that this would militate against an impartial tribunal. We do not agree that this impairs the ability of Ford Motor Credit to obtain a fair trial. We have previously held that when a trial judge granted a directed verdict and we reversed and remanded for trial and the matter was in fact tried, there was no valid reason for the judge to disqualify. *Carton* v. *Missouri Pacific Railroad*, 315 Ark. 5, 865 S.W.2d 635 (1993). We noted in *Carton* that a judge has a duty to remain in a case unless there is some valid reason to disqualify. Moreover, the decision to disqualify rests within the trial court's discretion. *Trimble* v. *State*, 316 Ark. 161, 871 S.W.2d 562 (1994); *Pinkston* v. *Lovell*, 296 Ark. 543, 759 S.W.2d 20 (1988). Reversals of summary judgment orders and directed verdicts and remands for new trials occur from time to time. Were we to require a new judge to be substituted in each instance, that would necessitate multiple appointments and exchange agreements that may not in fact be necessary. We decline to do so in this instance.

Reversed and remanded.

Ena WILSON and Bruce Wilson
v. William R. BROWN and Jane Brown

94-920 897 S.W.2d 546

Supreme Court of Arkansas
Opinion delivered April 3, 1995
[Rehearing denied May 1, 1995.*]

*Holt, C.J., not participating.

Robinson, Staley & Marshall, by: *Robert L. Robinson*, Jr., for appellants.

Pope, Shamburger, Buffalo & Ross, by: *John K. Shamburger*, for appellees.

ROBERT L. BROWN, Justice. This case involves two adjacent businesses — a skating rink and a catfish restaurant — the customers of which use the same driveway for ingress and egress from Highway 25 in Heber Springs. Appellants Ena and Bruce Wilson own the skating rink.[1] Appellees William R. and Jane Brown own the catfish restaurant. The central dispute involves the joint use of an easement strip and alleged interference in that usage by each party against the other.

In 1982, Greers Ferry Development Company, Inc. owned the property abutting Highway 25 which property is now owned by the Wilsons and the Browns, including the easement which is in dispute in this matter. In that year, Greers Ferry Development sold part of its property to the Wilsons' predecessors, James L. Hawkins and Cherolyn Hawkins, for the purpose of operating a skating rink and stated in the deed: "Grantor reserves unto himself a parking and driveway easement." That easement was described as having dimensions of 30 feet by 220 feet and ran from Highway 25 to the skating rink. On July 31, 1992, the Wilsons purchased this same property from Heber Springs State Bank, which succeeded to the interest of Greers Ferry Development, "subject to any existing easements." The Wilsons now operate the skating rink known as Skateland on the property. Prior to that date and on April 7, 1988, the Browns purchased the other part of the Greers Ferry Development property and have operated a catfish restaurant, Mr. B's, on that property. Since their purchase of the land, they have used the easement for a driveway and for parking. The Wilsons have continued to use the strip for access from the skating rink to Highway 25.

In May 1993, the Wilsons began to experience problems with the Browns' use of the easement strip. On July 2, 1993, the Wilsons wrote a letter to the Browns instructing them to cease dumping waste water and fish debris onto Skateland's property and demanding that they also prevent their customers from parking on the property. On August 26, 1993, the Browns filed a peti-

[1]The catfish restaurant also has its own separate entrance apart from the joint driveway.

tion in chancery court, seeking a temporary restraining order and a permanent injunction against the Wilsons from interfering with their easement. The chancellor temporarily restrained the Wilsons from blocking the easement pending the hearing. On September 13, 1993, the Wilsons answered the Browns' petition and counterclaimed against the Browns. The Wilsons alleged that the easement reserved was in gross and personal to Greers Ferry Development and, therefore, terminated when Greers Ferry Development's interest in the restaurant property ceased. Further, they asserted that the actions of the Browns in dumping refuse on the Skateland property and burning trash constituted a continuous trespass and nuisance, and they requested that the chancellor enjoin the Browns and their customers from parking and driving on the easement. As an alternative, the Wilsons sought a declaratory judgment authorizing the Wilsons to erect a fence at the Browns' expense which would set off the easement strip from the restaurant property. Finally, the Wilsons prayed for a dismissal of the Browns' petition on the ground that the Browns should not be allowed to come into equity with unclean hands. On December 10, 1993, the chancellor modified the temporary restraining order and directed the Browns not to dump trash on the easement strip or impede ingress or egress to the skating rink property.

On March 3 and 4, 1994, the matter was tried before the chancellor. Following the trial, the chancellor issued a letter opinion finding that the easement was appurtenant to the Browns' property and not personal to Greers Ferry Development. In his resulting decree, he ordered the Browns to erect a barricade on the easement strip. That barricade, according to the decree, would allow the Wilsons to have the full 30-foot width at the entrance of the easement strip off Highway 25 for the first 10 feet but would then limit the width of the easement to 18 feet rather than 30 feet for the remainder of the strip. On March 31, 1994, the Wilsons moved for an amended decree for the reason that the barricade denied them adequate access to Highway 25. The chancellor denied the motion.

For their first point, the Wilsons urge that the chancellor was wrong in finding that the easement strip was appurtenant to the restaurant property and not personal to Greers Ferry Development. We disagree. This court has explained that ease-

ments appurtenant run with the land and easements in gross are personal to the grantors. *Merriman* v. *Yutterman*, 291 Ark. 207, 723 S.W.2d 823 (1987); *Wallner* v. *Johnson*, 21 Ark. App. 124, 730 S.W.2d 253 (1987). An easement appurtenant serves a parcel of land called the dominant tenement. The property on which the easement is imposed is the servient tenement. *Thompson on Real Property*, § 60.02(f)(3) (David A. Thomas ed. 1994). An easement in gross does not have a dominant tenement because it benefits one person or entity, not the land. *Id.* In addition, when we interpret a deed, the primary consideration must be given to the intent of the grantor. *Bennett v. Henderson*, 281 Ark. 222, 663 S.W.2d 180 (1984). The intent of the grantor should be garnered solely from the language of the deed unless the language of the instrument is ambiguous, uncertain, or doubtful. *Id.* If the language of the deed is ambiguous or doubtful, it should be construed against the party who prepared it. *Id.*

The Wilsons rely on *Merriman* v. *Yutterman, supra*, and *Rose Lawn Cemetery Assoc., Inc.* v. *Scott*, 229 Ark. 639, 317 S.W.2d 265 (1958), for their contention that the failure to reserve the easement in heirs, successors, and assigns renders the easement merely one in gross. In *Merriman*, this court addressed the following language in a will: "the forty (40) foot driveway from Free Ferry Road, three hundred (300) feet Northward, shall be kept open for the common use of the devisees in this will." This court held that by stating in his will that the driveway was to be kept open for the *common use* of the devisees in the will, the deceased evidenced his intent that the easement was personal to those parties. Because the easement was in gross, it was not transferable. In *Rose Lawn Cemetery*, the grantor conveyed his interest in property to his three sisters "except a strip of land 25 feet wide . . ., which is reserved as a roadway for use of the parties hereto." The grantor's children subsequently inquired whether they had an interest in the strip of land reserved by the grantor. This court held that the language in the deed created an easement in gross which was personal to the parties which ended at the grantor's death. Accordingly, the grantor's children could claim no interest in the strip of land. We note that in both the *Merriman* and the *Rose Lawn* cases the use of the easement was limited to certain individuals. That factor warranted a conclusion that the easements were in gross. To the same effect are *Ft. Smith*

Gas Co. v. *Gean*, 186 Ark. 573, 55 S.W.2d 63 (1932) and *Field* v. *Morris*, 88 Ark. 148, 114 S.W. 306 (1908).

In the case before us, there are several factors that lead us to conclude that the terms of the deed are ambiguous on the issue of whether the easement was intended to be personal to Greers Ferry Development or to run with the restaurant property. The easement language at issue states: "Grantor reserves unto himself a parking and driveway easement." This language, however, does not provide the reason for the reservation of an easement or for whose use the easement was reserved. It stands to reason, though, that a development company would reserve the easement to run with the restaurant property so as to enhance its marketability. Indeed, it is illogical, as the chancellor concluded, to think that a development company was interested in an easement solely for personal use. The Wilsons were under no illusions about this. They took title to the Skateland property in 1992 subject to existing easements and shared the driveway and parking with the Browns before the litigation commenced in 1993.

We believe that the Greers Ferry Development deed to the Hawkinses in 1982 is ambiguous and that the chancellor correctly considered parol evidence from former officers of Greers Ferry Development and others in finding the easement to be appurtenant. We affirm the chancellor on this point.

For their next point, the Wilsons maintain that the chancellor erred in denying them an injunction against the Browns' various acts of trespass. The Wilsons list seven examples of conduct by the Browns which, they contend, constitute a continuing trespass:

> 1. Parking their vehicles on the easement and allowing their customers and employees to park there in such a way as to block vehicular access to the skating rink from the highway;
>
> 2. Refusing to ask their customers to move their parked vehicles which blocked the access.
>
> 3. Digging trenches across skating rink property and washing grease, waste water, fish waste, and other garbage with a hose from the catfish restaurant property onto the skating rink property.

4. Burning trash day and night in an open barrel close to the skating rink in violation of a city ordinance.

5. Throwing boxes out the back door of the catfish restaurant onto the skating rink property.

6. Refusing to clean up drinking cups, beer cans, whiskey bottles, and so forth that their customers threw out on the easement.

7. Permitting their employees to smoke marijuana and hurl expletives at the Wilsons and the young patrons of the skating rink.

We address several of these allegations as part of our *de novo* review, since the chancellor did not expressly resolve them. With respect to the allegation that the Browns dug ditches to wash the grease and fish waste from the restaurant onto the skating rink property, that situation appears to have been mitigated. Jane Brown testified that she has installed a drain for her employees to use to dispose of waste water. The allegation of burning trash also appears to be moot. Jane Brown testified that she removed the burn barrel pursuant to instructions from the Heber Springs Fire Chief, Frank Valentine, in October 1993 and that she no longer burns waste on her property.

The chancellor did consider the assertion that the Browns were throwing empty boxes onto skating rink property. Jane Brown testified that she has broken the boxes down and thrown them into the trash dumpster ever since Bruce Wilson first asked her to remove them in the summer of 1993. But in any case, the chancellor in his decree directed that the Browns construct a fence at their expense on their west property line between the restaurant and skating rink to prevent boxes and paper materials from blowing onto the Wilsons' land. That directive resolves this aspect of the Wilsons' counterclaim.

[redacted] With regard to trash on the easement, verbal abuse, and marijuana smoking, the allegations are more appropriate for a claim of nuisance and fall short of what is required for a finding of continuing trespass. The Wilsons also contend that the Browns have engaged in a continuing trespass by parking their cars and allowing their employees and customers to park in the easement which blocks their access to Highway 25. Because we

have held that the Browns have an easement for parking and a driveway along the easement strip, there is no basis for trespass. Nevertheless, we address the question of the extent to which the Browns and their customers can block the access of the Wilsons and their customers to Highway 25 under the final point.

For their third point, the Wilsons urge that the chancellor erred in allowing the Browns to come into equity with unclean hands. They cite as examples of unclean hands the same conduct used to support their claim of trespass. The equitable maxim of unclean hands is stated as follows:

> The clean hands maxim bars relief to those guilty of improper conduct in the matter as to which they seek relief. *Marshall* v. *Marshall*, 227 Ark. 582, 300 S.W.2d 933 (1957). Equity will not intervene on behalf of a plaintiff whose conduct in connection with the same matter has been unconscientious or unjust. *Batesville Truck Lines, Inc.* v. *Martin*, 219 Ark. 603, 243 S.W.2d 729 (1951).

Merchants & Planters Bank & Trust Co. v. *Massey*, 302 Ark. 421, 790 S.W.2d 889 (1990). The chancellor's decree was silent on this issue. We perceive from the tone of the briefs in this appeal that the rancor between the parties in this matter is considerable and that bitterness has attached. Regardless, on *de novo* review we do not consider the evidence of unconscientious or unjust conduct on the part of the Browns to be so clearcut and of such a magnitude as to warrant a decision in this matter based on unclean hands.

For their final point, the Wilsons assert that the barricade ordered by the chancellor within the easement strip divested them of land owned in fee simple. We agree that the chancellor was without authority to order the erection of a barricade which effectively took part of their servient tenement without just compensation. This is impermissible. *See* Ark. Const. Art. 12, § 9. We reverse the chancellor on this point and direct that the chancellor amend his decree to remove the requirement of a barricade.

Two businesses are involved here and the owners of each have an interest in the easement strip as owners of the dominant and servient tenements. We have recognized that in deter-

mining the relations between the easement owner and the possessor of the servient estate, the governing principle is that neither should unreasonably interfere with the rights of the other. *Jordan* v. *Guinn*, 253 Ark. 315, 485 S.W.2d 715 (1972). We have further recognized that what is reasonable or unreasonable will vary with the facts of the case. *Id.* It is generally recognized that the holder of the dominant estate has a duty to use the property so as not to damage the owner of the servient estate. *Davis* v. *Arkansas Louisiana Gas Co.*, 248 Ark. 881, 454 S.W.2d 331 (1970). Conversely, the owner of a servient estate may not erect a barrier that unreasonably interferes with the right of passage by the easement owner. *Jordan* v. *Guinn, supra.*

We have held that the restaurant property carries with it a parking and driving easement as an easement appurtenant over the strip in dispute. That does not mean, though, that the Browns can block, impede, or otherwise truncate the Wilsons' access to Highway 25. That clearly would constitute an unreasonable interference with the rights of the owners of the servient estate. The 30 feet by 220 feet easement strip will continue to be used by the Browns and their customers for parking and a driveway but not in such a manner as to impede or block the ingress and egress of the Wilsons and their customers from the Skateland building to Highway 25. Nor may the Wilsons or their customers block similar ingress and egress for the restaurant customers along the easement strip.

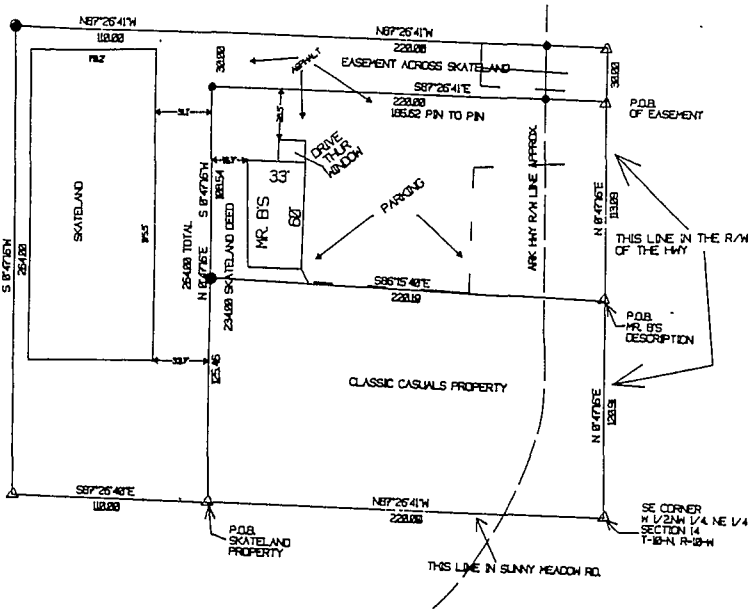
Affirmed in part. Reversed in part and remanded for an order consistent with this opinion.

HOLT, C.J., not participating.

[redacted] [redacted]

SCALE 1 IN. = 60 FT.

LEGAL DESCRIPTION'S FOR: SKATELAND & MR. B's CATFISH



THIS DRAWING PREPARED FROM LEGAL DESCRIPTIONS FURNISHED AND A PREVIOUS SURVEY DONE BY ME IN 1988.

LEGEND

- ● FOUND IRON PIN
- △ COMPUTED POINT
- ——— BOUNDARY LINE

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DECEMBER 20, 1993

Gus M. PANNELL *v.* STATE of Arkansas

CR 94-452 895 S.W.2d 911

Supreme Court of Arkansas
Opinion delivered April 3, 1995

Karen R. Baker, for appellant.

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

ANDREE LAYTON ROAF, Justice. This criminal case is an appeal from a conviction for first degree battery. The sole issue raised on appeal pertains to a remark made by the prosecutor during closing argument concerning the defendant's failure to testify, but we do not reach the merits of that argument. The case was certified to this court from the Court of Appeals on a ques-

tion of the notice of appeal. We find that no effective notice of appeal was filed from the original judgment and dismiss.

Gus Pannell, appellant, was charged with attempted murder as a result of slashing the throat of another individual during an argument. A jury trial was held on October 12, 1993, and appellant was found guilty of first degree battery and sentenced to seven years imprisonment and a fine of $5,000. A notice of appeal was filed on November 5, 1993, but at that time, judgment had not yet been entered. The Judgment and Commitment Order was subsequently entered on November 9, 1993, but appellant did not appeal from that order.

An order extending the time to file the record on appeal was granted on January 19, 1994, and on April 26, 1994, the judge in the original case entered an order for an "Amended Judgment" for appellant. The only changes in the amended judgment were a notation that the defendant had begun serving jail time on March 13, 1993, and that he had 214 days of credit. Appellant filed a notice of appeal from the amended judgment on the same day it was entered. The record was filed in this court on April 29, 1994.

The issue in this case is whether a timely notice of appeal was filed pursuant to A.R.Cr.P. 36.9(a). We find it was not.

The second notice of appeal was filed pursuant to the amended judgment, which was entered more than 120 days after the entry of the original judgment. In criminal cases, an aggrieved party may seek relief to correct a sentence illegal on its face at any time, but must petition within 120 days to seek relief from a sentence imposed in an illegal manner. *Delph* v. *State*, 300 Ark. 492, 780 S.W.2d 527 (1989); *Fritts* v. *State*, 298 Ark. 533, 768 S.W.2d 541 (1989). The corollary to that rule is that the trial court is without jurisdiction to modify a sentence once it has been put into execution. *Toney* v. *State*, 204 Ark. 473, 743 S.W.2d 816 (1988); *Coones* v. *State*, 280 Ark. 321, 657 S.W.2d 533 (1983). A sentence is considered in execution once the court issues a commitment order. *Kelly* v. *Washington*, 311 Ark. 73, 843 S.W.2d 797 (1992); *Redding* v. *State*, 293 Ark. 411, 738 S.W.2d 410 (1987).

We specifically addressed the question in *Delph* v. *State, supra*, as to whether a request for credit for jail time was a request

for a modification of a sentence after it had been put into execution. We held that it was.

Under *Delph* it is clear the trial court in this case was without jurisdiction to modify the sentence. The trial court had already issued a commitment order when the amended judgment was entered in April 1994, and the only change in the new judgment was a credit for jail time. The amended sentence should be vacated with directions to the trial court to reinstate the original sentence. *See Redding* v. *State, supra.*

There remains the question of the notice of appeal. Because the trial court was without jurisdiction to amend the judgment, the notice of appeal from the amended judgment was ineffective. The first notice of appeal was also ineffective as it was entered prior to the date of entry of the original judgment. *See* A.R.Cr.P. 36.9(b); *Mangiapane* v. *State*, 314 Ark. 350, 862 S.W.2d 258 (1993); *Tucker* v. *State*, 311 Ark. 446, 844 S.W.2d 335 (1993).

The appeal is therefore dismissed.

Dr. John SMITH, Vice President for Student Affairs, UCA; Winfred L. Thompson, President, UCA; and Madison P. Aydelott, III; Ben F. Burton; Elaine Goods; Rush Harding, III; Jerry Malone; Joe M. White; and Dalda F. Womack, Board of Trustees; UCA *v.* Heather A. DENTON

93-1297 895 S.W.2d 550

Supreme Court of Arkansas
Opinion delivered April 3, 1995

Mary B. Stallcup, General Counsel for UCA, for appellants.

Linda P. Collier, for appellee.

ROSALIND M. MOUSER, Special Justice. In this appeal from a decision of the Faulkner County Chancery Court finding the firearms policy of the University of Central Arkansas facially void and violative of substantive due process and setting aside the three-year suspension of appellee Heather A. Denton, a UCA student, the appellants — the University of Central Arkansas and members of its administration and Board of Trustees[1] — raise four points for reversal.

[1]For convenience, the appellants will generally be designated as a group by the commonly recognized abbreviation "UCA."

UCA argues that (1) the court had no power to set aside UCA's disciplinary action against Ms. Denton, unless the university's action was arbitrary, capricious, and contrary to law; (2) UCA's decision to suspend Ms. Denton was neither arbitrary nor capricious; (3) UCA's decision to suspend Ms. Denton was not contrary to law; and (4) Ms. Denton received procedural due process. These four questions can be grouped more coherently under two broad issues: whether Ms. Denton received (1) procedural due process and (2) substantive due process. Although the chancellor did not address the former topic, we have determined, on *de novo* review, that Ms. Denton was denied procedural due process. We uphold the decision of the chancery court when it reaches the right result, even if it did not enunciate the right reason. *Cawood* v. *Smith*, 310 Ark. 619, 839 S.W.2d 208 (1992). It is unnecessary for us to address the substantive due process issue.

Ms. Denton requested and was denied damages and attorney's fees. On cross-appeal, she contends that the chancellor erred in finding that the actions of UCA and its agents did not exempt them from their immunity and in denying her damages and attorney's fees. We agree with the chancery court's findings and affirm its decisions on both the appeal and the cross-appeal.

Facts

In December 1992, after several firearms incidents on its campus, UCA issued a revised firearms policy, which provided that:

> Any student possessing, storing, or using a firearm on University controlled property or at University sponsored or supervised functions, unless authorized by the University, will be suspended from UCA for a period of not less than three years unless a waiver of the suspension is granted by the President upon the recommendation of the Vice President for Student Affairs.

A copy of the amended firearms policy was delivered to every student organization and residence-hall room and was published on January 11, 1993, in the student newspaper.

On the morning of Saturday, February 13, 1993, Heather A. Denton, a UCA freshman honors student on a full academic schol-

arship with no disciplinary record, loaned her automobile to a friend, Victor Smith, a non-student. The vehicle was returned to her later in the day.

That evening, Ms. Denton, Eric Patterson, a UCA student, and a mutual friend, Rita Patel, went "cruising" off-campus in Ms. Denton's car, with Mr. Patterson driving. While they were stopped in downtown Conway, a confrontation occurred with unknown occupants of a pickup truck. During the incident, a third vehicle arrived on the scene, and, reportedly, an unidentified person in that car waved a handgun.

Soon after these events, Mr. Patterson drove Ms. Denton's car back to the UCA campus. A Conway police officer, who had received a report about the incident (including the brandished weapon), located and followed Ms. Denton's vehicle to the campus and then stopped and searched it. An unloaded semi-automatic weapon was found in a backpack-style book bag beneath the passenger seat. Ms. Denton, Mr. Patterson, and Ms. Patel denied knowledge of the presence of the gun, though Mr. Patterson stated that it was owned by Victor Smith. Mr. Patterson was arrested and removed from the scene of the stop. No action was taken against either Ms. Denton or Ms. Patel by law enforcement officials.

After becoming aware of the incident, appellant Dr. John Smith, UCA Vice-President for Student Affairs, interviewed Ms. Denton on Monday, February 15, 1993. During the interview, Dr. Smith advised her that she was being charged with a violation of the firearms policy and was being suspended pending a determination by the Student Judicial Board. Dr. Smith ordered Ms. Denton to leave the campus immediately. No written notice of the charge was given to Ms. Denton prior to this meeting, nor did Dr. Smith simultaneously document the interview.

On Wednesday, February 17, 1993, some four days after the incident, the Student Judicial Board conducted a hearing. Various witnesses gave testimony, including Victor Smith, who admitted that he was the owner of the gun and that he had borrowed Ms. Denton's car to go shooting at targets with Mr. Patterson and his brother. He said that after they had finished, he put the gun in the book bag and placed it in the floorboard behind the passenger seat without Ms. Denton's knowledge or permission.

The Board found Ms. Denton not guilty of the charge, declaring its belief that she "did not have knowledge that the weapon was in the car," and recommended that no action be taken against her. Dr. Smith, however, rejected the Student Judicial Board's finding and determined that Ms. Denton should be suspended. Ms. Denton then appealed Dr. Smith's decision to the University Discipline Committee, which found her guilty of a violation of the firearms policy but recommended that the sanction be reduced. Dr. Smith, to whom the recommendation had been referred, withdrew from further consideration of the case.

As a result, Ms. Denton appealed the decision to appellant Dr. Winfred L. Thompson, President of UCA, who upheld the University Discipline Committee's guilt determination but rejected its recommendation of a reduced sanction. Dr. Thompson then imposed the three-year suspension provided for in the UCA firearms policy.

On March 11, 1993, Ms. Denton filed a petition for a temporary restraining order in the Faulkner County Chancery Court, requesting that the court stay or enjoin her suspension from UCA. The following day, the chancellor entered a temporary injunction. Subsequently, on March 31, 1993, Ms. Denton filed an amended petition for a permanent injunction, asserting that UCA's firearms policy failed, on its face, to provide substantive due process and that UCA's actions failed to provide procedural due process. An expedited hearing was held on April 8 and 16, 1993. The chancery court converted the temporary restraining order into a permanent restraining order, finding that:

> the UCA gun policy violates the 5th and 14th Amendments to the Constitution of the United States of America, in that it is violative of substantive due process; that is, the policy is void on its face and violates basic principles of democracy. The policy is hereby struck and any attempts to enforce the said policy against any student subsequent to April 16, 1993, will be sanctioned by the inherent contempt authority of the Court.

Having found that the firearms policy was facially void, the chancery court declared the procedural due process issue moot and declined to issue a ruling on the question. The court also found that the actions of UCA and its agents did not remove their

immunity and, therefore, that Ms. Denton was not entitled to damages and attorney's fees. From that order, this appeal and cross-appeal arise.

Standard of review[2]

As the Administrative Procedure Act is not applicable to this case, we consider the evidence presented at trial on a *de novo* basis. The avenue for judicial review of the substance of academic decisions is narrow. *See Regents of the University of Michigan* v. *Ewing*, 474 U.S. 214 (1985). There is a general policy against intervention by the courts in matters best left to school authorities. *Henderson State University* v. *Spadoni*, 41 Ark. App. 33, 848 S.W.2d 951 (1993).

It is undisputed that UCA is a state-supported institution of higher learning which may delegate to its administration disciplinary power over non-academic offenses. A chancery court has no power to interfere in the exercise of a state-supported university's discretion in the promulgation and implementation of disciplinary measures unless it is shown by clear and convincing evidence that the university abused its discretion. *See Springdale Board of Education* v. *Bowman*, 294 Ark. 66, 740 S.W.2d 909 (1987); *Williams* v. *Board of Marianna School District*, 274 Ark. 530, 626 S.W.2d 361 (1982); *Safferstone* v. *Tucker*, 235 Ark. 70, 357 S.W.2d 3 (1962). We hold that there was clear and convincing evidence, outlined in the discussion below, that UCA's actions constituted an abuse of the university's discretion.

Procedural due process

The Due Process Clause of the Fourteenth Amendment to the United States Constitution gives rights to a student who faces suspension or expulsion for misconduct at a tax-supported college or university. *Henderson State University* v. *Spadoni, supra, citing Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). A student facing suspension is entitled, at the very minimum, to some kind of notice and some kind of hearing. *Goss* v. *Lopez*, 419 U.S. 565 (1975).

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[2]UCA's first point for reversal is, in fact, merely a statement of the appropriate standard of review, and we treat it accordingly.

The UCA "Standards of Student Conduct" promulgates disciplinary procedures governing the enforcement of university regulations. The student handbook notes that "the University strives to protect the rights of students involved in the disciplinary process by providing *specific due process procedures*, including appeals, to insure fair and just hearings." (Emphasis added.) The Vice President for Student Affairs is charged with the responsibility of overseeing the disciplinary process and is assisted by several committees and hearing officers who are assigned specialized functions. The Student Judicial Board, comprised of eleven voting student members and the Dean of Students or a designee in an advisory capacity, hears serious, suspendable offenses. Appeals may be made to the University Discipline Committee, UCA's chief appellate body, which consists of three faculty members, three administration representatives, and three students.

The disciplinary process is initiated by the filing of a written report of an alleged incident of non-academic misconduct with the Office of Vice President for Student Affairs. Thereafter, according to the "Standards of Student Conduct":

> *The Dean of Students will receive incident reports and assign discipline cases to the appropriate council and/or hearing officer as needed.* The Student Judicial Board [or other appropriate council or hearing officer] make their recommendations to the Vice President for Student Affairs. Disciplinary action shall be taken only after a hearing is held and the Vice President for Student Affairs has reviewed the action and made a final decision.

(Emphasis added.) The hearings are conducted informally, without strict adherence to the rules of evidence.

A notice provision is set forth in the "Standards":

> The student(s) accused shall be notified, *in writing*, of the alleged charge and of the date, time and place of the hearing. Notice of hearing will be *mailed to the student(s) or delivered to the residence hall room, if the student(s) lives on campus, at least three (3) days prior to the hearing.*

(Emphasis added.) The accused and complainant are afforded the right to be present at the hearing, to present evidence by wit-

ness, affidavit, or deposition, to bring an advisor to the hearing, and to question all witnesses.

Appeals are assigned to the University Discipline Committee and must be made in writing to the Vice President for Student Affairs within three days after a disciplinary decision is rendered. One or more of the following reasons may serve as the basis of an appeal:

1. Inadequate opportunity to prepare defense;
2. Inadequate evidence to justify decision; or
3. Sanction not in keeping with gravity of wrong-doing.

The Vice President for Student Affairs is vested with the authority to make the final decision regarding all disciplinary concerns.

In the present case, UCA failed to adhere to its own expressly enunciated standards for ensuring procedural due process. The procedures provided by the university were not structurally flawed; in terms of actual compliance, however, the letter and spirit of procedural due process were violated. To protect due process, the courts, in matters pertaining to a governmental entity's observance and implementation of self-prescribed procedures, must be particularly vigilant and must hold such entities to a strict adherence to both the letter and the spirit of their own rules and regulations. *See Powell* v. *Heckler*, 789 F.2d 176 (3rd Cir. 1986); *Koolstra* v. *Sullivan*, 744 F. Supp. 243 (D. Colo. 1990).[3]

Here, there was no indication that the Dean of Students reviewed the charge against Ms. Denton before it was referred to Dr. Smith or before the case was assigned to the Student Judicial Board, as required by the UCA "Standards of Student Conduct." Instead, Dr. Smith, Vice President of Student Affairs, interviewed Ms. Denton on Monday, February 15, 1993, and verbally advised her that a disciplinary hearing would be held by the board. Having ordered her to leave the campus immediately, he then caused to be delivered to her vacated residence-hall room a written notice, dated February 15, 1993, of the hearing before

[3]Although the federal cases cited deal with Social Security claims, the stated principle was intended to apply to all governmental agencies.

the Student Judicial Board to be held "at 7:00 p.m., on Wednesday, February 17, 1993." The notice, which more properly should have been mailed to her permanent address, was sent to the dormitory room two days prior to the hearing rather than three days beforehand, as required by the "Standards."

Thus, UCA, by the terms of its own self-imposed standards, failed to provide Ms. Denton the promised protection of "specific due process procedures." Yet not only was there a failure to comport with the letter of procedural due process, there was also a failure to abide by its spirit. Throughout the proceedings, Dr. Smith acted in a variety of often-conflicting capacities. He was at once investigator, prosecutor, witness, and judge. Although Dr. Smith, as Vice President for Student Affairs, clearly held the ultimate authority in disciplinary matters, he overrode the decision of the Student Judicial Board. No provision was made in the UCA handbook for the Vice President for Student Affairs to step aside from a case, yet Dr. Smith did so following the University Discipline Committee's technical finding of guilt and its recommendation of a reduced sanction.

The matter was submitted for review to UCA President Dr. Winfred Thompson. He retained the three-year suspension because Ms. Denton's appeal was based only on the lack of adequate evidence and not on the appropriateness of the sanction.

While the severity of the sanction is a stated basis for appeal under the UCA "Standards for Student Conduct," the fact remains that "[a]ll non-academic discipline hearings are informal," according to the handbook. To deprive a student of her educational property interest on narrowly formal grounds as exemplified in these circumstances is to violate the spirit of procedural due process. We hold that Ms. Denton was denied the "rudimentary elements of fair play" required by the Due Process Clause. *See Henderson State University* v. *Spadoni, supra, citing Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 159 (5th Cir. 1961).

Under the circumstances, Ms. Denton was denied procedural due process. We therefore affirm the decision of the chancery court, albeit for a different reason than that given by the chancellor. *Cawood* v. *Smith, supra.*

Cross-appeal: Attorney's fees

The Arkansas Constitution prohibits awards of damages in lawsuits against the State of Arkansas and its institutions. Ark. Const. Art.5, § 20. If officers and employees of the State of Arkansas act without malice and within the scope of their employment, they are immune from an award of damages in litigation.

The chancery court specifically found that none of the officers and employees of UCA acted with malice. Likewise, the actions of UCA's officers and employees fail to rise to "such reckless disregard of the rights of another as to constitute the equivalent of ill will." *Bland* v. *Verser*, 299 Ark. 490, 774 S.W.2d 124 (1989). We affirm the chancery court's findings on Ms. Denton's cross-appeal.

Based upon the facts as found by the chancery court and the law set forth herein, we affirm the chancery court's decision in all respects.

Affirmed.

NEWBERN, J., concurs.

BROWN, J., dissents.

ROAF, J., not participating.

DAVID NEWBERN, Justice, concurring. The problem in this case, I think, is that the UCA firearms policy is offended by "possession" of a firearm without knowledge. The Student Judicial Board found Ms. Denton not guilty because she had no knowledge the pistol was in her car. Dr. Smith testified the school policy was violated regardless of knowledge. The Chancellor apparently gagged on that point and declared the policy to be in violation of Ms. Denton's right to substantive due process.

While I agree UCA violated its own procedures somewhat, I also agree with the dissenting opinion's point that we seem to be stretching to decide the case on that basis. The dissenting opinion seems equally extended, however, in its apparent conclusion that the evidence is sufficient to show Ms. Denton knew of the presence of the pistol in her car because it was in a book bag which was not pushed under the seat. I know of no evidence

that the book bag was transparent or that anyone told her the pistol was in it. I dare say that had the contraband been drugs we would not have found the evidence of the presence of it in Ms. Denton's car satisfied the constructive possession factors required to hold her in "possession." *See Mings* v. *State*, 318 Ark. 201, 884 S.W.2d 596 (1994). Those factors all point to whether the accused had knowledge of the presence of the contraband.

Substantive due process requires that legislation be rationally related to achieving a legitimate governmental purpose. *See Winters* v. *State*, 301 Ark. 127, 782 S.W.2d 566 (1990). No doubt UCA had a legitimate governmental purpose for its policy, and the zeal with which the administration sought to implement it is laudable up to a point.

A policy which can be the basis of punishment of one who is the victim of circumstances created by others without her knowledge can also be said to be related to that purpose. It could place even the most innocent student in fear of being punished and thus perhaps serve the purpose. Such a policy is, however, in my view, irrational and unfair to the point that it cannot be said to be rationally related to anything. The Chancellor got this case right. I concur in the result reached by the majority opinion.

ROBERT L. BROWN, Justice, dissenting. This case involves the suspension of Heather Denton for having a semi-automatic pistol (TEC .22) and four loaded clips of ammunition (three fully loaded with 30 rounds and one with 29 rounds) in her car on campus. The majority stretches to affirm this case and ultimately does so on a completely different basis than that employed by the chancellor. The chancellor granted the injunction because he believed that Ms. Denton lacked the culpable intent to possess the pistol or even knowledge of it. According to the majority, however, Heather Denton was not afforded procedural due process because the notice of her first hearing before the Student Judicial Board was inadequate and the letter of the Student Handbook was not followed in every respect.

The majority is wrong to equate minor lapses in Student Handbook procedures with a violation of the United States Constitution. It is also wrong to affirm for reasons not even raised by Ms. Denton in her pleadings or argued in her brief in this appeal. What she argued to the chancellor was that Dr. John

Smith was somehow biased against her and that Dr. Thompson should have discussed the case with her and her mother prior to the Discipline Committee meeting. However, the chancellor found: "I think Dr. Smith was simply trying to enforce the policy as he had been instructed to. And I find no fault in the way he has conducted himself in this matter, whatsoever."

The majority disagrees and raises procedural lapses never pursued by Ms. Denton. What is patently unfair about this is the University has not had the opportunity to answer the majority's asserted procedural deficiencies which amount to findings and conclusions by an appellate court. Ms. Denton never asserted a violation of her procedural due process rights in this appeal. The University, as a matter of fact, did contend that due process was given to Ms. Denton and told this court specifically how and why. Ms. Denton did not take issue with that contention. Now a majority of this court does take issue with that contention and does so in a way that forecloses the opportunity of UCA to respond.

But irrespective of the majority's stretch to find a theory for the affirmance, there was no violation of procedural due process in this case. In December 1992, the University Board of Trustees adopted the gun policy at issue because of firearm incidents on campus:

> Any student possessing, storing, or using a firearm on University controlled property or at University sponsored or supervised functions, unless authorized by the University, will be suspended from UCA for a period of not less than three years unless a waiver of the suspension is granted by the President upon the recommendation of the Vice President for Student Affairs.

The gun policy was fully disseminated to the student body.

On February 13, 1993, Heather Denton and the driver and a passenger, Eric Patterson and Rita Patel, were stopped in Ms. Denton's car, a two-door Pontiac Firebird, on campus by a Conway police officer, Michael Edgmon. Edgmon had been following the car after a disturbance report at a Conway intersection. He searched the car at which time the automatic pistol and clips of ammunition were located in a black bag which had been partially pushed under the passenger seat from behind that seat. The

bag was not under the seat as the majority proclaims. Ms. Denton denied knowledge of the pistol and clips. Patterson told the arresting police officer that the pistol was owned by Victor Smith.

On February 15, 1993, Dr. John Smith, the University Vice President for Student Affairs, interviewed Heather Denton. He showed her the police report by Officer Edgmon and advised her that she was charged with violating the University's gun policy and was suspended pending a hearing. According to Dr. Smith and Ms. Denton, after being advised of the charge, they discussed alternatives for a hearing. Dr. Smith told her that she could have an administration hearing as early as the next day before the Dean of Students, Dr. Gary Roberts, or a hearing before the Student Judicial Board. The latter hearing was already scheduled for Wednesday, February 17, 1993. Ms. Denton stated that she would talk to Eric Patterson about it. She opted for a hearing before the Student Judicial Board.

Dr. Smith testified that he sent her a copy of his suspension letter dated February 15, 1993, with notice of the disciplinary hearing before the Student Judicial Board and a copy of Officer Edgmon's police report. It is unclear whether he gave a copy of either to her at that meeting. The letter and police report were introduced as a joint exhibit at the subsequent trial. Ms. Denton denied receiving the letter before the Student Judicial Board hearing, although she admitted seeing a copy of the police report before that meeting.

On February 17, 1993, the Student Judicial Board comprised of student members conducted a hearing on the matter. Ms. Denton was notified of the hearing and present throughout it. Various witnesses were called and testified on behalf of Ms. Denton, including Eric Patterson, Victor Smith, Heather Denton, and Rita Patel. Officer Edgmon, Associate Director of the Department of Public Safety Glenn Stacks, and Assistant Dean of Students John Cagle testified in support of the University's position. The majority opinion is in error when it concludes that the Dean of Students did not review the charge against Ms. Denton before the Judicial Board hearing. His assistant was at the hearing and participated. The Student Judicial Board recommended that no disciplinary action be taken against Ms. Denton because the Board believed that she did not know the gun was in her car.

On February 22, 1993, Dr. John Smith, after listening to the tapes of the Student Judicial Board hearing and after interviewing Ms. Denton, Eric Patterson, Victor Smith, Rita Patel, and Officer Edgmon as well as the Chairman of the Student Judicial Board rejected the Board's recommendation. He stated that he believed that she was "guilty of possessing a weapon on the UCA campus" and determined that suspension was in order. At the trial of this matter, he testified that possession of a weapon without knowledge was a violation of the gun policy but that knowledge of the weapon was important for deciding the penalty to be assessed. The inconsistencies in the participants' stories played a part in his decision to assess the three-year suspension. As between concluding that Ms. Denton knew of the handgun in her car or did not know, he concluded that she did. He especially was influenced by the fact that Victor Smith testified that he had thrown his black bag with the gun and clips on the floor in the back seat and had not pushed it under the seat. He was also influenced by the fact that Ms. Denton had been in her car earlier that afternoon when the gun and ammunition were there.

Ms. Denton appealed Dr. Smith's decision to the University Discipline Committee comprised of University faculty, staff, and students. On March 4, 1993, which was two weeks after the Student Judicial Board hearing, the University Discipline Committee voted unanimously to hear Ms. Denton's appeal and did so. Ms. Denton was notified of the hearing and attended. At the hearing that followed, Ms. Denton in attendance with her mother, Paula Jamison, testified and was questioned by the Chair of the Committee. Officer Edgmon also testified as did Dr. Smith. Officer Edgmon showed the gun and ammunition clips seized from the Denton car to the Committee. The Committee voted 5 to 2 to uphold the decision of guilty but to lessen the sanction. The Committee also voted to affirm the decision of guilty as to Eric Patterson and the full three-year suspension.

Ms. Denton next appealed the matter to Dr. John Smith to make the final decision. Because of Dr. Smith's involvement, he recused and turned the file over to University President Dr. Winfred Thompson. Dr. Thompson reviewed the matter, and on March 9, 1993, he upheld the Committee's decision but instituted a full three-year suspension for Ms. Denton.

On March 11 and 18, 1993, Ms. Denton filed her petitions for declaratory and injunctive relief. Later, a hearing on the petition was conducted and testimony was taken. At the conclusion of two days of testimony, the chancellor stated his ruling from the bench in which he referred to "gaping inconsistencies" in Ms. Denton's story. Later, the chancellor entered his decree (1) declaring the University's gun policy to violate substantive due process, and (2) granting a permanent injunction against the University's suspension of Ms. Denton. The chancellor further ruled that there was no need for him to discuss procedural due process and that issue was moot.

The standard of review for interference in university disciplinary matters is stringent indeed and was best summarized by a recent Court of Appeals decision:

> There is a general policy against intervention by the courts in matters best left to school authorities. "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Goss* v. *Lopez*, 419 U.S. at 578, citing *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). The courts have been reluctant to interfere with the authority of local school boards to handle local problems. *Fortman* v. *Texarkana Sch. Dist. No. 7*, 257 Ark. 130, 514 S.W.2d 720 (1974). A chancery court has no power to interfere with school district boards in the exercise of their discretion when directing the operation of the schools unless the boards clearly abuse their discretion. *Springdale Bd. of Educ.* v. *Bowman*, 294 Ark. 66 (1987). The burden is upon those charging such an abuse to prove it by clear and convincing evidence. *Bowman*, 294 Ark. at 71, 740 S.W.2d 909. Undoubtedly these general principles apply to disciplinary hearings for students at state supported universities and colleges.

Henderson State University v. *Spadoni*, 41 Ark. App. 33, 35, 848 S.W.2d 951, 953 (1993). Accordingly, the courts of this state should be most reluctant to interfere in disciplinary proceedings of state colleges and universities such as we have here except when violations of due process rights are clear and unmistakable.

Here, if anything, Ms. Denton received more in the way of due process protection than is required. She had two full hearings where she was present and where she testified and other witnesses testified on her behalf: one before the Student Judicial Board, which found her not guilty, and one before the University Discipline Committee, which found her culpable. In addition, her case was reviewed by the University Vice President for Student Affairs, Dr. John Smith, and by the President of the University, Dr. Winfred Thompson. That totals four reviews of her case before she took it to court.

The seminal case for procedural due process protection of students at state universities is *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). There, the students were expelled from college, and the Fifth Circuit Court of Appeals held that those students were entitled to notice of the charges and the witnesses against them and a hearing allowing both sides to present their positions in complete detail prior to expulsion as part and parcel of due process. Although the *Dixon* case is credited with establishing a property right in a student's attendance at a state university, the United States Supreme Court has yet to decide that issue. The Court has, however, *assumed* a student's property interest in higher education in order to reach certain due process issues. *See Regents of University of Michigan* v. *Ewing*, 474 U.S. 214 (1985).

The Eighth Circuit Court of Appeals has discussed procedural due process in the context of an unruly demonstration on a college campus:

> We do not hold that a school has the authority to require a student to discard any constitutional right when he matriculates. We do hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct; that, as to these, flexibility and elbow room are to be preferred over specificity; that procedural due process must be afforded (as Judge Hunter by his first opinion here specifically required) *by way of adequate notice, definite charge, and a hearing with opportunity to present one's*

> *own side of the case and with all necessary protective measures*; that school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure; and that the courts should interfere only where there is a clear case of constitutional infringement.

Esteban v. *Central Missouri State College*, 415 F.2d 1077, 1089-1090 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). (Emphasis added.)

Though we must assume that Ms. Denton did not receive written notice three days in advance of the Student Judicial Board hearing as the Student Handbook contemplates, she never complained of lack of notice. In fact, she had full notice of the hearing. In Dr. John Smith's office on February 15, 1995, she was shown a copy of Officer Edgmon's police report on the Saturday night incident. The two then discussed whether Ms. Denton wanted an expedited administrative hearing before the Dean of Students or a hearing before the Judicial Board in two days which was already scheduled to meet. She chose the latter. The Due Process Clause of the United States Constitution does not require a written three-day notice. It requires notice, and everyone admits that Ms. Denton got notice of the hearing in this case.

She also knew the witnesses against her and what they would say before the Judicial Board hearing on February 17, 1993. Ms. Denton admitted seeing the police report of Officer Edgmon, which was the essence of his testimony, before that hearing. She also knew in advance the administration's position as testified to by Assistant Dean of Students John Cagle. Ms. Denton, Eric Patterson, Victor Smith, and a friend, Rita Patel, testified in her favor, and the Judicial Board found her not guilty. Dr. Smith then listened to the tapes of the Student Judicial Board hearing and again interviewed pertinent witnesses and the Chairman of the Judicial Board. He decided not to accept the Board's recommendation.

Fifteen days later, Ms. Denton appeared with her mother at the University Discipline Committee hearing and testified on her own behalf as did Eric Patterson. She certainly had written notice and knowledge of the witnesses against her at this hearing. Officer Edgmon and Dr. Smith testified against her. After the Uni-

versity Discipline Committee hearing, Dr. Smith disqualified himself from making the final decision because of his previous involvement, and the University President, Dr. Thompson, made the ultimate determination. Short of having a full-blown judicial proceeding with counsel present and cross-examination, which due process does not require in this context, Ms. Denton was afforded more than adequate procedural safeguards. *See Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978); *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961); *Nash* v. *Auburn University*, 621 F. Supp. 948 (D.C. Ala. 1985).

Moreover, Dr. Smith did not violate the spirit of due process. He did investigate the initial charge against Ms. Denton on February 15, 1993, but he did not attend the Student Judicial Board meeting on February 17, 1993 — Assistant Dean of Students John Cagle did. Dr. Smith did attend the University Discipline Committee meeting on March 4, 1993 but only for the purpose of explaining his decision to suspend. That Committee did not agree with Dr. Smith's decision on the penalty, and for that reason he disqualified himself from making the final decision. Far from violating due process safeguards, Dr. Smith was zealous in making certain that they were provided, a fact which the chancellor acknowledged.

The majority complains that Dr. Smith performed protean roles in this matter. Then, illogically, the majority concludes that Dr. Smith was wrong to step aside and let President Thompson make the ultimate decision. The sole reason for Dr. Smith to remove himself from the final decision was to eliminate any suggestion of a conflict of interest. His actions were appropriate and should not be twisted into a reason for concluding that there was a denial of due process.

The majority cites no case for the principle that failure to adhere strictly to Student Handbook procedures amounts, in itself, to a violation of a constitutional magnitude. That is because there are none. Here, Ms. Denton did not complain of lack of notice of the first hearing because she received notice. She did not complain of surprise witnesses against her because there were none, and she had full opportunity to present her own case. That is all that due process requires.

I am fearful that by requiring such strict adherence to student handbooks and equating those procedures to what the U.S. Constitution requires, we undermine the ability of universities and even primary and secondary schools to enforce their disciplinary policies. In this case, a legitimate school gun policy was violated, and there were no procedural lapses of constitutional significance. Indeed, Ms. Denton was allowed to present her case fully on multiple occasions. I dissent.

Charles PATTON *v.* STATE of Arkansas

CR 95-230 895 S.W.2d 531

Supreme Court of Arkansas
Opinion delivered April 3, 1995

John F. Gibson, Jr., for appellant.

No response.

PER CURIAM. John F. Gibson, Jr., filed a motion for rule on the clerk on behalf of his client, Charles Patton. The appellant requests a "rule on the clerk to reinstate his appeal by filing the record tendered herewith; for an order permitting the Appellant

to proceed with a belated appeal of his convictions on counts one, two and three . . .; and Appellant further prays that a record be prepared at the cost of the State of the entire proceedings on counts one, two and three . . . ." This appeal, however, involves two separate judgment and commitment orders. In one case, the appellant was convicted of three counts of delivery of a controlled substance, and, in the second case, the appellant was convicted of a fourth count of delivery of a controlled substance.

The judgment and commitment order for the fourth count of delivery of a controlled substance was entered on January 5, 1994. On March 9, 1995, the appellant tendered the record with the clerk and filed this motion for rule on the clerk. In this case the record was tendered more than seven months after the entry of the judgment. *See* Ark. R. App. P. 5(b). It is the attorney's duty to file the record on time. *Franklin* v. *State*, 318 Ark. 324, 885 S.W.2d 23 (1994). When a complete record is not available, a partial record will suffice. If attorney will concede by affidavit within thirty days from the date of this *per curiam* that it was his fault that the record was not timely filed, or if other good cause is shown, then the motion will be granted.

As to the convictions for the three counts of delivery of a controlled substance, the judgment and commitment order was entered on August 5, 1993. First, contrary to the appellant's statements, that record, which was tendered to the clerk on March 7, 1994, contained the trial proceedings on counts one, two and three. Second, the Court of Appeals dismissed the appellant's appeal for failure to file a brief.

Because counsel for the appellant merges the two cases, we are unable to grant the relief requested. The motion for a rule on the clerk is denied without prejudice to file a proper motion.

GLAZE, J., not participating.

James ARTHUR, M.D., Allan C. Gocio, M.D., Hot Springs Neurosurgery Clinic, P.A., St. Joseph's Regional Health Center, Inc., Calcitek, Inc., Sisters of Mercy Medical Systems, Sisters of Mercy Health System — St. Louis Pooled Comprehensive Liability Agreement, and American Medical International, Inc. d/b/a National Park Medical Center
v. Betty Jo ZEARLEY and Herman Zearley, Brad Cazort and Sandra Partridge, as Administrators of the Estate of Charlotte Phillips Cox, Deceased

94-1012 895 S.W.2d 928

Supreme Court of Arkansas
Opinion delivered April 10, 1995
[Rehearing denied May 15, 1995.*]

*Special Justices Ernie E. Wright and Bruce T. Bullion, join. Newbern, Glaze, Brown, and Roaf, JJ., not participating.

[redacted]

Friday, Eldredge & Clark, by: *J. Philip Malcom, Robert S. Shafer*, and *Allison Graves*, for appellants James Arthur, M.D., Allan C. Gocio, M.D., Hot Springs Neurosurgery Clinic, P.A..

Wright, Lindsey & Jennings, by: *Edwin L. Lowther, Jr.*, for appellants St. Joseph's Regional Health Center, Inc. and Sisters of Mercy Health System.

Mitchell, Williams, Selig, Gates & Woodyard, by: *Lyn P. Pruitt* and *Rhonda M. Wheeler*, for appellant Calcitek, Inc.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Mike Huckabay* and *Tim Boone*, for appellant American Medical International, Inc. d/b/a National Park Medical Center.

Hicks Law Firm, by: *Charles R. Hicks, George R. Wise, Jr., Lamar Porter, Bob Davidson* and *George Ellis*, for appellees.

JACK HOLT, JR., Chief Justice. This is an interlocutory appeal from an order certifying a class action. Appellees Betty Jo Zearley and Herman Zearley successfully sought certification in circuit court of a variety of tort claims centered around medical malpractice arising out of the alleged improper surgical implantation, by Drs. James Arthur and Allan C. Gocio, of a product known as "Orthoblock" into the spines of several patients. Appellees Brad Cazort and Sandra Partridge, acting as administrators of the estate of Charlotte Phillips Cox, deceased, were permitted to intervene in the lawsuit and serve as additional class

representatives. We initially granted a temporary stay of the trial court's order certifying the class and requested the parties to file briefs. In examining the issues on their merits, we hold that the trial court abused its discretion in allowing the testimony of appellees' counsel at the hearing, and in certifying the cause as a class action.

The appellants are the physicians, their clinic, the hospitals where the surgeries took place, and the manufacturer of Orthoblock, who, together, make the following assignments of error: (1) that the trial court erred in certifying the class; (2) that the trial court erred in permitting class counsel to testify and act as advocate in the same proceeding; (3) that the trial court erred in failing to deny class certification when there were pending lawsuits arising out of the same transaction or occurrence; (4) that the trial court erred by adding additional class representatives; (5) that the trial court erred in ordering the hospitals to breach the physician-patient privilege by identifying non-Orthoblock patients; and (6) that the trial court erred in finding that venue was proper in Saline County. We hold that trial court abused its discretion in allowing the appellees' counsel to testify and acts as advocate in the same proceeding, and in certifying a class where individual issues predominated over common questions of law or fact. In so holding, it is unnecessary for us to address the remaining arguments, and we reverse and remand this case to the trial court with instructions to decertify the class.

Facts

On June 24, 1993, Appellees Betty Jo Zearley and Herman Zearley filed a complaint in Saline County Circuit Court alleging medical negligence, battery, fraud, outrage, strict liability and breach of warranty arising out of the surgical implantation of a medical product called "Orthoblock" into Mrs. Zearley's spine. The Zearleys named as defendants Dr. James Arthur, who performed the surgery, Dr. Allan Gocio, who assisted in the procedure, their clinic, Hot Springs Neurosurgery Clinic, P.A. (together, the "physicians"), Calcitek, Inc. ("Calcitek"), the manufacturer of Orthoblock, and St. Joseph's Regional Health Center, Inc., ("St. Joseph's), where the procedure took place.

Approximately one year later, on June 9, 1994, the Zearleys amended their complaint to request certification of over 300

of the physicians' patients who had undergone similar surgeries involving Orthoblock, and added the Appellant American Medical International, Inc., d/b/a National Park Medical Center ("AMI"), where some of the patients' surgeries had taken place. In response, Calcitek argued that due to approximately 80 other actions filed in other counties arising out of the same circumstances, the Zearley's request for certification should be denied.

After a hearing at which the trial court allowed, over objection, testimony of Charles Hicks, one of the attorneys for the Zearleys and other parties seeking to become class representatives, it announced by letter opinion on July 7, 1994, its intention to certify a class against all defendants except AMI, who had not yet entered an appearance. Thereafter, the Zearleys filed a motion to approve notice to prospective class members and to add additional representatives. At a subsequent hearing on September 15, 1994, with AMI having entered an appearance, the trial court approved notice and allowed, over the objection of appellants, appellees Brad Cazort and Sandra Partridge, attorneys and administrators of the estate of Charlotte Phillips Cox[1], deceased, to intervene as parties plaintiff and to become additional class representatives. The trial court also ruled, over objection, that venue was proper in Saline County. It is from these adverse rulings that this appeal is taken.

I. Attorney as witness and advocate

The physicians, in a position adopted by Calcitek, AMI, and St. Joseph's, allege that the trial court erred in allowing one of the attorneys representing the class, Charles Hicks, to testify and act as advocate at the July 7, 1994, class certification hearing. During this proceeding, Mr. Hicks took the witness stand and testified under oath while his associate, Mr. Porter, asked questions of him on direct examination. As the physicians assert in their brief, Mr. Hicks testified as to the characteristics of Orthoblock, commented on what medical X-rays showed, summarized the anecdotal complaints of his clients, described medical tools

[1]Ms. Cox, had a pending action against the physicians, Calcitek, and AMI at the time of her death. Her attorneys, Cazort and Partridge, testified at the September 15, 1994, hearing in support of their motion to intervene and to serve as class representatives, which the trial court granted in its entirety.

allegedly used to insert the Orthoblocks, offered his opinion on the expected length of trial and the adequacy of potential compensation, and concluded that there was "no question this is a mass injury situation." It was also through Mr. Hick's testimony that all of the appellees' exhibits were introduced. While Mr. Hicks was undoubtedly the primary witness at the hearing, Betty Zearley and Herman Zearley also offered testimony. The physicians objected to Mr. Hicks's testimony at the July 7, 1994, hearing, and again a post-hearing motion to reconsider and to disqualify him as counsel, both of which were overruled by the trial court. On appeal, Mr. Hicks asserts that he merely assisted the trial court with an analysis and evaluation of the proof, and was not actually a witness in the case.

Model Rule of Professional Conduct 3.7 provides as follows:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

The general rule is clear and unmistakable. *A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.* The reasoning underlying the general rule is to prevent prejudice and a conflict of interest. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Conversely, a witness is to tell the truth without loyalty to either party and without regard to which side his testimony might favor. Combining the dissimilar roles of attorney and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and his client. The court of appeals has written that:

> There are several reasons for the general rule. First, because of interest or the appearance of interest in the outcome of the trial, the advocate who testifies at trial may be subject

> to impeachment and the evidentiary effect of his testimony will be weakened, thus harming his client. Second, opposing counsel may be handicapped in cross-examining and arguing the credibility of trial counsel who also acts as a witness. Third, an advocate who becomes a witness may be in the unseemly position of arguing his own credibility. Fourth, the roles of advocate and witness are inconsistent and should not be assumed by one individual. Last, the attorney should not act as both trial counsel and a material witness because of the appearance of impropriety.

Ford v. *State*, 4 Ark. App. 135, 139, 628 S.W.2d 340, 342 (1982) (footnotes omitted).

Our case law is equally clear. In *Enzor* v. *State*, 262 Ark. 545, 559 S.W.2d 148 (1977), in interpreting an earlier version of the same rule, we wrote:

> The Arkansas Reports are replete with cases where this Court has registered its disapproval of an attorney testifying in an action in which he is an advocate. See: *Canal Insurance Company* v. *Hall*, 259 Ark. 797, 536 S.W.2d 702 (1976); *Watson* v. *Alford*, 255 Ark. 911, 503 S.W.2d 897 (1974).
>
> In this action, one of the appellant's attorneys testified in behalf of appellant. We must again take this opportunity to reiterate strongly our disapproval of an attorney testifying in an action in which he is an advocate. An attorney who is to testify in an action should withdraw from the litigation. On the other hand, if an attorney is going to serve as an advocate for his client, he should refrain from testifying in the action.

Id. at 551, 559 S.W.2d at 151.

Other cases where we have made similar statements include the following: *Purtle* v. *McAdams*, 317 Ark. 499, 879 S.W.2d 401 (1994); *Burnette* v. *Morgan*, 303 Ark. 150, 794 S.W.2d 145 (1990); *Bishop* v. *Linkway Stores, Inc.*, 280 Ark. 106, 655 S.W.2d 426 (1983); *Boling* v. *Gibson*, 266 Ark. 310, 584 S.W.2d 14 (1979); *Jones* v. *Hardesty*, 261 Ark. 716, 551 S.W.2d 543 (1977); *Canal Ins. Co.* v. *Hall*, 259 Ark. 797, 536 S.W.2d 702 (1976); *Dingledine* v. *Dingledine*, 258 Ark. 204, 523 S.W.2d 189 (1975);

McWilliams v. *Tinder*, 256 Ark. 994, 511 S.W.2d 480 (1974); *Watson* v. *Alford*, 255 Ark. 911, 503 S.W.2d 897 (1974); *Montgomery* v. *First Nat'l Bank of Newport*, 246 Ark. 502, 439 S.W.2d 299 (1969); *Old American Life Ins. Co.* v. *Taylor*, 244 Ark. 709, 427 S.W.2d 23 (1968); *Rushton* v. *First Nat'l Bank of Magnolia*, 244 Ark. 503, 426 S.W.2d 378 (1968).

The exceptions to the general rule are equally clear. They are:

> (1) A lawyer can testify if the testimony relates solely to an uncontested matter; (2) A lawyer can testify to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (3) A lawyer can testify if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Not one of the three exceptions is applicable to the case before us. These three exceptions are the only ones provided by the rule. It is a settled rule of construction that when certain exceptions are specified in a rule, all others are excluded. The Latin maxim is *expressio unius est exclusio alterius.*

In the case before us, the trial court allowed Mr. Hicks's testimony on the basis that he had "testified in a hearing on dealing with a procedural consideration by the court." Accordingly, the appellees ask us to agree that because the class certification was "procedural," Mr. Hicks did not act as an "advocate at trial," and, as such, the general rule prohibiting an attorney from testifying is not applicable. In rejecting the appellees' argument, we recognize that there is no exception that allows an attorney to testify about the propriety of a class certification in a contested case, and note that the creation of such an exception would not be a legitimate construction of the rule. An attorney in our system of jurisprudence is to serve as an advocate and is to have complete loyalty, within the bounds of the law, to his client. The attorney so acted at the certification hearing. He testified on direct examination about the characteristics of Orthoblock; testified about what medical x-rays showed; summarized the anecdotal complaints of his clients; testified to the foundation for introduction of exhibits; testified about the medical tools used in the procedure; an even testified that there was "no question this is a

mass injury situation." The beginning of his cross-examination is abstracted as follows:

> I am the plaintiff's counsel on the record on all pleadings in these 80 cases. Mr. Porter, who's been asking me questions [on direct] is employed by my law firm . . .
>
> *I have a financial interest in all of this litigation* . . . that I'm testifying to as a witness. At this very moment I am testifying strictly as to factual issues and not acting as advocate. I did not renounce my contingency fee before I took that stand ... As I've testified *and put my credibility as issue from that witness stand,* I have still maintained an attorney/client relationship with the 80-something different litigants in the lawsuits. (Emphasis added.)

[redacted] The issue was whether a class should be certified. The issue was fully, even bitterly, contested by all parties at the hearing. The record of the certification hearing contains ten volumes. The appeal to this court of the certification ruling contains one abstract, and eight briefs. Mr. Hicks engaged in full and complete advocacy, representing his known clients with all of his considerable ability. Aside from his clients' interests, he had something very close to a personal interest. He not only sought class certification, he also sought the identity of all possible clients who might become members of the class, as he asked for, and obtained, an order requiring the appellants to disclose the names, addresses, telephone numbers, and social security numbers of over three hundred other patients who had this same procedure so that they would become members of this lawsuit. The witness was advocating a class action with all of his ability. Under these circumstances, we hold that it was error to permit Mr. Hicks to testify and act as advocate in the same proceeding. In declaring that this ruling was in error, we acknowledge the trial judge's finding that he would have certified the class in the absence of Mr. Hicks's testimony. That being the case, we must now examine the remaining evidence to determine whether the trial court erred in certifying the class.

II. Class certification requirements

[redacted] We review questions of class certification under an abuse of discretion standard. *See Summons* v. *Missouri Pacific*

Railroad, 306 Ark. 116, 813 S.W.2d 240 (1991). Arkansas Rule of Civil Procedure 23(a) sets out the prerequisites to a class action:

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

See also Summons v. *Missouri Pac. R.R., supra.*

In addition to these prerequisites, the class action must also be maintainable under Rule 23(b), which states in pertinent part that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

See also Lemarco Inc. v. *Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991).

The crux of the physicians' argument, which is again adopted by reference by Calcitek, AMI, and St. Joseph's, is that the issue of informed consent is foundational to the individual claims and cannot be tried on a class basis. We agree, and find persuasive the cases cited by the physicians in support of their argument. In *Harrigan* v. *United States*, 63 F.R.D. 402 (E.D.Pa. 1974), a paralyzed veteran alleged that he was negligently and fraudulently induced to submit to urinary tract surgery, and that he would not have consented to the surgery if he had been fully and correctly advised of the nature and consequences of the operation. In refusing Harrigan's request to represent a class of all paralyzed veterans who had undergone similar urological surgeries on the basis of allegedly similarly misleading information, the Pennsylvania district court recognized that the "thrust" of his complaint involved the issue of informed consent:

> The concept of informed consent is a complex one involving such issues as what information was supplied to each patient, what the emotional condition of each patient was, what each patient's understanding of the information conveyed was, and whether there was a necessity of dispensing with the requirement of informed consent due to emergency conditions. A determination of informed consent in each case depends upon a separate inquiry into the facts surrounding each operation and an application of the facts to the governing legal principles.

63 F.R.D. at 405.

The district court in *Harrigan* concluded that there were no common issues of fact or law. This decision was cited by the California Court of Appeal in *Brown* v. *Regents of University of California*, 151 Cal. App.3d 982, 198 Cal. Rptr. 916 (3d Dist. 1984), which held that individual issues substantially predominated over common questions where plaintiffs brought eleven claims including intentional concealment, misrepresentation, battery, and negligence, alleging that they were negligently and fraudulently induced to consent to coronary care and medical treatment at a university medical center. The plaintiffs in *Brown* sought to represent a class of similarly-situated patients who had died or had suffered injuries from their coronary care at a university hospital, yet the court refused to do so, recognizing that a number of areas required individual proof:

> Whether a particular class member relied on the representation, for example will require close scrutiny of what was said between a class member and his physician. A class member's particular medical condition and method of treatment must be examined in order to determine proximate cause of any claimed damage and the actual extent of such damage. All of the foregoing involve questions of what is medically appropriate for a particular patient under his particular circumstances . . .
>
> . . . [T]he court must grapple with complex issues relating to a patient's medical condition prior to surgery, the need for medical care and the extent of such care required by his condition, the variable nature of the dialogue between

> physician and patient, the surgical process itself, and post-surgical complications and care.

198 Cal. Rptr. at 920.

In their brief, the appellees argue that the cases cited by the physicians involved the sole issue of informed consent, while the use of Orthoblock in the surgeries here provides the "common link." They argue that because the use of this product itself was experimental in that it was not approved by the FDA for use in spinal surgeries, the physicians breached their duty to obtain informed consent by failing to use the word "experimental" in patient conferences. We do not find this argument persuasive, for the appellees are in no position to know what was said in the physicians' oral conferences with other patients, as Dr. Arthur, in his deposition stated that each of the communications with the Orthoblocks were oral and not written. The appellees' argument is further weakened by their own complaints, as the issue of informed consent is woven throughout their claims for negligence, battery, tort of outrage, and fraud or fraudulent concealment.

In support of their position that the requirements of commonality and predominance have not been met, the physicians refer to Ark. Code Ann. § 16-114-206 (1987), which sets out the burden of proof for a plaintiff in an action for medical injury, as well as a framework for considering the issue of informed consent in subsection (b), which states, in pertinent part, as follows:

> (b)(1) Without limiting the applicability of subsection (a) of this section, where the plaintiff claims that a medical care provider failed to supply adequate information to obtain the informed consent of the injured person, the plaintiff shall have the burden of proving that the treatment, procedure, or surgery was performed in other than an emergency situation and that the medical care provider did not supply that type of information regarding the treatment, procedure, or surgery as would customarily have been given to a patient in the position of the injured person or other persons authorized to give consent for such a patient by other medical care providers with similar training and experience *at the time of the treatment*, procedure, or surgery in the locality in which the medical care provider practices or in a similar locality.

(2) In determining whether the plaintiff has satisfied the requirements of subdivision (b)(1) of this section, the following matters shall also be considered as material issues:

(A) Whether a person of ordinary intelligence and awareness in a *position similar to that of the injured person or persons* giving consent on his behalf could reasonably be expected to know of the risks or hazards inherent in such treatment, procedure, or surgery;

(B) *Whether the injured party or the person giving consent* knew of the risks or hazards inherent in such treatment, procedure or surgery;

(C) *Whether the injured party would have undergone the treatment, procedure, or surgery regardless of the risk involved* or whether he did not wish to be informed thereof;

(D) Whether it was reasonable for the medical care provider to limit disclosure of information because such disclosure could be expected to adversely and substantially affect the *injured person's condition.*

(Emphasis added.)

In accordance with this statute, the jury will be called upon to assess several factors which will vary with each individual plaintiff, including the "position of the injured person" under section (b)(2)(A), as each patient will have a unique medical history and condition, diagnosis, and treatment plan. The complaints presented to the trial court indicate that while some patients had Orthoblock inserted at one level of the vertebrae, others had the device inserted at two or three levels. The Orthoblock was also used in different sizes and was shaped to fit the patient as part of the surgical procedure, and while some patients had repeat surgeries, others, including Mrs. Zearley, had the Orthoblock removed.

It is also significant that the type of information that would customarily be given "at the time of treatment" under section (b)(1) will also vary from patient to patient. According to the deposition of Dr. Arthur, the Orthoblock surgeries were performed between November 1989 and January 1993. During this span of three years and two months, both the physicians' expe-

rience with the use of Orthoblocks and the available knowledge concerning cervical fusion surgeries were constantly changing, which affected the content of their disclosures to the patients and the applicable standard of care. For example, Dr. Arthur stated in his deposition that he offered one patient, Mr. Hall, three options regarding the materials which could be used in the fusion procedure: freeze-dried bone, bone from his hip, and Orthoblock. Dr. Arthur further explained how medical knowledge of HIV transmission via freeze-dried bone had changed since the time of Mr. Hall's surgery.

Referencing section (b)(2)(B), the knowledge of the patient or other person authorized to give consent will necessarily vary by virtue of prior experience and contact with other patients, and this difference will likely affect the finding of fact regarding the individual patient's appreciation of the risks and the adequacy of the disclosures that were made. Also at variance is whether the patient would have chosen the Orthoblock surgery regardless of the risk, or if he or she would have simply preferred not to be informed. The application of section (b)(2)(C) requires inquiry into all the circumstances surrounding each individual case, including the testimony and credibility of the patient, the distress of the patient's circumstances, and the jury's assessment of what transpired at the informed consent conference. Referring again to Dr. Arthur's deposition, the doctor related that Mr. Hall was in extreme pain when the Orthoblock procedure was discussed, and that Mr. Hall stated to him, "I don't care what you use in there; just make my arm quit hurting."

The ultimate trier of fact, in determining whether any limitation upon disclosure was reasonable in light of the patient's condition in section (b)(2)(D), will undoubtedly take into account the available alternatives to the particular patient, his or her prognosis for recovery, the degree of the patient's pain and suffering, the patient's emotional stability, and other individual medical or psychological factors. We cannot say, in the main, that these facts alone provide the requisite commonality which warrants the certification of a class. In sum, when applying Arkansas's informed consent statute to the facts in this case, it is clear that individual issues predominate over questions common to the members of the class on the issue of informed consent alone.

In addition to the facts surrounding informed consent, there are other issues which are uncommon to the class members. For instance, the issue of causation appears uncommon, such that even if the jury were to find that the physicians had not made a proper disclosure, such a failure and the resulting use of Orthoblock in surgery may not be the proximate cause of the patient's injury or loss; rather, other factors peculiar to the patient's medical condition may be the sole or proximate cause of damages. Moreover, the appellees' claims for breach of warranty against Calcitek are likewise uncommon and inappropriate for class treatment, for each individual claim alleges a breach of the warranties of fitness and merchantability which proximately resulted in damages. For these reasons, we see no need to further discuss the issue of breach of warranty. While Calcitek adopts by reference the physicians' argument on this point, it emphasizes in its brief that the individual claims for products liability are not suitable for class treatment as well. Calcitek cites the case of *Raye* v. *Medtronic Corp.*, 696 F. Supp. 1273 (D.Minn. 1988), in support of its position, in which a Minnesota district court, in a products liability action involving a pacemaker, reasoned as follows:

> This case is very similar to the cases cited by defendant in which courts refused to certify classes in actions alleging defective medical products. In those cases and in this case, there simply are not enough common questions of law or fact to justify use of the class mechanism. Issues which would need to be separately litigated with respect to each member include: causation, liability, and damages.

696 F. Supp. at 1275.

The rationale of the *Raye* decision is helpful in analyzing the facts before us, as here, Calcitek's potential liability could differ among the individual claims, as the actions of the physicians, St. Joseph's, and AMI as intermediaries will likely be at variance. As the California Court of Appeal stated in *Rose* v. *Medtronics, Inc.*, 107 Cal. App.3d 150, 166 Cal. Rptr. 16 (1980):

> Like any manufacturer of a potentially defective product, the defendant may face claimants with varying periods of use of the product, varying needs for its replacement, varying elements of causation, varying degrees of injury, and varying amounts of damages.

166 Cal.Rptr. at 20.

As the manufacturer of Orthoblock, Calcitek will face individual claimants who had the devices inserted at various levels of their spines over a three-year period, and who had varying needs for subsequent surgical procedures. As stated previously, the issue of informed consent will likewise vary from patient to patient, affecting the elements of causation, degree of injury, and damages.

Granted, when looking at the pleadings, there are common questions of law among the individuals seeking class certification, as all complaints allege the same legal theories of recovery — medical negligence, battery, fraud, outrage, strict liability and breach of warranty. We have said that under our Rule 23, a party seeking class certification has to show that there were common questions of law or fact. *See International Union of Elec., Radio & Mach. Workers* v. *Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988), *quoting Ross* v. *Ark. Communities*, 258 Ark. 925, 529 S.W.2d 876 (1975). However, the party seeking certification must also show that the class action is superior to individual remedies. *Id.* Here, due to the large number of issues which are individual to each prospective class member, class certification is not superior to individual actions. In short, under the circumstances in this case, we hold that the trial court abused its discretion in ordering certification.

III. Conclusion

Granted, we have held that a trial court has broad discretion to allow or disallow an action to proceed as a class action. *Summons* v. *Missouri Pac. R.R., supra, International Union of Electrical, Radio and Machine Workers* v. *Hudson, supra.* While our approach taken recently to questions of class action certification has been described as liberal[2], we have not held that a trial court's discretion is so broad that it cannot be the subject of proper review. *See Summons* v. *Pac. R.R., supra.*

On the record before us, we have no hesitation in holding

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[2]See Kenneth S. Gould, *New Wine in an Old Bottle — Arkansas's Liberalized Class Action Treatment Procedure — A Boon to the Consumer Class Action?*, 17 U. Ark. Little Rock L.J. 1 (1994).

that the trial court abused its discretion in allowing Mr. Hicks's testimony, and in subsequently ordering certification. In so holding, we dissolve the temporary stay and reverse and remand the trial court's order with instructions to decertify the class.

Special Justice BRUCE T. BULLION joins in this opinion.

Special Justice ERNIE E. WRIGHT concurs in part and dissents in part.

NEWBERN, GLAZE, BROWN, and ROAF, JJ., not participating.

ERNIE E. WRIGHT, Special Associate Justice, concurring in part, dissenting in part. I concur in the majority opinion reversing the judgment of the trial court certifying this case as a class action; however, I disagree with its holding that the trial court abused its discretion in allowing Mr. Hicks, an attorney for the appellees, to testify at the pretrial proceeding on the procedural issue of whether the case should be certified as a class action. The word "pretrial" suggests proceedings preliminary to the trial itself, which normally refers to a trial on the merits.

Mr. Hicks's testimony was not before the jury in a trial of the case on its merits, as it was offered and received by the trial court only on the procedural issue. I believe an appropriate application of Rule 3.7 is to construe it as applicable to testimony at trial of a case on its merits or incident to final disposition of the case, such as in summary judgment. There is substantial authority supporting this view. *See Kapco Mfg.* v. *C & O Enter.*, 637 F. Supp. 1231 (N.D. Ill. 1985); *Mobley* v. *Harmon*, 313 Ark. 361, 854 S.W.2d 348 (1993); *Parker* v. *State*, 271 Ark. 84, 607 S.W.2d 378 (1980); and *Henry* v. *Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992).

In *Mentor Lagoons, Inc.* v. *Rubin*, 510 N.E.2d 379 (Ohio 1987), the Ohio Supreme Court reversed the trial court for refusing to allow the attorney for a party to testify on the ground that it might be in violation of the Code of Professional Responsibility. The court stated that the rule does not go to the competency of the testimony and that the trial judge must determine the competency of the testimony without reference to the disciplinary rule.

The federal courts, in dealing with the model rule, look with

disfavor upon an attorney testifying on behalf of his client; however, they do not construe the rule as going to the competency of the testimony. *See* 9 A.L.R. Fed. 500-525. In the case of *United States* v. *Morris*, 714 F.2d 669 (7th Cir. 1983), the Seventh Circuit held that the district court did not abuse its discretion in allowing the attorney for the defendant to testify at a pretrial suppression hearing.

The trial judge has considerable discretion regarding the admission of evidence, and, on appeal, when the appellant fails to establish that the attorney's testimony prejudiced him, the admission of the testimony is not a ground for reversal. *In Re Marriage of Lee*, 481 N.E.2d 1045 (Ill. App. 1 Dist. 1985). In Arkansas, the rule on appellate review is in accord, as this court does not reverse absent a showing of prejudice. *Peters* v. *Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993); *Arkansas Public Service Comm'n* v. *Yelcot Tel. Co.*, 266 Ark. 365, 585 S.W.2d 362 (1979).

It is clear that the majority has concluded that the order certifying the class should be reversed on grounds other than Mr. Hicks's testimony. It follows that the admission of the testimony is not properly included as a ground for reversal. While there may well be some question as to the propriety of attorney Hicks testifying, I do not view the action of the trial judge in allowing the testimony as an abuse of discretion or as any ground for reversal.

William L. AUSTIN and Deborah M. Austin, his wife
v. ARKANSAS STATE HIGHWAY COMMISSION

94-997 895 S.W.2d 941

Supreme Court of Arkansas
Opinion delivered April 10, 1995

Branch, Thompson & Philhours, by: *Robert F. Thompson*, for appellants.

Robert L. Wilson, Chief Counsel, by: *Charles Johnson*, for appellee.

TOM GLAZE, Justice. The appellants, William and Deborah Austin, purchased a tract of land on the outskirts, but within the city limits, of Paragould. The property is bounded on the west side by Highway 49 and the other three sides are bordered by property owned by different owners. The Austins had the property rezoned for commercial use.

A dispute resulted between the Austins and appellee Arkansas State Highway Commission when the Commission worked on a Highway 49 bridge located just north of the Austins' property. Apparently, without notice to the Austins, the Commission's bridge crew extended a metal guard rail south from the bridge and along the highway right-of-way fronting the Austins' property. The Austins complained that the guard rail eliminated access to their property, and they lost all economic and beneficial use of it. As a result, the Austins filed suit in circuit court against the Commission, alleging that the Commission had taken their property in violation of the Due Process and Equal Protection Clauses

of the United States Constitution. The Commission moved to dismiss the Austins' suit, stating the court lacked jurisdiction over the Commission because the Commission is a state agency which enjoys sovereign immunity under Article 5, Section 20 of the Arkansas Constitution. The Austins responded, arguing the Federal Supremacy Clause, Article 6, Section 2 of the United States Constitution, required the circuit court to enforce their constitutional claims. The trial court granted the Commission's motion to dismiss, and the Austins challenge that decision in this appeal.

[redacted] Arkansas law is well established that the Highway Commission cannot be sued, and this immunity cannot be waived even by the legislature. *Bryant* v. *Ark. State Highway Comm.*, 233 Ark. 41, 342 S.W.2d 415 (1961); *Ark. State Highway Comm.* v. *Nelson Bros.*, 191 Ark. 629, 87 S.W.2d 394 (1935). However, where the Commission threatens to take private property without making any provision for compensation, the landowner is entitled to enjoin the Commission from taking the property until an amount sufficient to cover the damages is first deposited in court. Such an injunction, restraining the commissioners from acting illegally, is not regarded as a prohibited suit against the state. *See Ark. State Highway Comm.* v. *Partain*, 192 Ark. 127, 90 S.W.2d 968 (1936). But where the landowner stands by and permits the Commission to take, occupy, and damage his lands, he could not maintain an action against the Commission to recover his damages, for such a coercive proceeding will constitute a suit against the state. *See Ark. State Highway Comm.* v. *Bush*, 195 Ark. 920, 114 S.W.2d 1061 (1938); *Federal Land Bank of St. Louis* v. *Ark. State Highway Comm.*, 194 Ark. 616, 108 S.W.2d 1077 (1937).

[redacted] Here, the Austins point out that they were never notified of the Commission's work until after its completion, and they were unable to seek an injunction or claim damages before the taking took place. A similar situation occurred in *Bryant*, where the Highway Commission, without notice to the landowners, quickly closed their motel business's only exits, and they had no time to seek injunctive relief. Nonetheless, this court explained Arkansas's rigid and mandatory sovereign immunity provision as follows:

> [I]t is contended that the Commission closed the exits so

> quickly that there was no time for an injunction to be sought. This argument misconceives the basis for the Commission's immunity to suit after the taking or damage has occurred. The landowner's inability to recover damages does not rest upon the doctrine of laches, in that he has slept upon his rights. Rather, the underlying reason for the court's holding is simply a recognition of the fact that an action to compel the State to redress a past injury would unquestionably constitute a suit against the State. Such a proceeding is plainly forbidden by the constitution.

Based upon Arkansas's sovereign immunity law, the *Bryant* court upheld the trial court's dismissal of the landowner's suit against the Commission.

While the Austins seem well aware of Arkansas's mandatory sovereign immunity law, they argue that the trial court should still have jurisdiction to enforce their due process and equal protection claims under the Supremacy Clause. In reviewing the record, it does not appear the trial court specifically ruled on these federal claims, but, instead, it merely determined the Austins' suit was in the nature of an inverse condemnation action against the State Highway Commission and should be dismissed because it violated Arkansas's sovereign immunity law. Nonetheless, the lower court, in reaching its decision, apparently did consider the case of *Light* v. *Blackwell*, 472 Fed. Supp. 333 (E.D. Ark. 1979, aff'd mem. 620 F.2d 307 (8th Cir. 1980)), wherein a federal district court had an inverse condemnation case before it when it wrestled with the same-type constitutional claims the Austins now advance. In *Light*, the district court in pertinent part stated the following:

> The complaint alleges that plaintiffs have been deprived of their constitutional right of due process because of the unlawful taking of their property without payment of just compensation in violation of the Fifth and Fourteenth Amendments. The plaintiffs here have not been deprived of due process since due process remedies are available to the plaintiffs in state court for the alleged taking of their property. *Cf. Ingraham* v. *Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L. Ed.2d 711 (1977). Equitable relief could have been sought in the Pulaski County Chancery Court whereby

> the defendants for the State may be enjoined from the taking of property until just compensation is provided therefor. *See Flake* v. *Arkansas State Highway Comm'n*, 251 Ark. 1084, 476 S.W.2d 801 (1972), and *Arkansas State Highway Comm'n* v. *Partain*, 192 Ark. 127, 90 S.W.2d 968 (1936).
>
> In the event a taking occurred before the plaintiffs had the opportunity to seek injunctive relief in the Pulaski County Chancery Court, then the plaintiffs have available to them the remedy of resorting to the State Claims Commission. *See* Ark. Stat. Ann. § 13-1401, *et seq.* (Repl. 1968) [now Ark. Code Ann. §§ 19-10-201 -210 (Repl. 1994)]. The State Claims Commission satisfies the constitutional requirement of due process, and is readily available to the plaintiffs for the relief they seek for the alleged wrongful acts. *Thus having the remedies of the Pulaski County Chancery Court and/or the State Claims Commission available to them, it is not necessary for plaintiffs to resort to federal court for relief.* (Emphasis added.)

We agree with the *Light* decision where it holds that a landowner's due process and equal protection claims are satisfied under Arkansas law since the landowner, claiming a taking of property, may either seek prospective injunctive relief in chancery court or damages from the State Claims Commission. Certainly, such holding is consistent with *Roesler* v. *Denton*, 239 Ark. 462, 390 S.W.2d 98 (1965), where this court held that in considering claims against the state, the State Claims Commission's procedures and remedy satisfied the due process requirements.

[redacted] We should further mention that this court, citing *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), and *Parratt* v. *Taylor*, 451 U.S. 524 (1981), stated that the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner and due process requirements of the Constitution are satisfied when an adequate post-deprivation procedure exists. *Fireman's Ins. Co.* v. *Arkansas State Claims Comm'n*, 301 Ark. 451, 784 S.W.2d 771 (1990). In *Fireman's Ins. Co.*, the court concluded that such due process requirements were met by Arkansas's post-deprivation procedure under the State Claims Commission process.

We also point out that the Austins' due process argument is the same argument advanced, considered and rejected by this court in *Ark. State Highway Comm.* v. *Flake*, 254 Ark. 624, 495 S.W.2d 855 (1973).[1] There, the court made short shrift of the constitutional argument in a somewhat different way, by stating the following:

> Counsel for the appellees, perforce conceding that "the award may appear to conflict with prior decisions of this court," nevertheless insists that the landowners' inability to sue the State involves a denial of due process of law. We cannot agree. Sovereign immunity was a common law doctrine that originated centuries before the Fourteenth Amendment was adopted. It still exists in many forms. In the *Bryant* case, *supra*, we considered and rejected the same arguments that are now presented by the appellees. We are urged to overrule that decision, but we think it should be sound.

We mention the Austins' reliance on *Lucas* v. *South Carolina Coastal Council*, 504 U.S. 970 (1992), where South Carolina enacted restrictions upon the use of shore front property and those restrictions/regulations deprived the property owner of the economical viable use of his property. In *Lucas*, the Supreme Court held that the property owner suffered a "taking," and here the Austins argue they suffer a similar taking, since the State Highway Commission erected a barrier across their property, thereby eliminating access to and losing all economical beneficial use of their property. *Lucas* is of no help to the Austins, since whether the Austins suffered a "taking" is not the threshold issue. As discussed above, even assuming a "taking" was had by the State Highway Commission's actions, the pertinent questions to be answered are whether Arkansas's sovereign immunity law is enforceable and whether a landowner's right to seek injunctive relief in chancery court or damages via the State Claims Commission satisfy due process requirements. We answer those questions in the affirmative.

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[1]We note that, in rejecting the landowner's due process argument, the *Flake* decision makes no mention of the State Claim Commission procedure, but instead, the court premised its decision based on the historical fact that sovereign immunity is a common law doctrine that originated centuries before the Fourteenth Amendment.

Finally, the Austins frame a second issue, contending the State Claims Commission cannot assume jurisdiction of constitutional claims because of the separation of powers. The issue was apparently not presented to or decided by the trial court, and, as a consequence, we need not do so here. Suffice it to say that, in the circumstances of this case, the State Claims Commission has the jurisdiction to consider the Austins' claim for damages against the state under Ark. Code Ann. § 19-10-204 (Repl. 1994) and such claim and hearing procedures are fully set out in Ark. Code Ann. §§ 19-10-205–210 (Repl. 1994).

For the reasons stated above, we affirm the trial court's dismissal of the Austins' suit.

DUDLEY, J., not participating.

SUNBELT EXPLORATION CO., Harold Oliver, Mabel Oliver, Donald Newton, Arlaween Newton, Drucilla Jones, Shelvon Gregory, and Stanley Gregory
v. STEPHENS PRODUCTION CO. and Chevron USA, Inc.

94-1233 896 S.W.2d 867

Supreme Court of Arkansas
Opinion delivered April 10, 1995

Dorsey Ryan and *Matthew Horan*, for appellants.

Daily, West Core, Coffman & Canfield, for appellees.

TOM GLAZE, Justice. This case involves oil and gas leases and, as such, the facts leading to the present appeal are lengthy and complicated. Because the facts are important to our decision, they are set out below as simply as possible.

In the 1950s, the appellees Stephens Production Co. and Chevron USA, Inc. acquired oil and gas leases in the Arkoma Basin from the appellant lessors' predecessors in title. The leases provide for the payment of royalties on the basis of market value, with the royalties constituting the lessors' chief consideration for conveying their rights in the leaseholds. All of the land covered by the leases at issue were pooled by the Arkansas Oil and Gas Commission into the Gregory Unit. The Gregory Unit is adjoined by three other units, the Blakely Unit, the Gooch No. 1 Unit, and the Gooch No. 2 Unit. Stephens also holds all the leases in the adjoining three units, and the Gregory Unit lessors also own mineral interest in one or more of the adjoining three units. All four units, the Gregory, Gooch Nos. 1 and 2, and the

Blakely, share a number of reservoirs at various depths which contain natural gas. The subject of this suit is the Dunn C or Paul Barton reservoir, (hereinafter the Dunn reservoir), which lies underneath all four units.[1]

In 1959, Stephens drilled the Gregory No. 1 well in the Gregory Unit, and in 1971, Stephens recompleted the Gregory No. 1 at two additional depths to reach the R. Barton and Dunn reservoirs.[2] At the time, it was not known that the Dunn reservoir contained a fault located under the Gregory Unit which was caused by the breaking of the rock planes. The result of this fault was to divide the reservoir into two parts, trap the gas, and prevent the Gregory No. 1 well from producing or draining gas from the southern portion of the Dunn reservoir. No other wells were drilled in the Gregory Unit for more than thirty years. In 1961, Stephens and Chevron drilled a well in the Blakely Unit that produced from the Dunn reservoir, and between November 2, 1961, and September 17, 1985, they drilled offset wells in the Gooch units which produced gas from the Dunn reservoir on the south side of the fault.[3]

In the late 1980s, appellant Sunbelt Exploration Company began looking for prospects in the Arkoma Basin. Not realizing that the Paul Barton and Dunn C reservoirs were one and the same and, thereby, concluding that Stephens and Chevron had abandoned their leaseholds in the Gregory Unit, Sunbelt purchased top leases from all the appellant Gregory Unit lessors. *See Crystal Oil Co.* v. *Warmack*, 313 Ark. 381, 855 S.W.2d 299 (1993) (top lease defined). By letter dated July 6, 1990, Sunbelt informed Stephens that Stephens' and Chevron's leases in the

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[1]The Dunn reservoir was denominated the Paul Barton at the Gregory No. 1 well and denominated the Dunn C on the other units. This fact added to the confusion because the Paul Barton and the Dunn C were considered to be two separate reservoirs at one time.

[2]The term, recompleted, refers to the "technique of drilling a separate well-bore from an existing casing in order to reach the same reservoir, or redrilling the same well bore to reach a new reservoir after production from the original reservoir has been abandoned." Howard R. Williams & Charles J. Meyers, *Manual of Oil and Gas Terms* 811 (7th ed. 1988).

[3]An offset well is "a well drilled on one tract of land to prevent the drainage of oil or gas to an adjoining tract of land, on which a well is being drilled or is already in production." *Oil and Gas Terms* at 634.

Gregory Unit were subject to judicial termination, and requested that Stephens release the undeveloped balance of the unit for exploration and production by Sunbelt. On July 11, Stephens responded that it was planning to drill in the unit and would do so.

Subsequently, in October 1990, Stephens completed drilling the Gregory No. 2 well which reached the Orr reservoir and provided conclusive information that the Dunn reservoir did contain a fault. As a result, Stephens drilled the Gregory No. 3 and No. 4 wells for additional production of the Orr reservoir and the Dunn reservoir south of the fault. Chevron did not participate in the drilling of the three new wells, and instead entered into farm-out agreements with farmees who were unaware of Sunbelt's actions.[4]

In June 1991, Sunbelt filed suit in federal court against Stephens and Chevron. That suit was dismissed for failure to join the lessors as indispensable parties. Subsequently, Sunbelt entered into agreements with the lessors that allowed Sunbelt to sue Stephens and Chevron, share any award with the lessors, and hold the lessors harmless for any litigation costs.

On November 26, 1991, Sunbelt and the lessors filed their complaint in circuit court against Stephens and Chevron "to try title" of the Gregory Unit leases, ejectment of Stephens as a trespasser, damages, an accounting, and other relief. Sunbelt[5] also claimed abandonment of the leases by Stephens, breach of the implied covenant to explore and further develop, and breach of express covenants to develop and protect from drainage. Finally, Sunbelt requested a declaratory judgment that the top leases it held were effective from the date of taking, and that the old leases with Stephens were abandoned effective that same date. In sum, Sunbelt requested judicial cancellation of Stephens' and Chevron's leases so that its top leases would then become effective. Excep-

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[4]A farm-out agreement is an assignment by a leaseholder to another operator wherein the assignee is obligated to drill on the acreage as prerequisite to transfer of the leaseholder's interest. Williams & Meyers, *Oil and Gas Terms* at 342.

[5]To provide for easier reading, Sunbelt is used to represent both Sunbelt and the lessors, and Stephens is used to represent both Stephens and Chevron. Exception occurs where it is necessary to identify a distinct interest of the lessors or Chevron.

tions were made for the Gregory No. 1 well and the rights of Chevron's farmees in the Gregory Nos. 2, 3, and 4 wells. Stephens and Chevron filed separate answers both challenging circuit court's subject matter jurisdiction, claiming Sunbelt's action was not to try title, but instead was for cancellation of oil and gas leases, and requested transfer to chancery court. Further, Stephens denied any breach or trespass, and pled affirmative defenses.

On May 12, 1993, the circuit court granted Stephens' motion to transfer to chancery court. Other motions were filed by the parties and other orders were entered which are not at issue on appeal.

The case was tried before the chancellor January 10 through 12, 1994. On May 11, following submission of post-trial briefs, the chancellor entered his judgment and opinion in favor of Stephens and Chevron, and dismissed Sunbelt's complaint with prejudice. On that same date, the chancellor entered an order *nunc pro tunc* modifying a clerical error in his judgment and opinion. On June 3, Stephens filed a motion for award of attorneys' fees. On July 5, the chancellor entered an order holding that he had jurisdiction of the matter and allowed Sunbelt to submit additional arguments. By opinion entered July 7, the chancellor awarded attorneys' fees against Sunbelt only and in favor of Stephens in the amount of $67,440.38 and in favor of Chevron in the amount of $19,621.47. Sunbelt appeals from the circuit court order of transfer, the chancellor's judgment and opinion, and the award of attorneys' fees.

First, we consider Sunbelt's challenge to circuit court's order of transfer and chancery court's jurisdiction over this matter. Sunbelt argues that because its complaint requested a writ of ejectment, the circuit court had jurisdiction and cites for support *Henry* v. *Gulf Refining Co. of La.*, 176 Ark. 133, 2 S.W.2d 687 (1927). There, the lessee brought action in circuit court in ejectment against Gulf, where the lessee claimed the right to possession under mineral leases. However, *Henry* is distinguishable from the present case because in *Henry*: (1) there was no challenge to the court's jurisdiction, (2) the case involved determination of whether the lessee had performed under the express terms of the leases, (3) the parties claimed under a common source of title, (4) the lessee had been ousted from possession,

and (5) the lessee was seeking adjudication of title and restoration of possession.

Here, Sunbelt does not contend Stephens' interest in the Gregory Unit terminated automatically under the terms of the lessors' leases with Stephens. Further, Sunbelt, by its own admission, held only top leases which by their definition are inferior to the original leases held by Stephens. *See Crystal Oil Co.* v. *Warmack*, 313 Ark. 381, 855 S.W.2d 299 (1993). Sunbelt's interest under a top lease cannot become effective until either Stephens concedes abandonment and voluntarily relinquishes possession, or there is a judicial determination that Stephens' leases are cancelled.

Cancellation of an oil and gas lease is an equitable remedy and is appropriate when a breach of the implied covenant of reasonable development is shown. *Robertson Enterprises, Inc.* v. *Miller Land & Lumber Co.*, 287 Ark. 422, 700 S.W.2d 57 (1985); *Blair* v. *Clear Creek Oil & Gas Co.*, 148 Ark. 301, 230 S.W. 286 (1921). Cancellation of instruments is one of the well-recognized grounds of equity jurisdiction. *American Ins. Co.* v. *Mountain Home Sch. Dist. No. 9,* 300 Ark. 547, 780 S.W.2d 557 (1989). Although Sunbelt mentions ejectment in its complaint, the complaint necessarily speaks in terms of cancellation of Stephens' leases. Considering the required remedy in these matters, we believe Sunbelt's request for a judicial determination of cancellation was both appropriate and controlling. And finally, we note that subject matter jurisdiction is determined from the pleadings. *Union Pacific R.R. Co.* v. *State Ex. Rel. Faulkner County*, 316 Ark. 609, 873 S.W.2d 805 (1994).

Having determined that jurisdiction was properly in chancery, we turn to Sunbelt's appeal from the chancellor's decision on the merits. At trial, Sunbelt alleged Stephens acted imprudently by failing to recomplete the Gregory No. 1 well earlier than 1971, by failing to discover the Dunn fault before 1990, and by failing to prevent drainage.

In his opinion and judgment on the merits, the chancellor held there was no evidence indicating that Stephens acted imprudently in not recompleting the Gregory No. 1 well to the Dunn reservoir prior to 1971. He found the evidence was essentially uncontroverted that in 1959, when the Gregory No. 1 was drilled,

the technology was not available to show whether significant amounts of gas existed in the Dunn reservoir. Further in 1971, it was only Stephens' implementation of extraordinary measures which allowed production of a significant amount of gas from the Dunn reservoir.[6] Additionally, the chancellor found no evidence that Stephens' failure to find the fault prior to 1990, or to drill additional wells south of the fault to prevent drainage was due to imprudent management.[7] The chancellor held that the issue as to the amount of drainage by the Blakely and Gooch wells, if any, was moot because of his determination that Stephens had acted prudently in its management of the Gregory leases. While normally the question of whether a lessee acted as a prudent operator in its management goes to the entire acreage within the leasehold, the chancellor limited his ruling only to Stephens' management of the Dunn reservoir.

On appeal, Sunbelt argues the chancellor erred by applying the prudent operator standard to both its claims for damages from drainage and to its claim for cancellation of Stephens' leases in the Gregory Unit. Because Stephens is a common lessee with the adjoining units whose wells allegedly drained gas from the Gregory Unit, Sunbelt contends the chancellor should have placed the burden on Stephens to prove its diligence, rather than requiring Sunbelt to prove Stephens was a imprudent operator.

[redacted] This court has noted there are five types of implied covenants in oil and gas leases, among which are the covenant to proceed with reasonable diligence in developing the leasehold, and the covenant to protect the leasehold from drainage from wells on adjoining lands through drilling offset wells. *Amoco Production Co.* v. *Ware*, 269 Ark. 313, 602 S.W.2d 620 (1980). The duty of the operator-lessee is to act reasonably and prudently regarding how development should proceed, and while the judgment of the operator can be considered when determining whether the operator acted reasonably, he must act with sound judgment

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[6] The measures used included sandfracing and commingling of gas from the Dunn A and Dunn C reservoirs. Sandfracing is an "operation designed to loosen or break up tight formations which contain oil or gas, thus causing such formations to have more permeability and greater production." *Oil and Gas Terms* at 880.

[7] Because gas is migratory in nature and will move from a higher to lower pressure, gas which was originally under one unit can be drained by a well placed on another unit.

and not arbitrarily. *Id.* One measure of whether an operator acts reasonably is whether he acts with due diligence for the benefit of both himself and the lessor. *Id. See also Crystal Oil Co.* v. *Warmack*, 313 Ark. 381, 855 S.W.2d 299 (1993); *Enstar Corp.* v. *Crystal Oil Co.*, 294 Ark. 77, 740 S.W.2d 630 (1987); *Byrd* v. *Bradham*, 280 Ark. 11, 655 S.W.2d 366 (1983); *Ezzell* v. *Oil Associates, Inc.*, 180 Ark. 802, 22 S.W.2d 1015 (1930); *Mansfield Gas Co.* v. *Alexander*, 97 Ark. 167, 133 S.W. 837 (1911).

While Sunbelt cites other jurisdictions where the burden is placed on the operator to prove excuse for significant delay in drilling where the operator also owns the draining well, such is not the law in Arkansas. Under Arkansas case law, the burden of proving breach of an implied covenant is on the one seeking cancellation of the lease. *Blair*, 148 Ark. 301, 311, 230 S.W. 286, 289-90 (1921).

The evidence revealed that the Arkansas Oil and Gas Commission does not allow production by more than one well per unit from a common source or reservoir, absent the existence of a fault. Because Stephens began producing from the Dunn reservoir with its recompletion in 1971, it was Sunbelt's burden to show that Stephens' failure to produce from the reservoir prior to 1971, and its failure to discover the Dunn fault was a breach of Stephens' duty as a prudent operator. No evidence was presented to show that Stephens should have developed the Dunn reservoir or should have realized the Blakely well was producing from the same reservoir prior to the 1971 recompletion.

The uncontroverted evidence showed Stephens did not breach its duty in not discovering the Dunn fault prior to 1990. John Shields, an independent geologist who made maps for Stephens in the 1970s, testified he realized a section in the Gregory No. 1 well might be a fault, but because the section was only one hundred feet, he considered it insignificant and representing a thinning of the reservoir. Sunbelt's own geologist, Dr. Charles Bartlett, testified he missed the fault in 1981. John Sharp, a geologist who did mapping for Stephens from 1986 to 1990, testified he noticed one hundred feet missing from the Gregory No. 1 well and realized it was probably a fault. Because he could not tell which direction the fault ran, Sharp recommended that Stephens drill into the Orr reservoir.

G.H. Porter, Jr., vice president in charge of drilling and production at Stephens, testified that through the years the shut-in pressures for the Blakely, Gregory No. 1, and the two Gooch wells were very close, indicating they were all in the same reservoir without any fault separation. Further, Porter stated on May 14, 1990, when John Sharp informed Stephens that a fault existed and recommended drilling, Stephens applied to the Arkansas Oil and Gas Commission for approval of an exceptional location, which was granted. The Gregory No. 2 well was drilled to the Orr reservoir and supplied conclusive evidence that a fault existed within the Dunn reservoir. Subsequently in 1991, Stephens began production in the Gregory Nos. 3 and 4 wells.

Next, we consider whether Stephens breached its duty as a prudent operator in failing to drill offset wells to the Dunn reservoir. While Sunbelt and the lessors alleged loss of gas and royalties from drainage, Sunbelt failed to prove the lessors actually sustained losses. Again, the uncontroverted evidence indicated Stephens produced or will produce all the gas originally in place under the Gregory Unit, plus more. Dave Kvach, a petroleum engineer and Sunbelt's own witness, testified that 164% of the gas originally in place north of the fault was produced, and that the Gregory Nos. 2, 3, and 4 wells will produce 30% to 40% more than was originally in place south of the fault. Henry Coutret, a consulting petroleum engineer and witness for Stephens, testified that after the recompletion in 1971, migration of gas north of the fault went back onto the Gregory Unit. Coutret conceded that if Stephens had drilled the Gregory No. 2 well earlier it would have produced more gas. However, Coutret also stated that of about three billion cubic feet of gas in place initially south of the fault, the Gregory No. 2 well alone will produce approximately two billion.

[redacted] Although the appellate court tries chancery cases *de novo* on appeal, it will not reverse the findings of a chancellor unless they are clearly erroneous. *Perry* v. *Nicor Exploration*, 293 Ark. 417, 738 S.W.2d 414 (1987). Based on the evidence as discussed, we cannot say the chancellor erred in finding that Stephens acted as a prudent operator in its management of the Dunn reservoir within the Gregory unit, and that Sunbelt failed to prove Stephens breached any implied covenants in the Gregory leases.

Finally, Sunbelt challenges the chancellor's award of attorneys' fees to Stephens and Chevron based on three arguments, only one in which we find any merit. The chancellor awarded fees pursuant to Ark. Code Ann. § 16-22-308 (Repl. 1991), which reads as follows:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs.

Here, Sunbelt brought action against Stephens and Chevron based upon its top leases and requesting that Stephens' leases be cancelled because Stephens had abandoned its leases and breached its implied duties to explore and develop and to protect from drainage. Under the plain terms of § 16-22-308, Stephens and Chevron prevailed against Sunbelt's allegations that they breached their lease terms, and the trial court was therefore authorized to award reasonable attorney's fees in these circumstances.

Sunbelt also argues that, under ARCP Rules 52(b) and 59(b), Stephens' and Chevron's motions for attorneys' fees were untimely because their motions were filed more than ten days beyond the filing of the final judgment dismissing Sunbelt's and the lessors' case. Those rules do not mention when motions for attorneys' fee must be submitted. Instead, this court's holding in *Alexander* v. *First Nat'l Bank of Ft. Smith*, 278 Ark. 406, 646 S.W.2d 684 (1983), controls that issue here. In *Alexander*, the court rejected Alexander's argument that the trial court was without jurisdiction to award attorneys' fees, since at the time of the award, the notice of appeal had been filed. The court held matters that are collateral or supplemental to the trial court's judgment are left within the trial court's jurisdiction even though an appeal has been docketed. In so holding, the court upheld the trial court's award of attorneys' fees and executor's fees since the awards were collateral to Alexander's appeal from the lower

court's decision to uphold First National Bank's accounting. In accordance with *Alexander*, we conclude that Stephens' and Chevron's motions were not required to be filed within the ten-day period set out in Rules 52(b) and 59(b), and the trial court had the authority to award the attorneys' fees it did. *Cf. Spring Creek Living Center* v. *Sarrett*, 318 Ark. 173, 883 S.W.2d 820 (1994), (court held that the trial court could retain jurisdiction of an ARCP Rule 11 motion for sanctions as a collateral matter to the underlying cause of action which had been appealed).

In conclusion, Sunbelt challenges the award of attorneys' fees as excessive, but we find that argument without merit. The trial court's award will not be set aside except for abuse of discretion, *Chrisco* v. *Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990), and in reviewing the record, Sunbelt simply fails to show such an abuse. Sunbelt is correct, however, that only costs authorized by statute may be awarded. Stephens and Chevron submitted an itemization of legal fees and costs, which included depositions, expert fees and travel expenses. Because such costs are not allowable, *see Wood* v. *Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994), we remand so the trial court can deduct those unallowable expenses if such expenses were included in the amount awarded Stephens and Chevron.

Affirmed and remanded in part.

Shirley BRUMLEY *v.* James NAPLES

94-1194 896 S.W.2d 860

Supreme Court of Arkansas
Opinion delivered April 10, 1995

Compton, Prewett, Thomas & Hickey, P.A., by: *William L. Prewett*, for appellant.

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

DONALD L. CORBIN, Justice. Appellant, Shirley Brumley, appeals an order of the Union County Circuit Court granting the motion of appellee, James J. Naples, for summary judgment and dismissing with prejudice appellant's complaint for malpractice and breach of contract. Our jurisdiction of the appeal is proper pursuant to Ark. Sup. Ct. R. 1-2(a)(16) because it raises a question about the law of torts. Appellant raises five points for reversal. We find no error and affirm the trial court's judgment.

On July 7, 1988, appellee, a podiatrist, performed a surgical procedure to remove bunions located on the sides of appellant's feet. The procedure was performed at the New Boston General Hospital, in New Boston, Texas. After the procedure, appellant's left foot was improved, but she complained of persistent coldness and numbness in the great toe and second digit of her right foot.

On April 18, 1990, appellant filed an action for damages against appellee, alleging her injuries were caused by appellee's negligence in damaging the nerves of her right foot during the surgery.[1] Appellant's complaint set forth claims based on negligence in the surgery, lack of informed consent, and breach of contract. Appellee answered with a general denial of the complaint's allegations.

On April 20, 1992, appellee filed a motion for summary judgment based on appellant's failure to prove that appellee had acted outside the applicable standard of care. The motion was

[1]Appellant's then-spouse, Henry Brumley, originally joined in the complaint and prayed for damages for loss of consortium. However, by order filed March 24, 1992, Mr. Brumley's motion for nonsuit was granted.

supported by appellee's affidavit which incorporated several exhibits including appellant's answers to interrogatories, appellant's response to request for production of documents, appellant's deposition, and copies of the hospital's admission forms. Appellant responded that the motion was untimely inasmuch as discovery had not been completed and issues of fact remained; she attached her affidavit. Appellee's motion was denied.

On December 3, 1992, appellee renewed his motion for summary judgment and argued that appellant had failed to disclose an expert witness to establish that appellee had acted outside the applicable standard of care; the renewed motion adopted appellee's first motion. Appellant responded that appellee's deposition established a standard to advise a patient of risk and danger, and that issues of fact remained regarding the contract and lack of informed consent. Appellant's response was supported by appellee's deposition and correspondence regarding the injury to appellant's right foot. Appellee's reply denied the existence of any contract, and asserted that expert testimony, other than his own deposition, was required to establish a standard of care on the issues of negligence and informed consent.

By order filed April 28, 1993, the trial court found appellant had failed to disclose a "liability expert" except on the issue of informed consent, and granted partial summary judgment "as to all issues of liability except the issue of informed consent and breach of warranty and contract."

On March 29, 1994, appellee filed a second renewed motion for summary judgment, attached as an exhibit thereto the deposition of appellant's liability expert on the issue of informed consent, Mr. Luther Lewis, and argued the deposition failed to establish a fact question on that issue. The motion incorporated appellee's earlier motions. Appellant argued, in response, that Lewis was indeed an expert on the issue of the standard of care for informed consent.

By order filed September 6, 1994, incorporating a letter opinion dated August 16, 1994, the trial court found that it had instructed appellant by order filed February 16, 1993[2] to disclose

[2]Although appellant designated the order filed February 16, 1993 in her notice of appeal, she failed to abstract it for our review.

liability experts by March 29, 1993; that appellant had identified Lewis as an expert as to the issue of informed consent; that Lewis could not offer an opinion as to the proper standard of care for a podiatrist pursuant to Ark. Code Ann. § 16-114-206(b)(1) (1987); that appellant had failed to disclose any other liability expert; and, that appellee's motion for summary judgment as to "all issues of liability" was thereby granted and the complaint dismissed with prejudice. This appeal arises therefrom.

For reversal, appellant first argues that section 16-114-206, setting forth the burden of proof in medical malpractice actions, is unconstitutional. Our review of the abstract reveals that this issue was mentioned once before the trial court, to-wit, in her response to appellee's first motion for summary judgment, appellant stated: "Defendant argues that expert medical testimony is required in this case. If it were, the statute concerning actions for medical malpractice would be unconstitutional as legislation that is special, or class legislation." The abstract is otherwise devoid of any mention of this issue by either party or by the trial court.

[redacted] On this record, we conclude that appellant's constitutional challenge was neither properly briefed nor argued to the trial court, and that the trial court made no ruling on appellant's objection. The burden of obtaining a ruling on this issue was on appellant; her failure to do so, leaving the issue unresolved, operated as a waiver of the argument on appeal. *Parmley* v. *Moose*, 317 Ark. 52, 876 S.W.2d 243 (1994). Further, the record reveals that no notice of appellant's constitutional challenge was given to the Attorney General pursuant to Ark. Code Ann. § 16-111-106 (1987), and, on that ground, we may choose not to consider the argument on appeal. *Reagan* v. *City of Piggott*, 305 Ark. 77, 805 S.W.2d 636 (1991).

Appellant's second argument is that the trial court erred in granting summary judgment because, on the proof presented, there was a genuine issue of material fact on the issue of informed consent. Appellee responds that he was entitled to summary judgment on this issue because section 16-114-206(b) required expert medical testimony to establish the applicable standard of care for disclosure and appellant failed to produce such testimony. Appellant argues that, viewing the proof in the light most favor-

able to her as the party resisting the summary judgment motion, this court must find that appellee made no disclosure of the risks of surgery, and, on such proof, evidence of a standard for disclosure is not required because absolute nondisclosure violates any disclosure standard.

The standard for our review of motions for summary judgment, as we have stated many times, is as follows:

> Summary judgment is a remedy that should be granted only when it is clear that there is no genuine issue of material fact to be litigated. [Citation omitted.] The burden of proving that there is no genuine issue of material fact is upon the movant, and all proof submitted must be viewed in a light most favorable to the party resisting the motion. Any doubts and inferences must be resolved against the moving party. [Citations omitted.] The burden in a summary judgment proceeding is on the moving party and cannot be shifted when there is no offer of proof on a controverted issue. [Citation omitted.] When the movant makes a prima facie showing of entitlement, the respondent must meet proof with proof by showing genuine issue as to a material fact. [Citation omitted.]

Wyatt v. *St. Paul Fire & Marine Ins. Co.*, 315 Ark. 547, 551, 868 S.W.2d 505, 508 (1994).

Viewing the pleadings and evidence with respect to the informed consent issue in the light most favorable to appellant, we observe that in her complaint she alleged:

> The information furnished to [appellant] by [appellee] relative to the proposed surgery to be performed by him was not adequate whereby she could give an informed consent to the surgery. Had she been informed there was a danger of permanent crippling of her foot, she would not have consented to the operation. The defendant failed to advise her there would be any danger whatever in a loss of sensation or numbness in her foot as a result of the operation and, to the contrary, assured her it was a simple operation and there would be no danger.

In her deposition, appellant described two meetings she had

with appellee prior to her surgery. Their first meeting took place in appellee's office in June of 1988 when appellee initially examined appellant and recommended the surgery. In the deposition, when asked whether appellee explained any surgical procedure to her, appellant replied: "He just told me that he would remove those knots off of the sides of my feet, and he did not say anything about any pins or cutting any nerves in my toes or anything." Their second meeting took place in the hospital just prior to the time appellant was taken to surgery. In her deposition, appellant stated that appellee told her and her husband "the very same thing that he told me in his office that day, the first day I went to him." When asked whether appellee gave appellant any instructions about her care post-surgery, she answered in the negative, and added:

> A. [H]e did not tell me that he was going to go in there and put pins in my feet or cut any nerves in my toes. All he was supposed to do was take those knots off of the sides of my feet.
>
> Q. How did you think he was going to get the knots off the side of your feet?
>
> A. He was going to cut them out.

At a later point in the deposition, appellant was asked if she had spoken to another doctor at the hospital on the day of her surgery, she replied:

> A. I just can't remember. When I went over there that morning, I was scared to death because I didn't know what was going to happen to me. I've always been that way about hospitals.
>
> Q. I understand. And you were scared to death and didn't know what was going to happen and still didn't ask Doctor Naples what was going to happen to you?
>
> A. Well, Doctor Naples had told us that, you know, he'd explained the procedure to me twice, and he told me the same thing twice, and I just figured he knew what he was doing, and I didn't question him.

Finally, in her deposition, appellant stated that, on the day of the surgery, she signed without reading the hospital's disclo-

sure and consent form. This two-page document, subtitled "Medical and Surgical Procedures," was a preprinted form which included blank lines to permit the insertion of additional language. The document's stated purpose was "to make you better informed so you may give or withhold your consent to the procedure." It addressed risks and hazards of surgical, medical and diagnostic procedures generally. Additional handwritten language had been inserted identifying appellant's particular surgery and its particular related risks and hazards, including nerve injury. In the deposition, appellant stated that she did not believe the handwritten language was on the form at the time she signed it. The document stated that appellant had been given an opportunity to ask questions about the risks and hazards of the procedures to be used, and believed that she had sufficient information to give an informed consent.

We conclude that, although appellant asserts that absolutely no information regarding the risks of her surgery was disclosed to her, the pleadings and evidence, viewed in the light most favorable to her, do not substantiate her argument, but reveal that some information was disclosed. The informed consent issue then becomes whether the disclosed information was adequate to obtain appellant's informed consent. Adequate information, in the language of section 16-114-206(b), is:

> (1) [T]hat type of information regarding the treatment, procedure, or surgery as would customarily have been given to a patient in the position of the injured person . . . by other medical care providers with similar training and experience at the time of the treatment, procedure, or surgery in the locality in which the medical care provider practices or in a similar locality.
>
> (2) In determining whether the plaintiff has satisfied the requirements of subdivision (b)(1) of this section, the following matters shall also be considered as material issues:
>
> > (A) Whether a person of ordinary intelligence and awareness in a position similar to that of the injured person . . . could reasonably be expected to know of the risks or hazards inherent in such treatment, procedure, or surgery;

> (B) Whether the injured party . . . knew of the risks or hazards inherent in such treatment, procedure, or surgery[.]

Adequate disclosure of the risks of a procedure is measured by the customary practice of physicians in the community in which the medical care provider practices or in a similar community. *Fuller, Adm'x* v. *Starnes*, 268 Ark. 476, 597 S.W.2d 88 (1980).[3] This standard of care applied even in a case arising from the physician's failure to disclose to the patient certain known risks associated with the use of Demerol prior to injecting her with the drug. *Id.*

[redacted] The plaintiff's burden of proving the applicable standard of care and the defendant's failure to comply with that standard requires expert testimony when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge. *Reagan*, 305 Ark. 77, 805 S.W.2d 636; *Courteau* v. *Dodd*, 299 Ark. 380, 773 S.W.2d 436 (1989). In the present case, the trial court indeed required appellant to disclose an expert on the issue of informed consent. Upon its review of the deposition of appellant's disclosed expert, Lewis, the trial court determined that he could not offer expert testimony, as required by section 16-114-206(b), on the issue of informed consent. Absent expert testimony on this issue, the trial court concluded that appellant had not met her burden of proof and that no material issue of fact existed with respect to informed consent which required presentation of the case to a jury. We cannot say the trial court erred. *Reagan*, 305 Ark. 77, 805 S.W.2d 636; *Courteau*, 299 Ark. 380, 773 S.W.2d 436; *Fuller*, 268 Ark. 476, 597 S.W.2d 88; *see also Grice* v. *Atkinson*, 308 Ark. 637, 826 S.W.2d 810 (1992) (affirming judgment for defendant on directed verdict in dental malpractice case arising from failure to disclose risk of surgery).

Appellant's third argument is that the trial judge erred in granting summary judgment on her breach of contract claim because genuine issues of material fact exist concerning the existence and terms of the alleged contract between the parties.

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[3]Although the facts in *Fuller* developed just prior to the General Assembly's adoption of section 16-114-206, we specifically stated in that opinion that our holding was consistent with the new legislation.

Viewing the pleadings and evidence with respect to the contract issue in the light most favorable to appellant, we observe that in her complaint, appellant alleged: "The defendant contractually agreed not to cause damage to her and assured plaintiff that his operation would correct the problems in her foot." No written agreement was alleged or appended to the complaint. In her affidavit, appellant stated: "I entered into a contractual agreement with Dr. Naples based upon his oral representations with me prior to the surgery. He breached that contract by failing to produce surgical results that were satisfactory, but that were, rather, incapacitating."

We observe, however, that in her deposition the following colloquy occurred between appellant and appellee's counsel:

> Q. Did Doctor Naples make any guarantees or promises about his surgery?
>
> A. What do you mean?
>
> Q. Did he say, "I guarantee I can fix those feet," or "I promise that this will be the result"?
>
> A. Well, no, he didn't guarantee anything. He just told me that my feet would be better. And my left foot is better, but my right foot is not.

In addition, we observe that the hospital's disclosure and consent form, which appellant signed without reading, contained the statement: "I understand that no warranty or guarantee has been made to me as to result or cure."

We conclude that, although appellant asserts that a contract or guaranty existed between the parties, the pleadings and evidence, viewed in the light most favorable to her, do not substantiate the existence of such an agreement. Hence, we find appellant failed to rebut appellee's prima facie establishment of entitlement to summary judgment by introducing proof that she and appellee made an enforceable agreement that would give rise to a cause of action for breach of contract or warranty. *See generally*, Jack W. Shaw, Jr., Annotation, *Recovery Against Physician on Basis of Breach of Contract to Achieve Particular Result or Cure*, 43 A.L.R.3d 1221 (1972 & Supp. 1994). On these facts, we cannot say the trial court erred in granting appellee judgment

as a matter of law on the breach of contract or warranty claim. *South County, Inc.* v. *First Western Loan Co.*, 315 Ark. 722, 871 S.W.2d 325 (1994). Any unresolved factual issues are therefore irrelevant, and the trial judge did not err in granting the motion for summary judgment on this claim. *Rainey* v. *Travis*, 312 Ark. 460, 850 S.W.2d 839 (1993).

Appellant's fourth argument is that the trial court erred in ruling that her witness on the issue of informed consent, Lewis, did not qualify as an expert. The determination of whether a person is qualified as an expert in a particular field rests within the discretion of the trial court. *Williams* v. *Southwestern Bell Tel. Co.*, 319 Ark. 626, 893 S.W.2d 770 (1995). The trial court's discretion in this matter is broad, and will not be reversed absent a showing of abuse. *Phillips* v. *Clark*, 297 Ark. 16, 759 S.W.2d 207 (1988).

The test of qualification as an expert is whether, on the basis of the witness's qualifications, he has knowledge of the subject at hand which is beyond that of ordinary persons. *Williams*, 319 Ark. 626, 893 S.W.2d 770. In the present case, the trial court rejected Lewis as an expert on the issue of informed consent for the following reasons as stated in its August 16, 1993 letter opinion:

> After fully reviewing his deposition, it is the opinion of the Court that Mr. Lewis candidly admitted that he did not have an opinion on the proper standards of care for a podiatrist as relates to disclosures and consent forms. Basically Mr. Lewis knows about the basics of informed consent, that is how to keep the records, and how and when to have them executed. But with respect to the type of information a podiatrist should tell a patient, or the content of the information, he was unprepared to offer an opinion on that. He was not prepared to answer any medical questions dealing with informed consent. On page 31 of his deposition, he stated "The medical complications and risks, I cannot tell you what the podiatrist should say." In the opinion of the Court this at [sic] the heart of the issue of informed consent. Therefore, the plaintiff must obtain an expert to testify as to these facts.

Our review of Lewis's deposition is consistent with the quoted summary by the trial court. On these facts, we cannot say the court abused its discretion in this matter.

Appellant's fifth and last argument is that appellee's deposition contained admissions that should have been accepted by the trial court as expert testimony on the issue of the disclosure standard for informed consent.

Appellant argued appellee's deposition was expert testimony on the issue of informed consent in her response to appellant's first renewed motion for summary judgment. In his reply, appellee argued that Ark. Code Ann. § 16-114-207(3) (1987), as interpreted by this court in *Prater* v. *St. Paul Ins. Co.*, 293 Ark. 547, 739 S.W.2d 676 (1987), controlled this matter and disallowed use of appellee's deposition for the purpose of establishing his failure to comply with the applicable standard of care. By order filed April 28, 1993, the trial court, without expressly ruling on appellant's argument, stated that appellant had disclosed an expert on the issue of informed consent, and reserved that issue from its grant of partial summary judgment. No appeal was taken from the April 28, 1993 order.

In his second amended motion for summary judgment, appellee identified Lewis as appellant's disclosed expert on the issue of informed consent. In her response to the second amended motion, appellant confirmed that Lewis was offered as a medical expert qualified to testify on the issue of the standard of care for informed consent. Appellant did not renew her argument that appellee's deposition was expert testimony on this issue, nor was the issue mentioned by the trial court in its order filed September 6, 1994 granting the second renewed motion for summary judgment and dismissing the complaint.

On these facts, we find appellant has failed to preserve this argument by obtaining and designating for appeal any ruling by the trial court on the issue of the use of appellee's deposition to establish the standard for informed consent. Hence, we do not address the merits of appellant's final argument.

Affirmed.

DUDLEY, J., not participating.

Daniel HARMON *v.*
CARCO CARRIAGE CORPORATION and Martha Arends

94-1217 895 S.W.2d 938

Supreme Court of Arkansas
Opinion delivered April 10, 1995

Blackman Law Firm, by: *Phillip Crego* and *Christopher Jester*, for appellant.

Penix, Penix, Lusby & Nix, by: *Robin Nix*, for appellees.

DONALD L. CORBIN, Justice. Appellant, Daniel Harmon, appeals an order of the Craighead County Circuit Court granting summary judgment to separate appellees, Carco Carriage Corporation (Carco) and its employee, Martha Arends, on appellant's claims for malicious prosecution and abuse of process. As this case presents a question about the law of torts, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(16). The trial court erred in granting summary judgment on both claims. Therefore, we reverse and remand for trial.

Appellant filed suit against appellees asserting claims of malicious prosecution, abuse of process, and outrage. Appellant later withdrew his claim of outrage. The complaint stated that on June 18, 1991, appellees initiated criminal prosecution against appellant for theft of leased property, alleging appellant had rented from appellees and failed to return a 1991 Pontiac Grand Am automobile. Appellant was arrested, tried, and found not guilty of theft of leased property.

This suit followed. We consider separately the claims for malicious prosection and abuse of process. First, however, as this court did in *Culpepper* v. *Smith*, 302 Ark. 558, 560-61, 792 S.W.2d 293, 294 (1990), we recite

> [t]he procedures to be followed and the assumptions to be made in reviewing rulings granting summary judgments [which] have now become axiomatic. . . . The burden is on movant to demonstrate the absence of a genuine issue of fact. All emphasis is drawn against the moving party, and when reasonable minds might differ as to conclusions to be drawn from the facts disclosed, a summary judgment is not appropriate. [Citation omitted.] The purpose of a summary judgment is not to try issues, but to determine if there are issues to be tried. If doubt exists, summary judgment should not be granted. [Citations omitted.] When considering the facts, the court should view the testimony relating thereto in the light most favorable to the party against whom the judgment is sought. [Citation omitted.]

PROOF PRESENTED TO TRIAL COURT

Viewing the pleadings and evidence respecting the summary judgment motion in the light most favorable to appellant, we observe that in his complaint, appellant contended the prosecution for theft of leased property arose out of a dispute between him and Hertz Claim Management Corporation (HCM), after appellant was involved in an automobile collision. Pending settlement of appellant's claim from the collision, HCM provided him with the 1991 Pontiac Grand Am via appellee, Carco, the Hertz licensee in Jonesboro, Arkansas. According to appellant's complaint, HCM refused to extend the lease agreement on the 1991 Pontiac Grand Am past June 17, 1991, and instructed

appellees Arends and Carco to collect the rental from appellant or obtain the return of the Grand Am. Appellee Arends then completed an affidavit for a warrant for appellant's arrest, stating that appellant had leased the Grand Am and refused to return it. Thus, appellant alleged, appellees maliciously initiated criminal prosecution against him for the sole purpose of collecting a civil debt.

Appellees answered the complaint, admitting the affidavit for arrest and that appellant had been found not guilty of theft of leased property. However, appellees denied any knowledge of the automobile collision, and any relationship between appellant and HCM or between themselves and HCM. Appellee Arends denied acting pursuant to any instruction from HCM. The parties engaged in discovery, and appellees moved for summary judgment. In the motion, appellees referred to a deposition of appellant and an affidavit of appellee Arends; however, no such documents were attached to the motion or brief in support thereof.

Appellant filed a response to the motion for summary judgment and brief in support thereof asserting that appellees had failed to disclose material facts, and that these facts were in dispute. Appellant attached portions of appellee Arends's deposition to his response and alleged that appellee Arends failed to disclose to the police all the facts known to her when she swore out the arrest warrant. Also attached to appellant's response was an affidavit of Judge Bill Webster, the Jonesboro Municipal Judge, stating that he had read appellee Arends's deposition and that if he had known the facts not disclosed by appellee Arends, he would not have found probable cause for the arrest warrant.

MALICIOUS PROSECUTION

This court has previously set out the elements of malicious prosecution as follows: (1) a proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the plaintiff; (3) absence of probable cause for the proceeding; (4) malice on the part of the defendant; and (5) damages. *Cox* v. *McLaughlin*, 315 Ark. 338, 867 S.W.2d 460 (1993).

Here, the trial court granted summary judgment on the basis that probable cause existed to charge appellant with theft

of leased property and that appellees acted without malice. This court has stated that the issue of probable cause may be decided as a matter of law on summary judgment only if both the facts relied upon to create probable cause and the reasonable inferences to be drawn from the facts are undisputed. *Wal-Mart Stores, Inc.* v. *Yarbrough*, 284 Ark. 345, 681 S.W.2d 359 (1984). In the context of malicious prosecution, this court has defined "probable cause" as a state of facts or credible information which would induce an ordinarily cautious person to believe that the accused is guilty of the crimes charged. *Cordes* v. *Outdoor Living Center, Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). Moreover, in the context of malicious prosection, this court has defined "ordinary caution" as "'a standard of reasonableness which presents an issue for the jury when the proof is in dispute or subject to different interpretations.'" *Cox*, 315 Ark. at 347, 867 S.W.2d at 464 (quoting *Hollingsworth* v. *First Nat'l Bank & Trust Co.*, 311 Ark. 637, 640, 846 S.W.2d 176, 178 (1993)); *Cordes*, 301 Ark. at 31, 781 S.W.2d at 33.

In his response to the motion for summary judgment, appellant contended that appellee Arends had failed to disclose to the police all the facts known to her when she swore out the affidavit for arrest warrant, specifically, that she knew the Grand Am was available to be picked up, and that she only sought the return of the Grand Am, rather than appellant's arrest. In her deposition, which was attached to appellant's response, appellee Arends stated that she knew the car was available to be picked up in Piggott, Arkansas. Such knowledge on her part creates a dispute as to the existence of probable cause to charge appellant with theft of leased property. Additionally, appellant claims appellee Arends failed to disclose that she did not want appellant arrested, rather she wanted the Grand Am returned. Judge Webster stated in his affidavit, which was also attached to appellant's response, that if he had known appellee Arends knew the Grand Am was available to be picked up, and that she only sought the return of the Grand Am, he would not have found probable cause existed to arrest appellant for theft of leased property. Clearly then, the material fact of probable cause was in dispute and presented a question for the jury to resolve. We have no hesitation in concluding the trial court erred in granting summary judgment on the claim for malicious prosecution.

ABUSE OF PROCESS

This court has stated the elements of the tort of abuse of process as follows:

> (1) a legal procedure set in motion in proper form, even with probable cause, and even with ultimate success, but, (2) perverted to accomplish an ulterior purpose for which it was 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, 16, 846 S.W.2d 652, 654 (1993). The key to this tort is the improper use of process after issuance to accomplish an ulterior purpose for which the process was not designed. *Id.* It is the purpose for which the process is used, once issued, that is of importance. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 121, at p. 897 (5th ed. 1984). Abuse of process is somewhat in the nature of extortion or coercion. *Kutait*, 312 Ark. 14, 846 S.W.2d 652.

In their brief, appellees rely on *Smith & McAdams, Inc.* v. *Nelson*, 255 Ark. 641, 501 S.W.2d 769 (1973), a case where the owner of a truck initiated criminal prosecution on charges of larceny by bailee against its employee-drivers to recover the truck. The employees were arrested and brought to court where the charges were dismissed. At the ensuing trial for abuse of process, the truck owner testified his purpose in procuring an arrest warrant was to obtain the return of the truck; he testified further that he did not know nor care whether the drivers were tried on the charges. This court held there was no action taken subsequent to the filing of the charges, therefore there was no extortion or coercion. *Nelson* is distinguishable from the present case in that the criminal charges were dismissed in *Nelson* but brought to trial in the present case.

In the present case, the trial court granted summary judgment on appellant's claim for abuse of process stating that no wrongful action was taken by either appellee after the charges were filed. The record clearly reflects facts from which a reasonable inference to the contrary of the trial court's finding may be drawn. After appellee Arends completed the affidavit for arrest warrant and after she was told the Grand Am was available to be picked

up, she did nothing to prevent the issuance of the warrant or the bringing of appellant to trial on the charge of theft of leased property, for which appellant was ultimately acquitted. The material issue of whether appellees' use of legal process continued after the filing of the criminal charge until appellant was tried and acquitted was therefore in dispute.

Further, according to appellee Arends's deposition, she only sought the return of the Grand Am, not appellant's arrest. The use of criminal prosecution to extort payment of money or recovery of property has been cited by one treatise as a classic example of the tort of abuse of process. *Prosser and Keeton* at pp. 898, 899. In addition, this court has indicated that the service of an arrest warrant may constitute abuse of process. *Kutait*, 312 Ark. 14, 846 S.W.2d 652. Consequently, the record reflects a dispute as to the material issue of whether appellees pursued appellant's arrest and criminal prosecution for the sole purpose of recovering property. The proof on this issue was susceptible of producing more than one inference and therefore should have been presented to a jury. We have no hesitation in concluding the trial court erred in granting summary judgment on the claim of abuse of process.

The order granting summary judgment is reversed and the case is remanded for trial.

DUDLEY, J., not participating.

Nakia DAVIS *v.* STATE of Arkansas

CR 94-1376 896 S.W.2d 438

Supreme Court of Arkansas
Opinion delivered April 10, 1995
[Rehearing denied May 15, 1995.]

William M. Howard, Jr., for appellant.

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

ROBERT L. BROWN, Justice. This is an appeal from a judgment of conviction for capital murder under Ark. Code Ann. § 5-10-101(a)(1) (Supp. 1993). The penalty assessed was life imprisonment without the possibility of parole. Appellant Nakia Davis questions the trial court's decision denying his motion for a directed verdict following the State's case, which motion he premised on the insufficiency of the evidence for the underlying felony of aggravated robbery. We affirm the judgment of conviction.

In her opening statement at trial, the prosecutor set out her

theory of the case which was that Nakia Davis and an accomplice, Romondo Jenkins, shot and killed the victim, Anthony Williams, in the course of robbing him. The State's case revealed the following facts. On August 3, 1993, Anthony Williams received a small insurance settlement, approximately $2,000.00, as a result of an automobile accident. His fiance, Shawna Davis, testified that they paid utility bills and purchased a few items with part of the settlement money but intended to spend the bulk of the money on a new car, which they were to pick up on Friday, August 6, 1993. She testified that on Thursday night, August 5, 1993, Williams counted the remaining money, approximately $1,500.00, and placed it in the back of his checkbook. On Friday morning, Williams left the house to purchase several items he needed for the new car.

Patty McVay, a communications specialist with the Pine Bluff Police Department, testified that she received a 911 call at approximately noon on Friday, August 6, 1993. The caller stated that a brown car had run into a ditch and hit a fence, that a blue convertible had pulled up beside it, and that there was fighting inside the brown car. The caller also stated that someone was shooting at a person inside the brown car and that the person in the brown car appeared to be dead. He stated that there were five or six males in the blue convertible.

Stanley Lovett, Nakia Davis's cousin, was originally arrested in connection with the shooting. He testified that he and several friends, including Davis, had been riding around in a blue convertible. He stated that they drove over to a friend's house where they stayed for awhile. Lovett and two friends left without Davis, and when they returned, they saw a brown car stuck in a ditch with its tires spinning. He said he then got out of the blue convertible and walked over to the car in the ditch. He testified that he saw Davis walk down the driveway towards the brown car with a gun in his hand and fire three or four times into the back window of the car. The shots sounded as if they came either from a .22 or a .25 caliber pistol. He heard the victim in the car say, "Don't shoot me no more. Don't shoot me no more." As Lovett got closer to the car, the door opened and Romondo Jenkins emerged from the car. Jenkins had blood on his hands and clothes. Davis and Jenkins walked quickly away toward the house, and Lovett returned to the blue convertible where his cousin, Carlos

Urquhart, was waiting. The two drove the convertible around the block and picked up Davis and Jenkins in the alley behind the house. Lovett stated that he saw the victim, Anthony Williams, fall out of the car onto the ground, as they were driving away. After picking up Davis and Jenkins, they drove to a friend's house. Lovett stated that he never saw Williams with a pistol.

Anthony Smothers, a correctional officer with the State Diagnostic Unit, happened to be passing by the scene shortly after the shooting. He testified that he saw a car in a ditch and stopped to render assistance. He stated that as he was nearing the car, Williams opened the passenger door and fell out onto the street. Smothers said that he stayed with Williams until the Pine Bluff police arrived on the scene. He stated that he did not see any weapons at the crime scene.

Detective Rowland Dorman of the Pine Bluff Police Department was the officer in charge of the investigation. He testified that he was unable to locate any weapons at the crime scene. He did locate several bullet casings in the area and a checkbook. The bullet casings consisted of three .25 caliber shell casings and one .380 caliber shell casing. The checkbook contained unused checks and $397. Detective Dorman added that gun powder residue was found on the hands of Romondo Jenkins.

Ronald Andrejack, a firearms examiner for the Arkansas State Crime Laboratory, testified that the three .25 caliber shells were discharged from the same gun. He also testified that the bullet removed from Williams's abdomen was consistent with the .38 caliber class. Dr. Frank Peretti, Associate State Medical Examiner, next testified that Williams died from multiple gun shot wounds. He stated that Williams had been shot three times in his legs and that the wounds were consistent with wounds caused by .25 caliber bullets. Dr. Peretti added that it was the shot to the abdomen that was fatal.

No pistols were recovered at the crime scene. At the end of the State's case, Davis moved for a directed verdict on the basis that the State failed to show any evidence of the underlying felony of aggravated robbery. The motion was denied.

Davis then testified on his own behalf. He admitted shooting into the brown car, but he testified that he did so only in self-

defense. He stated that he was walking down the street when he heard a noise that sounded like a gunshot. He pulled his gun, and after seeing a brown car in the ditch, he placed the gun back in his waistband and walked towards the car. When he reached the car, he saw Romondo Jenkins and Anthony Williams wrestling inside the vehicle. He told Williams to "get up off my home boy." At that point, Williams pointed a gun at Davis, and Davis shot him three times in the legs. He stated that he did not shoot Williams in the stomach and was out on the street when that occurred. He further denied seeing or participating in a robbery of Williams. No motion for directed verdict was made by Davis at the close of all of the evidence. The jury returned a verdict of guilty on the charge of capital murder, and Davis was sentenced to life in prison without parole.

Davis's sole point on appeal is that there was insufficient evidence to support the underlying felony of aggravated robbery. Davis, however, did not preserve this point for our review.

[redacted] Rule 36.21(b) of the Arkansas Rules of Criminal Procedure provides:

> When there has been a trial by jury, the failure of a defendant to move for a directed verdict at the conclusion of the evidence presented by the prosecution *and at the close of the case* because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict. (Emphasis ours.)

See also Penn v. *State*, 319 Ark. 739, 894 S.W.2d 597 (1995); *Brooks* v. *State*, 308 Ark. 660, 827 S.W.2d 119 (1992); *Ferrell* v. *State*, 305 Ark. 511, 810 S.W.2d 29 (1991). The fact that Davis made a specific motion at the close of the State's case in chief is of no consequence because by presenting evidence in his defense, he waived his former motion for a directed verdict. *See Crawford* v. *State*, 309 Ark. 54, 827 S.W.2d 134 (1992); *Rudd* v. *State*, 308 Ark. 401, 825 S.W.2d 565 (1992), *citing* LaFave and Israel, *3 Criminal Procedure*, § 23.6(a) (1984). It was, therefore, incumbent upon Davis to move for a directed verdict at the close of the case in order to give the trial court an opportunity to consider the motion in light of the total proof presented. Davis failed to do this, and the issue of the sufficiency of the evidence presented was waived under Rule 36.21(b).

The record of this case has been reviewed in accordance with Supreme Court Rule 4-3(h) for rulings adverse to the appellant, and no reversible error has been found.

Affirmed.

DUDLEY, J., not participating.

TECHNICAL SERVICES OF ARKANSAS, INC.,
d/b/a JPAC Outdoor Advertising Company
v. Jim C. PLEDGER, Director of Arkansas Department of Finance and Administration; and Timothy J. Leathers, Commissioner of Revenues, Arkansas Department of Finance and Administration

94-1228 896 S.W.2d 433

Supreme Court of Arkansas
Opinion delivered April 10, 1995

Bradley & Coleman, by: *Jon R. Coleman* and *Robert J. Gibson*, for appellant.

Kenneth R. Williams, for appellee.

ANDREE LAYTON ROAF, Justice. This case involves the interpretation and construction of our sales and use tax, the Arkansas Gross Receipts Act of 1941, as amended, and the Arkansas Compensating Tax Act of 1949, as amended. Appellant's gross proceeds derived from sales of billboard advertising services are not taxed due to a specific exemption for advertising revenues earned by newspapers, publications, and billboard companies granted by the Arkansas Gross Receipts Act. Appellant failed to pay use tax on certain tangible items used in its advertising business, purchased from out-of-state vendors. No sales tax was collected from appellant by these vendors. Appellant claims that its gross proceeds exemption provides a basis for also exempting these items of personal property from the use tax because the items are purchased for use in providing advertising services to its customers. The chancellor ruled the items used in connection with the taxpayer's billboard advertising service are not exempt from the use tax, Ark. Code Ann. § 26-53-106 (Supp. 1993). We affirm.

Appellant Technical Services of Arkansas, Inc., d/b/a JPAC Outdoor Advertising Company (Technical Services) is a corporation engaged in the business of billboard advertising. The appellant erects billboards and enters into contracts with its customers to rent or lease billboard advertising space. The Arkansas Department of Finance and Administration (DFA) conducted a use tax audit of Technical Services' records for the audit period of January 1, 1988, through January 31, 1991. Technical Services was assessed a use tax deficiency, plus interest, in the amount of $16,367.13. The DFA assessed the use tax on "painted bulletins, posters, facings, hardware, and paint, *purchased out of state* for storage, usage, distribution, and consumption in Arkansas." (Emphasis supplied.) After exhausting its administrative remedies, the appellant paid the tax under protest and pursued its challenge in chancery court.

The chancellor found the items in question constituted tangible personal property against which the use tax was properly assessed. The court found that Ark. Code Ann. § 26-52-401(13) (Supp. 1993) exempts billboard advertising services from Arkansas

sales and use taxes, but expressed "some doubt about these items constituting a service." Further, the trial court found the appellant did not possess an Arkansas retail sales and use tax permit; therefore, the purchases were not exempt as a sale for resale pursuant to Ark. Code Ann. § 26-52-401(12) (Supp. 1993).

On appeal, Technical Services submits (1) it was entitled to an exemption under Ark. Code Ann. § 26-52-401(13); (2) the items were exempt under the sale for resale exemption provided by § 26-52-401(12); and (3) the taxation of the use of property in billboard advertising is in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The standard of review in these cases is well established. A strong presumption operates in favor of the taxing power, and the taxpayer must establish an entitlement to an exemption from taxation beyond a reasonable doubt. *Pledger* v. *C.B. Form Co.*, 316 Ark. 22, 871 S.W.2d 333 (1994); *Pledger* v. *Baldor Int'l, Inc.*, 309 Ark. 30, 827 S.W.2d 646 (1992). Tax exemptions are strictly construed against the exemption, and we have written that "to doubt is to deny the exemption." *C.B. Form Co., supra.* Finally, tax exemption cases are reviewed *de novo* and the appellate court does not set aside the findings of the chancellor unless they are clearly erroneous. *Baldor, supra.*

I. Ark. Code Ann. § 26-52-401(13)

Jeff Simmons, a senior tax auditor with the DFA, testified he assessed use tax on the poles, facings, posters, lighting equipment and any and all hardware used to attach the billboard to the pole. Simmons testified he assessed the tax on the items because they were bought out of state and shipped through interstate commerce, and no sales tax was charged. According to the testimony of Bill Levins, general manager of the appellant, "national" clients often provided the prepared posters which the appellant placed directly on the leased billboard. However, for those clients who did not provide their own posters, the appellant acted as an "agent" in securing the poster paper. The clients could buy the paper directly from the poster company if they had credit approval; however, in order to expedite the process, the appellant allowed the poster company to bill the appellant. Mr. Levins testified that the other items taxed were "necessary in

performing the services that we supply to our clients." Further, it is significant that Mr. Levins testified the appellant paid sales taxes when it purchased items used in its business from local suppliers.

The appellant contends that pursuant to Ark. Code Ann. § 26-52-401(13) "billboard advertising services" are exempt from the gross receipts tax; therefore, pursuant to Ark. Code Ann. § 26-53-112 (1987), "billboard advertising services," specifically the items of tangible personal property used to provide such services, are also exempt from the use tax. Further, the appellant submits that "services," as contemplated by the legislature in enacting the exemption, means "business." Consequently, the appellant contends no use taxes may be levied against the billboard advertising "business," which includes the items in question. We disagree.

Arkansas Code Ann. § 26-53-106(a) (Supp. 1993) provides:

> There is levied and there shall be collected from every person in this state a tax or excise for the privilege of storing, using, distributing, or consuming within this state any article of tangible personal property purchased for storage, use, distribution, or consumption in this state at the rate of three percent (3%) of the sales price of the property.

Arkansas Code Ann. § 26-53-112 (1987) provides in part:

> There is specifically exempted from the taxes levied in this subchapter: . . .
>
> (2) Sales of tangible personal property on which the tax under the Arkansas Gross Receipts Act, § 26-52-101 et seq., is levied, and *any tangible personal property specifically exempted from taxation by the Arkansas Gross Receipts Act*, § 26-52-101 et seq., and legislation enacted thereto. (Emphasis added.)

As authority for its claimed exemption from the use tax, the appellant relies upon the reference in § 26-53-112 to tangible personal property exempted by the Gross Receipts Act. Arkansas Code Ann. § 26-52-301 (Supp. 1993), gross receipts tax, provides in part:

> There is levied an excise tax of three percent (3%) upon

> the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> (1) Tangible personal property; . . .

Arkansas Code Ann. § 26-52-103(4) (Repl. 1992) provides:

> "Gross receipts" or "gross proceeds" means the total amount of consideration for the sale of tangible personal property and such services as are herein specifically provided for, whether the consideration is in money or otherwise, without any deduction on account of the cost of the properties sold, labor service performed, interest paid, losses, or any expenses whatsoever. . . .

However, Ark. Code Ann. § 26-52-401 (Supp. 1993) provides in part:

> There is specifically exempted from the tax imposed by this act the following: . . .
>
> (13) Gross proceeds derived from sales of advertising space in newspapers and publications and *billboard advertising services*; (Emphasis added.)

In essence, the appellant submits the items in question are "tangible personal property specifically exempted from taxation by the Arkansas Gross Receipts Act" and, consequently, are exempt from the use tax. We hold, however, that the items in question do not fall within the "billboard advertising services" exemption of the Gross Receipts Act. The gross proceeds exemption provided for sales of advertising services does not contemplate that all tangible personal property may be purchased tax free by a billboard advertising business. The exemption from the gross receipts tax simply provides that the "*gross proceeds derived from sales*" shall not be taxed. Further, the exception from the use tax found in § 26-53-112 exempts only tangible personal property specifically exempted by the Arkansas Gross Receipts Act. The items to be exempted are specifically described and identified in this act.

[redacted] The purchase and use of the items in question and other tangible personal property used in the operation of the business are not exempt from taxation. The appellant submits the legislature intended to exempt the "business of billboard adver-

tising" from the sales tax. Even assuming such an interpretation, the exemption is for the "gross proceeds derived from sales." There is no exemption for tangible personal property simply because it is used in the conduct of the business. *See* § 26-53-112.

According to the appellant's interpretation, any items involved to the "business" of billboard advertising would be exempt from the gross receipts tax and use tax. The appellant's interpretation requires the Court to conclude the appellant is exempt from the use tax on the items purchased out of state because it would be exempt from the sales tax if the items were purchased in Arkansas. Yet, it is significant that the appellant does not contest the payment of sales tax on items such as rope purchased in Arkansas for use in its "billboard advertising service."

The statutory language, as opposed to the agency interpretation, is controlling when a tax statute is to be interpreted by the Court. *Leathers* v. *Active Realty, Inc.*, 317 Ark. 214, 876 S.W.2d 583 (1994). Nevertheless, our interpretation is supported by the agency's interpretation of the statute. Arkansas Gross Receipts Tax Regulation GR-48(A)(4) provides:

> The term "billboard advertising services" means any and all services rendered in connection with the rental or lease of advertising space on an erection which is affixed to the land for the purpose of posting advertising messages.

Further, regulation GR-48(D) provides:

> The gross receipts or gross proceeds derived from the *sale of billboard advertising services* are exempt from tax. (Emphasis added.)

The interpretation of statutes by an administrative agency, while not conclusive, is highly persuasive. *In Re Sugarloaf Mining Co.*, 310 Ark. 772, 840 S.W.2d 172 (1992).

In the alternative, the appellant submits it was acting as an agent for its customers in purchasing the poster paper. The appellant contends the agency relationship is a "service" rendered in connection with the service of billboard advertising. As indicated, we hold the tax was not assessed on the "service" of

supplying the poster paper, rather it was assessed against the appellant's use or distribution of the poster paper. The appellant paid for and received the poster paper; such a purchase constitutes a use under the gross receipts act.

II. Sale For Resale

For its second point, the appellant asserts the items are exempt as sales for resale. Arkansas Code Ann. § 26-52-401 provides in part:

> There is specifically exempted from the tax imposed by this act the following:
>
> (12)(A) Gross receipts or gross proceeds derived from sales for resale to persons regularly engaged in the business of reselling the articles purchased, whether within or without the state if the sales within the state are made to persons to whom sales tax permits have been issued as provided in § 26-52-202.
>
> (B) Goods, wares, merchandise, and property sold for use in manufacturing, compounding, processing, assembling, or preparing for sale can be classified as having been sold for the purposes of resale or the subject matter of resale only in the event the goods, ware, merchandise, or property becomes a recognizable integral part of the manufactured, compounded, processed, assembled, or prepared products. . . .

The trial court found the appellant did not possess an Arkansas retail sales and use permit, and, therefore, the purchases were not exempt as a sale for resale.

On appeal, the appellant submits it was not required to hold a permit because it is exempted from the sales tax by Ark. Code Ann. § 26-52-401(13). Because we hold the items in question are not exempt under § 26-52-401(13), in order to claim the sale for resale exemption, the appellant is required to hold a retail sales permit.

III. Equal Protection

As its final point on appeal, the appellant submits the Fourteenth Amendment of the United States Constitution prohibits

the states from making or enforcing laws that deny any person equal protection of the laws. The appellant contends that the same statute which exempts billboard advertising services also exempts the gross receipts or gross proceeds derived from the sale of newspapers. Ark. Code Ann. § 26-52-401(4) and (13). The appellant submits the unequal enforcement of the two exemptions is unconstitutional. As support, the appellant cites the testimony of Wade Martin, general manager of the *Jonesboro Sun*, who stated the *Jonesboro Sun* does not pay a use tax on the ink or the paper used to produce the newspaper.

Although Mr. Martin testified at the trial, there is nothing in the record which indicates this argument was presented to the trial court. We will not decide an argument raised for the first time on appeal. *Silvey Cos.* v. *Riley*, 318 Ark. 788, 888 S.W.2d 636 (1994); *Jarboe* v. *Shelter Insurance Company*, 317 Ark. 395, 877 S.W.2d 930 (1994). Further, there is no indication in the record that the trial court ruled on the appellant's argument. Failure to obtain a ruling, even with respect to a constitutional question, precludes the issue on appeal. *Bonds* v. *State*, 310 Ark. 541, 837 S.W.2d 881 (1992); *See also Smith* v. *Leonard*, 317 Ark. 182, 876 S.W.2d 266 (1994).

In sum, we hold the appellant is not entitled to an exemption from the use tax, § 26-53-106, on the items in question.

Affirmed.

DUDLEY, J., not participating.

William Frances BOWEN *v.* STATE of Arkansas

CR 93-1003 895 S.W.2d 941(1)

Supreme Court of Arkansas
Opinion delivered April 10, 1995

No response.

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

PER CURIAM. The state, by and through Deputy Attorney General Clint Miller, seeks permission to file a belated brief in this capital murder case after having received five prior extensions. The state's brief was first due on June 19, 1994, but that time was extended to August 5, 1994, September 4, 1994, September 30, 1994, October 28, 1994, and December 2, 1994. We designated the December 2, 1994 extension to be a final one. However, the state's brief was not filed on December 2, 1994, nor was a timely motion filed requesting another extension or explaining why a brief had not been filed. Instead, on March 16, 1995, the state filed its motion for belated brief asking it have until April 14, 1995. In its motion, the state sets forth reasons such as the voluminous record, large number of points raised and other appellate business as being causes for its untimely motion. State's counsel, on the other hand, accepts full responsibility and faults no one else for his failure to complete the state's brief.

We grant the state's motion, however, a copy of this

per curiam will be forwarded to the Committee on Professional Conduct.

DUDLEY, J., not participating.

Joseph O'NEAL *v.* STATE of Arkansas

CR 95-148 896 S.W.2d 592(2)

Supreme Court of Arkansas
Opinion delivered April 10, 1995

Joseph P. Mazzanti III, for appellant.

No response.

PER CURIAM. Appellant, Joseph O'Neal, by his attorney, has filed for a rule on the clerk.

His attorney, Joseph P. Mazzanti, III, accepts full responsibility for failing to file the record on time.

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.

DUDLEY, J., not participating.

McGEHEE *v.* STATE of Arkansas

CR 95-368 896 S.W.2d 593

Supreme Court of Arkansas
Opinion delivered April 24, 1995

William M. Howard, Jr., for appellant.

No response.

PER CURIAM. Charles Allen McGehee, by his attorney, William M. Howard, Jr., has filed a motion for a rule on the clerk. His attorney admits by motion 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 In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). The motion is, therefore, granted.

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

Dinzel NORMAN *v.* STATE of Arkansas

CR 95-361 896 S.W.2d 874

Supreme Court of Arkansas
Opinion delivered April 24, 1995

George J. Stone, for appellant.

No response.

PER CURIAM. Appellant was convicted on September 6, 1994, of conspiracy to manufacture a controlled substance, methamphetamine, and manufacturing a controlled substance, marijuana. His notice of appeal was filed on September 27, 1994. On December 13, 1994, the Circuit Court of Newton County extended the time for filing the record until March 27, 1995. The record was tendered to the clerk's office after the extended time for filing had lapsed.

The appellant has filed a motion for rule on the clerk to compel the clerk's office to accept the record. In his motion, appellant states the reason the record was tendered late is that the Newton County Clerk's Office failed to turn the transcripts over to appellant's attorney or to file them themselves.

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 the Newton County Circuit Clerk's Office failed to turn the transcripts over to him or to file it themselves. 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, appellant'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.

Michael Thomas HAMILTON *v.* STATE of Arkansas

CR 94-603 896 S.W.2d 877

Supreme Court of Arkansas
Opinion delivered May 1, 1995

[redacted]

William R. Simpson, Jr., Public Defender, *Mac Carder, Jr.*, Deputy Public Defender, by: *C. Joseph Cordi, Jr.*, Deputy Public Defender, for appellant.

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

JACK HOLT, JR., Chief Justice. Appellant Michael Thomas Hamilton, a juvenile, was charged with first-degree murder in circuit court, convicted of manslaughter, and sentenced to a ten-year term of imprisonment. This case was transferred to us from the court of appeals under Ark. Sup. Ct. R. 1-2(a)(3). Hamilton argues on appeal that the circuit court erred in allowing hearsay testimony at a hearing on his motion to transfer his case to juvenile court. Inasmuch as the circuit court's findings were not premised on hearsay testimony, but, rather, upon the information filed against Hamilton, we affirm.

Facts

The appellant, Michael Thomas Hamilton, was charged by felony information on December 7, 1992, with first-degree murder in connection with the shooting death of eleven-year-old Shadrick Flemons at his home at 8 Winnie Cove in Jacksonville. Hamilton, who was fourteen on the date of the alleged offense, November 4, 1992, was charged as an adult in circuit court. On February 5, 1993, Hamilton filed a motion to transfer his case to juvenile court.

A hearing was held on the motion in circuit court on February 19, 1993, at which Detective Steven Ingram of the Jacksonville Police Department testified that he arrived at the scene of the shooting and interviewed three witnesses — Jeremy Wells, David Back and Matthew Duggie. Over Hamilton's hearsay objection, Detective Ingram testified that the three young witnesses told him that they were playing "war games" amongst some trees in the front yard of 8 Winnie Cove when they observed Hamilton and the victim, who had a toy gun, arguing. According to Detective Ingram, two of the three boys told him that they watched Hamilton go into the house and retrieve a rifle off a gun rack. It was Detective Ingram's testimony that one of the witnesses told

him that Hamilton cocked the rifle back "like maybe he was loading it," picked up a small box, put it down, then went outside to the front door and pointed the weapon at the victim. Apart from his testimony giving rise to the hearsay objection, Detective Ingram testified without objection that the eleven-year-old victim "had been shot in the head almost between the eyes." Detective Ingram further testified, also without objection, that the preliminary autopsy report indicated that the shot which killed the victim was fired from close range. The circuit court also heard testimony from Hamilton and Reverend Marvin Thomas in support of Hamilton's motion to transfer before denying the motion "based upon the level of violence that is alleged here."

Hamilton's case was tried in circuit court before a jury on October 13, 1993. The jury returned a guilty verdict for manslaughter, and the circuit court sentenced Hamilton to a ten-year term of imprisonment. In claiming as his sole point of error that "the circuit court erred by allowing the state to introduce hearsay testimony during the hearing on the appellant's motion to transfer to juvenile court," Hamilton, in reality, asserts that the trial court, in refusing to transfer his case to juvenile court, erroneously predicated its findings to retain jurisdiction on hearsay evidence.

Appealable order

The State asserts that this appeal should be dismissed as untimely since Hamilton failed to appeal the circuit court's February 19, 1993, ruling denying transfer of his case to juvenile court. In making this assertion, the State asks us to adopt the rationale of *State* v. *Harwood*, 98 Idaho 793, 572 P.2d 1228 (1977), in which the Idaho Supreme Court held that a juvenile cannot challenge a trial court's denial of a motion to transfer on direct appeal. We agree with the State's argument, and find persuasive the following language in *Harwood:*

> To allow a defendant who has been convicted in the superior court to question on appeal the propriety of the juvenile court's finding would afford him an opportunity to secure a reversal of a judgment of conviction even though he was found guilty after an errorless trial. Such a defendant should not be allowed to silently speculate on a favorable verdict and then after an adverse judgment is entered

> proclaim that the juvenile court's finding was erroneous. Moreover, it is in the accused's best interest to seek immediate relief from an improper finding in the juvenile court so he may be spared the burden and public scrutiny associated with a criminal trial. Additionally, the delay inherent in criminal prosecutions may substantially prejudice a juvenile court reconsideration of its prior finding of unfitness should the cause be remanded after a review of criminal proceedings.

572 P.2d at 1229, *quoting People* v. *Chi Ko Wong*, 18 Cal.3d 698, 135 Cal. Rptr. 392, 557 P.2d 976 (1976).

In short, we adopt the reasoning of *Harwood* by holding that a juvenile cannot challenge transfer orders on direct appeal from a judgment or conviction of the circuit court. In doing so, we must determine whether, pursuant to the status of our current law, our holding should be prospective.

Prior to 1989, it was commonplace for the challenge of transfer orders from juvenile court to circuit court or from circuit court to juvenile court to be raised on appeal. This practice continued until the General Assembly passed Act 273 of 1989, which repealed the Juvenile Code of 1975. This enactment, codified as Ark. Code Ann. § 9-27-318(h) (Repl. 1993) provides in pertinent part that:

> Any party may appeal from an order granting or denying the transfer of a case from one court to another court having jurisdiction over the matter.

Since the passage of Act 273, we have considered a number of cases involving transfer by way of interlocutory appeal. *See Davis* v. *State*, 319 Ark. 613, 893 S.W.2d 678 (1995); *Sebastian* v. *State*, 318 Ark. 494, 885 S.W.2d 882 (1994); *Beck* v. *State*, 317 Ark. 154, 876 S.W.2d 561 (1994); *Walter* v. *State*, 317 Ark. 274, 878 S.W.2d 374 (1994); *Bell* v. *State*, 317 Ark. 289, 877 S.W.2d 579 (1994); *Johnson* v. *State*, 317 Ark. 521, 878 S.W.2d 758 (1994); *Whitehead* v. *State*, 316 Ark. 563, 873 S.W.2d 800 (1994); *Oliver* v. *State*, 312 Ark. 466, 851 S.W.2d 415 (1993); *Holland* v. *State*, 311 Ark. 494, 844 S.W.2d 943 (1993); *Wicker* v. *State*, 310 Ark. 580, 839 S.W.2d 186 (1992); *Walker* v. *State*, 304 Ark. 393, 803 S.W.2d 502, *supplemental opinion on denial of rehearing*, 304

Ark. 402-A, 805 S.W.2d 80 (1991); *Slay* v. *State*, 309 Ark. 507, 832 S.W.2d 217 (1992); *Cobbins* v. *State*, 306 Ark. 447, 816 S.W.2d 161 (1991); *Bradley* v. *State*, 306 Ark. 621, 816 S.W.2d 605 (1991). However, we have also described appeals from denials of transfer motions as "although . . . interlocutory in nature, they are appealable by statute." *Webb* v. *State*, 318 Ark. 581, 886 S.W.2d 618 (1994), *citing State* v. *Hatton*, 315 Ark. 583, 868 S.W.2d 492 (1994). While we have not specifically held that denials of transfer motions are appealable after a judgment of conviction, we have addressed this issue in at least two cases on direct appeal following a conviction in circuit court. *See Tucker* v. *State*, 313 Ark. 624, 855 S.W.2d 948 (1993); *Johnson* v. *State*, 307 Ark. 525, 823 S.W.2d 440 (1992). *See also Porter* v. *State*, 43 Ark. App. 110, 861 S.W.2d 122 (1993).

[redacted] In reviewing our cases and legislation dealing with the issue of denials of transfer, it is obvious that, prior to the passage of Act 273 of 1989, codified at Ark. Code Ann. § 9-27-318(h), direct appeals were the preferred method of review; permissive interlocutory appeals were made practicable only by the passage of this act. Our cases since that date have seemed to go both ways, thus it would be unconscionable at this time to deny or foreclose Hamilton's right to appeal. For this reason, we adopt a prospective rule regarding the appeal of transfer orders pursuant to Ark. Code Ann. § 9-27-318(h), and hold that for criminal prosecutions commenced after the finality of this opinion, an appeal from an order granting or denying transfer of a case from one court to another having jurisdiction over juvenile matters must be considered by way of interlocutory appeal, and an appeal from such an order after a judgment of conviction in circuit court is untimely and will not be considered.

Denial of transfer

[redacted] In examining the denial of Hamilton's motion to transfer, the standard of review in such juvenile-transfer cases is whether the circuit court's denial of the motion was clearly erroneous. *Davis* v. *State, supra; Bell* v. *State, supra; Beck* v. *State, supra; Vickers* v. *State*, 307 Ark. 298, 819 S.W.2d 13 (1991). However, we do not reach the merits of Hamilton's hearsay argument, as there is no indication that the trial court's findings were based on anything other than the information filed with the trial

court. The circuit court denied the motion to transfer, obviously referring to the criminal information. We have said that the serious and violent nature of an offense is a sufficient basis for denying a motion to transfer and trying a juvenile as an adult, and that a criminal information, on its own, is sufficient to establish that the offense charged is of a serious and violent nature. *Id.; See also Walker* v. *State, supra.* Here, the information alleged that Hamilton committed first-degree murder by "unlawfully, feloniously, and with the purpose of causing the death of another person, did cause the death of Shadrick Flemons." In short, the charge by way of the criminal information alone was clear and convincing evidence which supported the circuit court's denial of the motion to transfer; accordingly, we cannot say that its ruling was clearly erroneous.

Affirmed.

NEWBERN and ROAF, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. Justice Roaf's dissenting opinion expresses my views on this case, and I join in that opinion. I wish to add only that the majority has now given us a prime example of the error we made in *Walker* v. *State*, 304 Ark. 393, 803 S.W.2d 502 (1991). There we placed the burden of proof on the juvenile rather than the State with respect to whether the juvenile should be tried as an adult. That has allowed us to permit the trial courts, time and again, to sanction adult trials for children solely on the basis of a charge of a violent crime.

No doubt some people below the age of 18 are tough, hardened, and incorrigible. In my view, the transfer provisions should be interpreted so that such persons wind up being treated as adults. The State, however, in a case such as this one, should be required to show more than that a youngster who was aged 14 has been charged with committing one act of violence.

I respectfully dissent.

ROAF, J., joins in this dissent.

ANDREE LAYTON ROAF, Justice, dissenting. I cannot argue with the rationale employed by the majority in holding that henceforth, juvenile transfer orders may not be appealed after a judgment of conviction in circuit court. However, the state will not

be appealing from circuit court convictions after a transfer or refusal to transfer, as the case may be; this holding will only affect juveniles, and I must dissent.

Of course a juvenile can be "found guilty after an errorless trial," even when he should not have been tried in circuit court in the first place. The question for me is how he got to circuit court, not what happened afterward. In light of this court's previous holdings in *Ring* v. *State*, 320 Ark. 128, 894 S.W.2d 944 (1995), and *Boyd* v. *State*, 313 Ark. 171, 853 S.W.2d 263 (1993), it seems to be open season on juveniles, at least in the context of juvenile transfer hearings. Indeed, the state in the instant case now seriously argues that the rules of evidence should not apply in such hearings. The majority wisely does not reach this issue in this sad case involving young playmates playing without adult supervision and with access to unsecured guns and ammunition. Undoubtedly, it is an issue that we will confront again.

I respectfully dissent.

NEWBERN, J., joins the dissent.

Robert Neal HELTON, Jr. *v.* STATE of Arkansas

CR 94-1363 896 S.W.2d 887

Supreme Court of Arkansas
Opinion delivered May 1, 1995

Joe Kelly Hardin, for appellant.

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

JACK HOLT, JR., Chief Justice. In this appeal from his conviction for rape, the appellant, Robert Neal Helton, Jr., raises two points for reversal. He contends that the trial court erred in (1) not granting a directed verdict because the State failed to produce sufficient evidence that would support a rape conviction; and (2) allowing the State, over the defense's objection, to have rebuttal during the sentencing phase of the trial. Neither point has any merit whatsoever, and we affirm the judgment of the trial court.

Facts

The record reveals that, on March 30, 1994, at about 1:00 a.m., appellant Robert Neal Helton, Jr., went to a neighboring house trailer where the victim was living and asked her to drive him in his Ford Bronco to a used car lot, saying that he was intoxicated and didn't want to be stopped by the police. After driving some distance, Helton directed the victim to turn down a dirt road.

When the vehicle stopped, Helton got out and urinated. Then he walked around to the driver's side, opened the door, seized the victim by the neck, and pressed something that she believed to be a knife to her side. The victim screamed, and Helton said, "Shut up. I'll kill you if you scream again."

Helton then ordered the victim to pull her pants down and to take her panties off. When she complied, he grabbed her hands and performed oral sex on her, warning her afterward that "You're not going to tell anybody about this. I'll kill you if you say anything about this." Next, Helton ordered the victim into the back seat of the vehicle, where he engaged in sexual intercourse with her and repeated his threat to kill her if she told anyone about the rape.

Subsequently, Helton and the victim returned to the trailer park, and the victim gave an account of the rape to the couple with whom she lived. Later in the day, she informed her boyfriend, who took her to the University of Arkansas for Medical Sciences in Little Rock for an examination. The crime was also reported to the Saline County Sheriff's Office, which began an investigation. Helton was charged by information on April 11, 1994, with the Class Y felony of rape, pursuant to Ark. Code Ann. § 5-14-103 (Repl. 1993), and with being an habitual offender.

A jury trial was conducted in the Saline County Circuit Court on September 2, 1994. Testifying on behalf of Helton, his fiancee, Deborah Melson, stated that the accused had spent the entire night in question sleeping in her room in the house she shared with her parents, her children, and her brother. Ms. Melson's mother, Mary Melson, also testified that Helton spent the night of the crime at her house. A guilty verdict was returned, and a life sentence was imposed. From that judgment, this appeal arises.

I. Directed verdict

Helton argues in his first point for reversal that the trial court erred in denying his motion for a directed verdict because the evidence was insufficient to support a rape conviction. Neither motion, however, was made with the requisite degree of specificity to preserve this issue for appeal.

At the close of the State's case, defense counsel made the following motion:

> MR. HARDIN: Make a motion at this time for a directed verdict on the charge of rape in that there's not been significant evidence which would lead to a conclusion by the jury that he's guilty of rape.

The court denied the motion. Subsequently, at the close of all the evidence, the defense made the following statement:

> MR. HARDIN: The defense renews its motion for a directed verdict on the grounds previously stated.

The court denied the attempted renewal.

In *Walker* v. *State*, 318 Ark. 107, 109, 883 S.W.2d 831, 832 (1994), this court declared that

> We draw a bright line and hold that a motion for a directed verdict in a criminal case must state the specific ground of the motion. Rule 36.21 of the Arkansas Rules of Criminal Procedure is to be read in alignment with Rule 50 of the Arkansas Rules of Civil Procedure. If a motion for directed verdict is general and does not specify a basis for the motion, it will be insufficient to preserve a specific argument for appellate review.

The holding was reiterated in *Daffron* v. *State*, 318 Ark. 182, 885 S.W.2d 3 (1994), a rape case, where we held that a motion for acquittal "based on the insufficiency of the evidence on the State's case" and a later renewal of "previous motions" constituted a waiver of the right to challenge the sufficiency of the evidence. The moving party must apprise the trial court of the specific basis on which a motion for a directed verdict is made. *Id.*

Because Helton failed to provide a specific basis for his directed verdict motion, the trial court did not err in denying it. The sufficiency issue having been waived, we need not consider it on the merits. *Andrews* v. *State*, 305 Ark. 262, 807 S.W.2d 917 (1991).

II. Rebuttal in sentencing phase

For his second point for reversal, Helton contends that the trial court erred in permitting the State to have rebuttal in the sentencing phase. While the jury was deliberating the question of guilt, the following exchange occurred between defense counsel and the trial court:

> MR. HARDIN: If there is a second stage, the defendant will object to the prosecution getting the advantage of a rebuttal argument in the second stage since there is not a burden of proof of beyond a reasonable doubt connected with that stage. It is just a matter of sentencing for the jury and the jury finding, based on the aggravating and mitigating circumstances presented by both sides. Therefore the defense will object to the prosecution getting the added closing advantage.
>
> THE COURT: And the court denies that motion, finding there is always a burden of proof on the moving party. In this case, the State, insofar as the evidence it presents,

is the moving party and does have the burden of convincing the jury of the truth of those allegations at least by a preponderance of the evidence, and the State will therefore have an opening and a rebuttal in its closing argument.

During the sentencing phase, the State elected not to present a rebuttal argument. Consequently, Helton suffered no prejudice and therefore has no basis for reversal with respect to this point. The issue is moot.

III. Rule 4-3(h)

As this was a case in which the appellant was sentenced to life imprisonment, the record has been thoroughly examined. There are no points preserved for appeal that appear to constitute prejudicial error.

Affirmed.

STATE of Arkansas *v.* CRITTENDEN COUNTY, et al.

94-930, 94-931 896 S.W.2d 881

Supreme Court of Arkansas
Opinion delivered May 1, 1995

[redacted]

Winston Bryant, Att'y Gen., by: *Patricia Van Ausdall*, Asst. Att'y Gen., for appellant.

Hale, Fogleman & Rogers, by: *Joe M. Rogers*, for appellee.

JACK HOLT, JR., Chief Justice. We have before us a consolidated appeal and cross-appeal which deals with the assignment of responsibility for payment of attorney's fees, investigative, witness, and other expenses incurred during the course of certain criminal trials in the Second Judicial District of the State of Arkansas. A single point is raised on direct appeal: whether the trial court erred in interpreting the Arkansas Public Defender Commission Act (Act 1193 of 1993, Acts of Arkansas) to require the State of Arkansas, rather than Crittenden County, to be responsible for payment of attorney's fees to appointed counsel for services rendered after July 1, 1993. On cross-appeal, issues have been raised concerning the sufficiency of the attorney's fees; the reimbursement of out-of-pocket expenses; and the responsibility of the county, as opposed to the state, for payment of trial-related expenses.

The State of Arkansas, appellant and a cross-appellee, contends that the Act should be interpreted in a manner consistent with the interpretations given to similar legislative acts in other jurisdictions and that public policy requires that the Act be applied as of its effective date of July 1, 1993, the effect of which is to require the county to assume payment for attorney's fees to

appointed counsel. We hold otherwise. Under the circumstances of this case, the circuit court did not err in finding the State of Arkansas responsible for payment of attorneys' fees after July 1, 1993.

Appellee and cross-appellant Crittenden County argues one issue in its cross-appeal: whether the trial court erred in requiring the county to pay expenses incurred on behalf of the indigent criminal defendants. We agree with Crittenden County that the trial court erred in this regard and accordingly order the trial court to enter a judgment consistent with our holding. The state is responsible for the payment of all related expenses.

Attorneys Daniel T. Stidham, Gregory L. Crow, Val P. Price, Scott Davidson, Paul N. Ford, and George R. Wadley, Jr., also filed a three-point cross-appeal, contending that the trial court erred in (1) establishing the amount of attorneys' fees for Messrs. Stidham and Crow and for Messrs. Price and Davidson, as the amounts were inadequate under this court's previous holdings; (2) establishing the amount of out-of-pocket costs due Messrs. Stidham and Crow; and (3) establishing the amounts of compensation for Messrs. Stidham and Crow's experts and for Messrs. Stidham and Crow's and Messrs. Price and Davidson's investigator, as the amounts were unreasonably low. There being no merit in the attorneys' argument, we hold that the trial court did not err under these circumstances.

Facts

Damien Echols, Charles Jason Baldwin, and Jessie Lloyd Misskelley, Jr., were charged with capital murder in the Crittenden County Circuit Court. Each defendant was found to be indigent, and two attorneys were appointed in June 1993 to serve jointly as trial counsel for each defendant. Because of a conflict, the Crittenden County public defender did not represent any of the defendants. Instead, trial counsel were called from private practice: Val Price and Scott Davidson were appointed to represent Echols; Paul Ford and George Wadley were appointed to represent Baldwin; and Daniel Stidham and Gregory Crow were appointed to represent Misskelley.

Meanwhile, on April 19, 1993, the General Assembly enacted Act 1193 of 1993, the Arkansas Public Defender Commission

Act, codified at Ark. Code Ann. §§ 16-87-201 — 16-87-214 (Supp. 1993). The act became effective on July 1, 1993. Up to that point, the State of Arkansas, pursuant to this court's holdings in *State* v. *Independence County*, 312 Ark. 472, 850 S.W.2d 842 (1993), and *State* v. *Post*, 311 Ark. 510, 845 S.W.2d 478 (1993), was held responsible for indigent defense fees. Under the new act, however, the responsibility for the payment of indigent defense fees was shifted to the counties.

On September 27, 1993, the Crittenden County Circuit Court held a hearing regarding the issue of whether, in the light of the new act, the State of Arkansas or Crittenden County should be responsible for attorneys' fees and costs in the cases. After the hearing, the court, requesting that briefs be submitted on the issue, took the matter under advisement.

Granting motions for change of venue, the Crittenden County Circuit Court ordered the Echols and Baldwin cases transferred to Craighead County and the Misskelley case, which had been severed, transferred to Clay County. Echols and Baldwin were tried together. The Honorable David Burnett, Circuit Judge, presided over the trials of all three defendants.

After the separate criminal trials were concluded, the trial court held a consolidated hearing on April 22, 1994, on the issue of attorneys' fees, expenses, and expert-witness fees. The circuit court found that the state was responsible for all attorneys' fees and that Crittenden County was responsible for all expenses in connection with the trials.

The following attorneys' fees were awarded, to be paid by the state: $30,500 to Val Price; $25,000 to Scott Davidson; $26,000 to Paul Ford; $20,000 to George Wadley; and a joint fee of $40,000 to Daniel Stidham and Gregory Crow. The court awarded the following reimbursements to be paid by Crittenden County for expenses incurred: $3,500 to Mr. Price; $5,500 to Messrs. Ford and Wadley; and $3,500 to Messrs. Stidham and Crow.

Fees were also provided, at county expense, for the various experts who assisted the defense teams: in the Echols case, $7,000 to Ron Lax of Inquisitor, Inc.; in the Baldwin case, $5,100 to Jim Rasicott of AB Communications, Inc., and $3,453.10 to Charles Lynch; and in the Misskelley case, $1,216 to Warren

Holmes of Holmes Polygraph Services, Inc., $1,500 to Dr. Richard Ofshe, $750 to Dr. William Wilkins, $2,005.81 to Dr. Robert Berry of RMB Associates, and no fee for Ron Lax of Inquisitor, Inc.

The state has filed two separate appeals, from Craighead and Clay Counties, and the three defense teams have filed separate cross appeals. Cases No. 94-930 and No. 94-931 have been consolidated for purposes of this appeal.

I. Direct appeal (State) — Attorneys' fees

The central question at the heart of this appeal is whether the State of Arkansas or Crittenden County was responsible for the payment of attorneys' fees in the present matter after June 30, 1993. A survey of the relevant cases leads us to the conclusion that the state must bear the financial burden in this instance.

As mentioned earlier, Act 1193 of 1993 became effective through its emergency clause on July 1, 1993. In the period immediately prior to enactment of this section, this court held that the state was responsible for payment of defense counsel's fees and expenses. *State* v. *Independence County, supra; State* v. *Post, supra.*

Act 1193 was a legislative response to a line of cases involving the payment of fees for appointed counsel. In *Arnold* v. *Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991), this court held that the statutory "fee caps" set forth in Ark. Code Ann. § 16-92-108(b) (1987) (repealed by Act 1193 of 1993) unconstitutional in their denial to appointed counsel of just compensation and equal protection of the laws. Subsequently, in *State* v. *Post, supra*, a plurality opinion, we declared the remainder of the statute unconstitutional and held that, because no statute delegated the duty of payment of indigents' attorneys' fees to the counties, the state bore responsibility. That holding was reiterated in *State* v. *Independence County, supra.* Within a few months, the General Assembly approved Act 1193, assigning counties the responsibility to pay, except for the costs of the Capital, Conflicts, and Appellate Office, which are to be borne by the state.

Section 8 of Act 1193 of 1993, codified at Ark. Code Ann. § 16-87-210(a) (Supp. 1993), provides that:

> When private attorneys or trial public defenders from another area are appointed to represent an indigent person, the attorneys or trial public defenders shall be paid by the county wherein the crime was committed.

The state concedes its responsibility for paying attorneys' fees through June 30, 1993, but insists that, as of July 1, 1993, the effective date of Act 1193, the payment of fees for services rendered by counsel for the indigent defendants in this matter became the duty of Crittenden County.

The circuit court, in its hearings in this regard and in its orders of May 10, 1994, and June 20, 1994, noted that the General Assembly, by enacting Act 1193, intended to provide assistance to the counties in capital murder cases through the creation of the Capital, Conflicts, and Appellate Office, which, however, "was not operational or functioning sufficiently" at the time private attorneys were appointed to represent Echols, Baldwin, and Misskelley. Because neither this service nor local public defenders were available due to circumstances, it was necessary to employ private attorneys, who, as the trial court stated, "received no assistance from said agencies" (*i.e.*, the Capital, Conflicts and Appellate Office).

The Capital, Conflicts, and Appellate Office, created by Section 7 of Act 1193 of 1993, Ark. Code Ann. § 16-87-205 (Supp. 1993), is to be appointed by the trial court "[i]n capital murder cases in which the death penalty is sought, if a conflict of interest is determined by the court to exist between the trial public defender's office and the indigent person, or if for any other reason the court determines that the trial public defender cannot or should not represent the indigent person." Ark. Code Ann. § 16-87-205(c)(1)(A) (Supp. 1993). Provision is also made for the appointment, "as a last resort," of "private attorneys whose names appear on the list of attorneys maintained by the commission." Ark. Code Ann. § 16-87-205(c)(1)(D) (Supp. 1993). Appointed private attorneys, under Section 6 of Act 1193, are to be paid "reasonable fees and compensation for expenses by the county where the crime was committed." Ark. Code Ann. § 16-87-209(f) (Supp. 1993).

The clear intent in the General Assembly's creation of the Capital, Conflicts, and Appellate Office was to allocate to the

state, if at all possible, the burdensome costs of defending capital murder cases. Implicit in the circuit court's orders in this case was a recognition that the primary thrust of the legislation would be thwarted by placing the duty of payment after June 30, 1993, on Crittenden County because the Capital, Conflicts, and Appellate Office was not operational at the time the private attorneys were appointed.

We agree with the circuit court's findings but are of the opinion that this issue may be resolved on a more fundamental level. The provisions of Ark. Code Ann. § 16-87-210(a) apply to instances "*When* private attorneys . . . are appointed. . . ." Act 1193 became effective on July 1, 1993. As the appointments in this case were made before the effective date of the law, they are not governed by it.

II. Cross-appeal (County) — Expenses

In its cross-appeal, Crittenden County argues that the circuit court erred when it held the county liable for payment of the defense costs, which amounted to $24,553.10 in the Echols and Baldwin case and $8,971.81 in the Misskelley case. The county points to this court's decision in *State* v. *Post, supra*, which held the state "responsible for payment of [the attorney's] fees and expenses." 311 Ark. at 521, 845 S.W.2d at 492. Similarly, in *State* v. *Campbell, supra*, this court placed the duty of paying both fees and expenses on the state.

The state, in its brief, does not respond to Crittenden County's citation of authorities supporting the contention that the state stands responsible for related expenses as stated in *Post, supra*, and *Campbell, supra.* During the period since these decisions were handed down, the legislature has created no statutory vehicle to provide for assessment of trial expenses against the county, and the state offers no compelling rationale for so inconsistent an application of the *Post* and *Campbell* holdings. Rather, the state, giving short shrift to the issue, claims that the same arguments concerning responsibility for attorney's fees apply to the assessment of expenses that were previously discussed in its brief and that there was no need to readdress or reargue the issue.

We disagree for the reasons stated in *Post* — that because there was no longer a statute with reference to the assess-

ment of fees, the state was responsible for the payment of both legal fees and expenses — and again in *Campbell*, where we declared that there was no statutory vehicle at the time for the assessment of fees and expenses against Newton County. Under the circumstances, the trial court erred in not ordering the expenses in question to be paid by the state.

Granted, as the dissent notes, Section 10 of Act 1193 of 1993, codified at Ark. Code Ann. § 16-87-212 (Supp. 1993), and effective July 1, 1993, provides that:

> (a)(1) The commission [Arkansas Public Defender Commission] is authorized to pay expenses regarding the defense of indigents, other than salaries, attorney's fees, and regular office expenses.
>
> (2) The expenses shall include, but shall not necessarily be limited to, fees for expert witnesses, testing and travel.
>
> (3)(A) Whenever, in a case involving an indigent person, a judge orders the payment of funds for the aforementioned expenses, the judge shall transmit a copy of the order to the commission, which is authorized in its discretion to pay the funds.
>
> (B) If the commission declines to pay the funds, the funds shall be paid by the county wherein the crime was committed, provided that the Arkansas Supreme Court may promulgate rules for the stay of such orders in the event that they are contested.

It is unclear from the record whether, at any point in the proceedings, the Arkansas Public Defender Commission (which, unlike the Capital, Conflicts, and Appellate Office, was operational as of July 1, 1993) was requested to pay the specified funds. Yet, as we have stated, we do not apply Act 1193 to the case at hand. When the attorneys were appointed, the *Post* and *Campbell* cases governed the payment of not only attorney's fees but also expenses, and the attorneys in the present case had a right to expect that they would receive compensation for their services and expenses from the state.

As the trial expenses constitute a separable element in the circuit court's judgment, and as a new trial on the issue may thus

be avoided, we direct that, upon remand to the trial court, an order be entered consistent with our holding and that a remittitur be entered in favor of Crittenden County against the State of Arkansas. *See Jacuzzi Brothers, Inc.* v. *Todd*, 316 Ark. 785, 875 S.W.2d 67 (1994).

III. Cross-appeal (Counsel) — Amount of fees and expenses

Cross-appellants Stidham, Crow, Price, and Davidson raise three points for reversal in their cross-appeal. Each concerns the setting by the circuit court of the amount of fees, costs, or compensation for counsel or witnesses. None has merit.

a. Adequacy of attorneys' fees

The attorneys first contend that the circuit court erred in establishing the amount of attorneys' fees because the amounts were inadequate under this court's previous holdings. They assert that they do not seek full compensation but instead seek adequate and reasonable compensation.

Under the standards promulgated in *Arnold* v. *Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991), the trial court should determine fees that are just, taking into consideration the experience and ability of the attorney, the time and labor required to perform the legal service properly, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar legal services, the time limitations imposed upon the client's defense or by the circumstances, and the likelihood, if apparent to the court, that the acceptance of the particular employment will preclude other employment by the lawyer.

In *Price* v. *State*, 313 Ark. 98-A, 856 S.W.2d 10 (1993), *supp. op. on denial of reh'g*, we held that there is no fixed formula for computing remuneration for attorneys and that the supreme court will defer to the superior perspective of the trial court to weigh and apply the factors set forth in *Arnold* v. *Kemp, supra*, based on an intimate familiarity with the proceedings and with the quality of services rendered. Further, we noted that the discretion of the trial court is not to be disturbed on appeal in the absence of abuse.

Here, the trial court had before it evidence of the hours devoted by counsel to the cases and the expenses incurred. Other

attorneys testified concerning their hourly rates for comparable work. The fees awarded in the present case were significantly lower than those cited by other attorneys. Messrs. Stidham and Crow received approximately $21.73 per hour; Mr. Price received approximately $33.06 per hour; and Mr. Davidson received approximately $31.02 per hour.

[redacted] The record does not reveal that the circuit court arrived at its conclusions regarding the amounts due for attorneys' fees in a cavalier manner. Opportunities were afforded counsel to make their case for higher fees. Moreover, the circuit court was not bound to accept the number of hours submitted by the attorneys. Given the circuit court's mindfulness of the limited resources available from either the state or Crittenden County, it cannot be said that there was an abuse of discretion in the court's decision.

b. Out-of-pocket expenses

The record indicates that Messrs. Stidham and Crow spent $4,049.11 of their own money in the defense of Misskelley. Of that amount, the circuit court reimbursed $3,500.

In *Arnold* v. *Kemp, supra*, as the cross-appellants note, this court quoted the following statement from State *ex rel. Stephan* v. *Smith*, 747 P.2d 816, 841 (Kan. 1987): "When the attorney is required to advance expense funds out-of-pocket for an indigent, without full reimbursement, the system violates the Fifth Amendment." 306 Ark. at 302, 813 S.W.2d at 774. The quotation appeared in the context of a discussion of property rights in attorneys' services subject to Fifth Amendment protection.

[redacted] Unlike the situation in *Arnold* v. *Kemp, supra*, here there was no systematic limitation on the amount of expenses recoverable by the attorneys. Indeed, *Arnold* v. *Kemp* entrusts to the sound judgment of the trial court the approval of "such reasonable expenses as are plainly necessary for the defendant to have her day in Court and to permit counsel to fairly and adequately present her case." 306 Ark. at 306, 813 S.W.2d at 777. In this instance, the trial court had before it accounts of services provided and expenses incurred by Messrs. Stidham and Crow. It was within the trial court's discretion to determine the reasonableness of the expenses set forth by the attorneys. The record

does not reveal a violation of the Fifth Amendment in the trial court's decision.

c. Compensation for experts

By the time of trial, Ark. Code Ann. § 16-92-109 (Supp. 1993) governed the payment of experts and investigative expenses. No guidelines are given by the statute, but *Arnold* v. *Kemp, supra,* as noted above, vests the decision concerning the award of reasonable expenses to the sound discretion of the trial court. Nothing in the record indicates that the circuit court exceeded the bounds of its discretion in setting compensation amounts for the expert witnesses.

Affirmed on direct appeal.

Reversed and remanded for further proceedings consistent with this opinion on cross-appeal of Crittenden County.

Affirmed on cross-appeals of attorneys Stidham, Crow, Price, Davidson, Ford, and Wadley.

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

ROBERT L. BROWN, Justice, concurring in part, dissenting in part. Act 1193 of 1993 which establishes the Trial Public Defender Offices was enacted April 19, 1993, with an effective date of July 1, 1993. Counsel for the three defendants in this case, all of whom were indigent, were appointed by the trial court the previous month in June 1993. Because the Capital, Conflicts, and Appellate Office created under Act 1193 had not been established at the time of the appointments and because the trial court found that that office rendered no assistance to counsel in the trials of these matters, I agree that the State should be responsible for the legal fees to private counsel. Act 1193 clearly contemplates the appointment of the Capital Office in the event of a conflict of interest in the public defender's office. *See* Ark. Code Ann. § 16-87-205 (Supp. 1993).

I see no reason, though, not to follow Act 1193 with regard to other defense costs and expenses incurred after July 1, 1993. Act 1193 provides:

> (a)(1) The commission [Arkansas Public Defender Commission] is authorized to pay expenses regarding the

defense of indigents, other than salaries, attorney's fees, and regular office expenses.

> (2) The expenses shall include, but shall not necessarily be limited to, fees for expert witnesses, testing, and travel.
>
> (3)(A) Whenever, in a case involving an indigent person, a judge orders the payment of funds for the aforementioned expenses, the judge shall transmit a copy of the order to the commission, which is authorized in its discretion to pay the funds.
>
> (B) If the commission declines to pay the funds, the funds shall be paid by the county wherein the crime was committed, provided that the Arkansas Supreme Court may promulgate rules for the stay of such orders in the event that they are contested.

Ark. Code Ann. § 16-87-212(a) (Supp. 1993).

It is unclear from the record whether the Commission was requested to pay the specified expenses. I would apply Act 1193 and remand the matter of the expenses and costs to the trial court so that the statutory procedure might be followed.

Alice MERTZ, et al. *v.* Gus PAPPAS, et al.

94-1119 896 S.W.2d 593

Supreme Court of Arkansas
Opinion delivered May 1, 1995

Hurst Law Office, by: *Q. Byrum Hurst, Jr.*, for appellants.

Winston Bryant, Att'y Gen., by: *Melissa K. Rust* and *William F. Knight*, Asst. Att'y Gen.s, for appellees.

ROBERT H. DUDLEY, Justice. Appellants filed this suit in circuit court and alleged that the City of Hot Springs levied and collected a five mill *ad valorem* tax in violation of Amendment 59 to the Constitution of Arkansas. The circuit judge on assignment held that tax did not constitute an illegal exaction. Appellants file a direct appeal on the merits, and appellees cross-appeal and argue the circuit court was without jurisdiction. We affirm on direct appeal, albeit for a different reason, and do not reach the cross-appeal.

The facts necessary to decide this case were before the trial court on the cross-motions for summary judgment and are as follows: The tax was levied in the years 1986 and 1987. The tax was collected in the years 1987 and 1988. The tax has not been levied since 1988. Appellants did not plead, nor did they prove, that there are any uncollected delinquent taxes as a result of the tax levied in 1986 and 1987. Appellants did not file their complaint until February 22, 1990.

Appellants do not have a claim because the taxes were voluntarily paid before suit was filed. We have consistently followed the common law rule that prohibits the recovery of voluntarily paid taxes, except where a recovery is authorized by a statute without regard to whether the payment is voluntary or compulsory. *See, e.g., City of Little Rock* v. *Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982); *Searcy County* v. *Stephenson*, 244 Ark. 54, 424 S.W.2d 369 (1968); *Thompson* v. *Continental Southern Lines, Inc.*, 222 Ark. 108, 257 S.W.2d 375 (1953). We follow this rule even when an illegal exaction claim is based on constitutional grounds. *Cash*, 277 Ark. at 504-05, 644 S.W.2d at 233. When recovery is authorized by statute upon payment "under protest," we literally require a payment "under protest." *Hercules, Inc.* v. *Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995). There is an exception for payment under coercion, *see Cash*, 277 Ark. at 505, 644 S.W.2d at 233; *Chapman & Dewey Land Co.* v. *Board of Directors*, 172 Ark. 414, 288 S.W. 910 (1926), but that exception is not applicable to the case at bar.

The reasoning underlying our cases is sound. When taxes are paid to a government they are deposited into that government's general revenues and ordinarily are spent within that tax year. However, when the government is put on notice that it may be required to refund those taxes, it can make the appropriate allowance for a possible refund. *See Hercules, Inc.*, 319 Ark. at 707, 894 S.W.2d at 578. If we were to allow refunds for taxes voluntarily paid in previous years, it would jeopardize current and future governmental operations because current and future funds might be necessary for the refund.

The trial court denied cross-motions for summary judgment and heard the case on its merits. The trial court then held that the tax was not levied in violation of Amendment 59. The trial court should have granted summary judgment in favor of appellees because appellants did not have a claim.

Summary judgment based upon a failure to state a claim upon which relief can be granted is different from summary judgment based upon a lack of disputed material facts which results in a party's entitlement to the judgment as a matter of law. The first is a failure to *state* a claim, while the second is the failure to *have* a claim. *West* v. *Searle & Co.*, 305 Ark. 33, 806 S.W.2d 608 (1991). Summary judgment on the basis of fail-

ure to *have* a claim results in a dismissal with prejudice. *Id.* at 36, 806 S.W.2d at 610. The appellants do not *have* a claim for past taxes voluntarily paid. Thus, we affirm on direct appeal. Since appellants do not *have* a claim in any court, we need not decide the cross-appeal as it is a moot issue. *See Mertz* v. *States*, 318 Ark. 390, 885 S.W.2d 853 (1994).

Jim PLEDGER, Director of the Department of Finance and Administration *v.* NORITSU AMERICA CORPORATION

94-1289 896 S.W.2d 595

Supreme Court of Arkansas
Opinion delivered May 1, 1995
[Rehearing denied June 12, 1995.*]

*Supplemental opinion issued June 12, 1995.

Beth B. Carson, Revenue Legal Counsel, for appellant.

Friday, Eldredge & Clark, by: *William Thomas Baxter* and *Barry E. Coplin*, for appellee.

DAVID NEWBERN, Justice. The Appellee, Noritsu America Corporation (Noritsu), sells automated equipment, or "minilabs," purchased and used by businesses which process film. The Department of Finance and Administration (DF&A) assessed a use tax against Noritsu for its 1983 through 1988 Arkansas sales. The tax was paid under protest. The assessment was upheld in an administrative proceeding, and Noritsu sued to recover the tax and interest paid. The Chancellor agreed with Noritsu's contention that the equipment falls within the manufacturing exemption from use tax found in Ark. Code Ann. § 26-53-114 (Supp. 1993). We reverse the decision because the equipment is not used to produce "articles of commerce."

We review tax exemption cases *de novo* on the record, although we do not reverse the Chancellor's factual findings unless they are clearly erroneous. *Martin* v. *Riverside Furniture Corp.*, 292 Ark. 399, 730 S.W.2d 483 (1987). There is no factual dispute in this case. It was tried largely on stipulations. The question is whether, given the facts before the Chancellor, it was, as a matter of law, error to hold Noritsu entitled to the exemption. The taxpayer must establish an entitlement to an exemption from taxation beyond a reasonable doubt. *Pledger* v. *C.B. Form Co.*, 316 Ark. 22, 871 S.W.2d 333 (1994). Tax exemption provisions must be strictly construed against exemption, and if there is any doubt concerning its application, the exemption must

be denied. *Martin* v. *Riverside Furniture Corp., supra.*

Section 26-53-114(a)(1)(A) exempts from use tax "Machinery and equipment used directly in producing, manufacturing, fabricating, assembling, processing, finishing, or packaging of articles of commerce . . . ." Prior to 1983, Ark. Stat. Ann. § 84-1904(r)(2)(E), the predecessor of § 26-53-114(b), defined the words "manufacturing" and "processing" for purposes of the statute to mean, "those operations commonly understood within their ordinary meaning." Following that general statutory guidance was a list of specific exemptions including items such as "mining, quarrying, refining, extracting oil and gas, cotton ginning," etc., but nothing about photographs or printing.

In *Western Paper Co.* v. *Qualls*, 272 Ark. 466, 615 S.W.2d 369 (1981), exemption was urged as to equipment used for commercial printing of stationery, wedding and business announcements, flyers, books, and business cards. We observed that, "in the ordinary use of the term we do not think of printing, photography, and binding as manufacturing." We concluded our opinion as follows:

> Commercial printing has certainly undergone technological changes over the years, but the final product remains the same — images on paper. The printer starts with manufactured paper and ink and through the use of manufactured machinery and equipment produces images on paper, a product which generally has no commercial market value other than to the individual for whom the commercial printer performed the service. "Ordinarily, we think of a manufactured article as something to be placed on the market for retail to the general public in the usual course of business." *Morely* v. *E.E. Barber Construction Co.*, 220 Ark. 485, 248 S.W.2d 689 (1952).

Subsequent to the decision in the *Western Paper Co.* case, the General Assembly amended § 26-53-114(b) to include in the list of specific exemptions "the services of overprinting and photographic processes incidental to printing." Noritsu contends the equipment it sells falls within the exemption because it is the same equipment as is used to process photographs "incidental to printing." It does not contend photographs produced with the equipment sold by it are indeed processed "incidental to printing."

In *C & C Machinery, Inc.* v. *Ragland*, 278 Ark. 629, 648 S.W.2d 61 (1983), we affirmed denial of exemption with respect to equipment purchased by a machine shop operator who used the equipment to convert unprocessed metal into finished products. We said:

> While we are persuaded that appellant's milling operation changes raw metal into a finished product, we are not persuaded that the finished product is an "article of commerce," as required under the exemption provision of the act . . . . The Chancellor was justified in finding under the evidence that appellant does not maintain a stock or inventory of finished articles for sale to the general public, rather, it produces custom items prepared for specific customers in response to special orders. Its products are prepared to customer specifications and are not readily marketable to the general public.

In support of our conclusion, we cited the *Western Paper Co.* case and the language about "retail to the general public." Although our focus in the *Western Paper Co.* case was on whether printing was manufacturing, the *C & C Machinery, Inc.* case has made it clear that our language in the *Western Paper Co.* case had implications with respect to whether custom printing products were "articles of commerce."

While we might agree with Noritsu's contention that its equipment is like that used "incidental to printing," the General Assembly has done nothing to alter the requirement that, to be exempt, manufacturing or processing equipment, regardless how it is defined, must be used to manufacture or process "articles of commerce" as stated in subsection § 26-53-114(a). Just as it was not shown in the *C & C Machinery, Inc.*, case or in the *Western Paper Co.* case, it has not been shown here that the products processed by the equipment in question are "placed on the market for retail to the general public in the usual course of business."

[redacted] Our *de novo* review leads us to conclude Noritsu has not shown beyond a reasonable doubt that it is entitled to the exemption and a return of the tax and interest it has paid. This case is remanded for an order consistent with this opinion.

Reversed and remanded.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
JUNE 12, 1995

1. APPEAL & ERROR — ISSUE WAS RAISED ON APPEAL — NO WAIVER FOUND. — Where the appellant abstracted testimony about the nature of the articles produced and then quoted language from cases making it clear that the items produced by photographic development equipment were not "articles of commerce," the issue was raised on appeal, and was properly addressed by the court.
2. APPEAL & ERROR — CHALLENGE ON THE MERITS MADE — NO EVIDENCE BEFORE COURT THAT THE WORK DONE BY THE MACHINES WAS ANYTHING OTHER THAN CUSTOM PHOTO FINISHING NOT RESULTING IN "ARTICLES OF COMMERCE" — REHEARING DENIED. — The appellee's argument that the abstract inclued evidence that the appellee's machines produced article of commerce was meritless where the deposition testimony revealed no evidence that the work done by the machines was anything other than a custom photo finishing not resulting in "articles of commerce"; rehearing was denied.

Petition for Rehearing; denied.

Department of Finance & Administration, by: *Beth B. Carson*, Acting Chief Counsel, for appellant.

Friday, Eldredge & Clark, by: *Barry E. Coplin, Robert S. Shafer* and *Allison Graves*, for appellee.

DAVID NEWBERN, Justice. Noritsu America Corporation has petitioned for rehearing contending we should not have considered whether the photographic development equipment produced "articles of commerce," as that was not argued by Mr. Pledger on appeal. The rehearing petition must be denied as we conclude the argument was before us.

Western Paper Co. v. *Qualls*, 272 Ark. 466, 615 S.W.2d 369 (1981), is a primary citation presented in Mr. Pledger's initial brief. In his argument he quoted the *Western Paper Co.* case opinion, in part, as follows: "'Ordinarily, we think of a manufactured article as something to be placed on the market for retail to the general public in the usual course of business.'

Morely v. *E.E. Barber Construction Co.*, 220 Ark. 485, 248 S.W.2d 689 (1952). . . ." The argument contending that the photo processing equipment was not manufacturing equipment also

quoted the following from *Riggs* v. *Hot Springs*, 181 Ark. 377, 26 S.W.2d 70 (1930): "We think of a manufactured article as something to be placed on the market for retail to the general public in the usual course of business."

Although, as Noritsu points out, Mr. Pledger's brief did not cite Ark. Code Ann. § 26-53-114(a)(1)(A) which addresses the "articles of commerce" aspect of the manufacturing exemption, that concept was a subject of the *Western Paper Co.* case which, as noted above, was cited in the argument and relied upon. Section 26-53-114(a)(1)(A) provides the basic exemption for manufacturing equipment upon which Noritsu must rely. It must serve as the foundation of any argument for exemption for manufacturing equipment. Even if a fundamental part of that subsection had not been argued, we would have difficulty ignoring it in a case in which the issue is exemption pursuant to that law.

Noritsu cites *Cummings* v. *Boyles*, 242 Ark. 923, 415 S.W.2d 571 (1967), and *Ford* v. *Ford*, 270 Ark. 349, 605 S.W.2d 756 (Ark. App. 1980), for the proposition that an argument not made on appeal is waived. We cannot say there was a waiver here. By abstracting testimony about the nature of the articles produced and then quoting language from cases making it clear that such items are not "articles of commerce" as we have defined that term, the issue was raised. Noritsu could have responded in its brief but chose not to do so.

Finally, Noritsu mounts a challenge on the merits of the argument pointing out abstracted evidence that "in addition to negatives and photo prints, the Appellee's [Noritsu's] machines produce baseball cards, business cards, greeting cards, enlargements and mini-posters" and that they could produce 1,200 prints per hour. The reference to business cards, greeting cards, enlargements and mini-posters gave us no reason to suspect that evidence that the equipment was producing articles of commerce. The reference to baseball cards gave us pause until we reviewed the cited portion of Mr. Pledger's abstract. The deposition testimony to which reference is made on the "baseball cards" is as follows: "Equipment today is capable of producing baseball cards such as trading cards for little leaguers or photo business cards." We have no evidence before us showing that the work done by

the machines is anything other than custom photo finishing not resulting in "articles of commerce."

Rehearing denied.

Kenneth K. WATANABE and Jessica Watanabe
v. Ed H. WEBB, Ellinor Webb, Dixon Realty, the Estate of Juanita Dixon, J.W. Williams, Pulaski Lenders Title Company, d/b/a Guaranty Title Company, and Gene Weston

95-3 896 S.W.2d 597

Supreme Court of Arkansas
Opinion delivered May 1, 1995

Rose Law Firm, by: *David L. Williams*, for appellants.

Charles R. Padgham, for appellees Ed H. Webb and Ellinor Webb.

Kathy A. Cruz, for appellees Dixon Realty, Estate of Dixon and J.W. Williams.

Anderson & Kilpatrick, by: *Miriam T. Hopkins*, for appellees Pulaski Lenders Title Company and Gene Weston.

TOM GLAZE, Justice. Appellees Ed and Ellinor Webb sold property to appellants Kenneth and Jessica Watanabe, and a dispute later arose concerning whether some springs were located on that property. Ultimately, the Webbs filed a foreclosure action against the Watanabes alleging the Watanabes were in default on their promissory note and mortgage. In addition to filing an answer and counterclaim against the Webbs, the Watanabes filed crossclaims against appellees Dixon Realty, Juanita Dixon, Guaranty Title Company and Gene Weston, alleging breach of contract, breach of fiduciary duties and misrepresentation.

A hearing was held in this matter, and on April 13, 1994, the trial court entered a decree of foreclosure against the Watanabes and dismissed the Watanabes' claims against all appellees. Upon the Watanabes' failure to satisfy the foreclosure decree, a commissioner's sale was held, and on June 2, 1994, an order confirming the commissioner's sale was entered. On July 5, 1994, the Watanabes filed a notice of appeal from the April 13 decree and June 2 order. On October 3, 1994, the Watanabes obtained an order to extend their time for filing the appeal record to January 2, 1995. Because January 2, 1995, was a legal holiday, the Watanabes tendered the record on January 3, 1995, and the supreme court's clerk accepted it. After the record was filed, all appellees subsequently filed motions to dismiss the Watanabes' appeal, contending the Watanabes' notice of appeal was filed untimely and their lodging of the record was late as well.

Appellees argue that the Watanabes' notice of appeal was untimely because their notice was not filed within thirty days from the entry of the foreclosure decree as required by Ark. R. App. P. 4(a). As mentioned above, the trial court entered its decree on April 13, 1994, but the Watanabes delayed filing their notice of appeal until July 5, 1994. In the recent case of *Scherz* v. *Mundaca Investment Corp.*, 318 Ark. 595, 886 S.W.2d 631

(1994), this court held that a decree foreclosing a mortgage and a later decree confirming the foreclosure sale were both final and appealable orders. Citing *Alberty* v. *Wideman*, 312 Ark. 434, 850 S.W.2d 314 (1993), the court reaffirmed this court's long-standing principle as follows:

> Thus, *a decree that orders a judicial sale of property and places the court's directive into execution is a final order and appealable* under Ark. R. App. P. 2(a)(1). *When there is such an order, a certification under Rule 54(b), is not necessary* . . . If it were otherwise, and there were questions about the validity of the sale, prospective bidders might not bid a reasonable amount because there would be a cloud over the matter, and no one wants to buy a lawsuit. Those issues can be finally determined under our procedure. As a separate matter, *any questions concerning the validity and adequacy of the bids might be heard on a later appeal from the order confirming title.*

Id., at 437, 850 S.W.2d at 316. (Emphasis added.)

The Watanabes suggest that, in the present case, the foreclosure decree was not final because it failed to set a day and place for the sale. That suggestion is meritless. Like in *Scherz*, the trial court here appointed a commissioner and directed that, if the Watanabes failed to pay the judgment of foreclosure, including $202,690.41 at a daily rate of $49.31, attorneys' fees of $10,000.00 and the maximum interest rate, the commissioner, after advertising the time, terms and place of sale for thirty days, shall by public auction sell the subject property at the Garland County Courthouse to the highest bidder.[1]

The Watanabes also try to distinguish *Scherz* by arguing the trial court there made an A.R.C.P. Rule 54(b) certification, but none had been made in the present case. This argument, too, has no merit because a Rule 54(b) certification was unnecessary. First, this court held in *Scherz* that, when a foreclosure decree's directives have been placed into execution, an appeal

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[1]The decree, among other things, continued, setting interest rates from the sale date, establishing lien rights and bonds, allowing for the contingency if a successful bidder failed to perform, providing for commissioner's report, requesting the Watanabes file an exemption schedule and distributing escrow funds upon confirmation of sale.

may be filed from that final decree without a Rule 54(b) determination. Second, Rule 54(b) provides that, when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the trial court may direct the entry of a final judgment as to one or more but fewer than all claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for entry of judgment. Here, the chancellor not only entered a detailed foreclosure decree in the Webbs' favor setting the decree into execution, it also specifically and generally dismissed the Watanabes' claims against the Webbs and all other parties to the lawsuit. In other words, no pending claims existed requiring a Rule 54(b) certification.

Although we hold the Watanabes' appeal from the April 13, 1994 foreclosure decree was untimely, their appeal from the lower court's final confirmation order entered on June 2, 1994, was timely. The Watanabes had thirty days within which to file their appeal from the June 2 order, and the filing deadline fell on Saturday, July 2, 1994. *See* Ark. R. App. P. 4(a). Under Ark. R. App. P. 9, whenever the last day for taking any action under the appellate rules or rules of the supreme court and court of appeals falls on a Saturday, Sunday, or legal holiday, the time for such action is extended to the next business day. Here, the Watanabes' appeal deadline not only fell on a weekend, but was also followed by a legal holiday, Monday, July 4, 1994. As a consequence, the Watanabes' notice of appeal was timely filed on the following business day, Tuesday, July 5, 1994.

Appellees argue that the Watanabes still filed the record late, since they waited until January 3, 1995, to lodge it with the supreme court clerk. Ark. R. App. P. 5(b) provides that in no event shall the time for filing the record on appeal be extended more than seven months from the date of the entry of the judgment, decree or order, or from the date on which a timely post-judgment motion under Rule 4(b) is deemed to have been disposed of under Rule 4(c), whichever is later. Here, no post-judgment motions were filed. Instead, the Watanabes obtained a timely order permitting them to file their record on Monday, January 2, 1995, which turned out to be a legal holiday. Again, as was the case with their notice of appeal from the June 2, 1994

confirmation order, the Watanabes' filing deadline for filing the record fell on a weekend and legal holiday, extending their deadline to the next business day — in this instance, Tuesday, January 3, 1995. In sum, the Watanabes filed their record timely and within the seven-month deadline provided under Rule 5(b).

For the foregoing reasons, we dismiss the Watanabes' appeal from the April 13, 1994 foreclosure decree, but we deny appellees' motion to dismiss the Watanabes' appeal from the June 2, 1994 confirmation order.

Joe Robert WESSON *v.* STATE of Arkansas

CR 94-822 896 S.W.2d 874

Supreme Court of Arkansas
Opinion delivered May 1, 1995

Lea Ellen Fowler O'Kelley, for appellant.

Winston Bryant, Att'y Gen., by: *Clementine Infante*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Justice. Linda Rabal and appellant Joe Wesson had been dating over a year, but because of Wesson's drinking, Rabal terminated the relationship with Wesson in the fall of 1992. Wesson made phone calls to Rabal both at her home and her office in a futile attempt to reconcile. During the early morning hours of November 15, 1992, Wesson damaged a car belonging to Rabal's overnight guest, and broke the door down to Rabal's apartment, confronting both Rabal and her guest. Wesson was arrested at the scene, and subsequently on April 7, 1993, plead guilty to misdemeanor charges of criminal trespass, criminal mischief, harassing communications and public intoxication. Afterwards, Wesson still continued to call Rabal at her home and work, and was observed in Rabal's apartment complex area.

On January 27, 1994, Wesson was charged with the felony of stalking Rabal during the period of April 20, 1993, through May 10, 1993. Wesson waived trial by jury, and was found guilty of stalking in the second degree. The trial court sentenced Wesson to five years imprisonment, and established conditions of probation for three years following his release. Wesson appeals from the trial court's interpretation of the stalking statute and from the sufficiency of the evidence.

Acts 379 and 388 of 1993 [Ark. Code Ann. § 5-71-229 (Repl. 1993)] created the offenses of stalking in the first and sec-

ond degree and also contained sections that amended the statutory offenses of harassment and terroristic threatening to make them Class A misdemeanors.[1] Stalking in the second degree, a Class C felony, is defined in relevant part as follows:

> [I]f [a person] purposely engages in a course of conduct that harasses another person and makes a terroristic threat with the intent of placing that person in imminent fear of death or serious bodily injury . . . . § 5-71-229(b)(1).

"Course of conduct" as used in § 5-71-229(b)(1) means a pattern of conduct composed of two or more acts separated by at least thirty-six hours but occurring within one year. In addition, the term "harasses" employed in § 5-71-229(b)(1) means acts of harassment as defined in Ark. Code Ann. § 5-71-208. Those parts of § 5-71-208 relevant here define harassment as follows:

> (a) A person commits the offense of harassment if, with purpose to harass, annoy, or alarm another person, without good cause, he:
>
> * * *
>
> (5) Engages in conduct or repeatedly commits acts that alarm or seriously annoy another person and that serve no legitimate purpose; or
>
> (6) Places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence; other than the residence of the defendant, for no purpose other than to harass, alarm, or annoy.

Here, Wesson concedes his acts fell within the definition of harassment as that term is defined and employed in the stalking statute. Nonetheless, he contends the stalking law also uses the term "terroristic threat" when defining the crime of stalking, and therefore, the state was required to show he made an "actual threat" of death or serious physical injury to Rabal as contemplated under the terroristic threatening statute, § 5-13-301. In this respect, we point out that, in construing § 5-13-301,

[1]These acts made no changes in defining the harassment or terroristic threatening offenses.

the court of appeals held, with which we agree, that the statute does not require that it be shown that the accused has the immediate ability to carry out the threats. *Knight* v. *State*, 25 Ark. App. 353, 758 S.W.2d 12 (1988). In sum, Wesson argues an "actual threat" must be shown as an essential element of the crime of stalking, and the trial court erred in finding that the state proved that element.

[redacted] First, we certainly agree that, under the plain terms of § 5-71-229(b)(1), stalking requires the perpetrator to make a threat with the intent of placing his victim in imminent fear of death or serious bodily injury. We disagree, however, with Wesson's contention that he did not make such a threat. In fact, our review of the record reveals that the evidence thoroughly supports Wesson did, in fact, threaten Rabal with both death and serious bodily injury. The evidence, introduced without objection, showed that from the time Rabal began breaking up with Wesson in late 1992, through May 10, 1993, Wesson called Rabal repeatedly. During that time Rabal changed her telephone number four times, but Wesson was able to obtain her unlisted number twice. Rabal testified Wesson told her in early April 1993, that he had thoughts of killing her but did not know whether to do it at her apartment or at her place of employment. Further, Rabal testified that she saw Wesson sitting in a truck at her apartment complex on Mother's Day weekend in 1993. Finally, Rabal testified that, during the evening of May 10, Wesson called her home eighteen times within a period of one and one-half hours before she finally disconnected her phone. She stated Wesson's call to her that evening was different from the others in that Wesson told her he was coming over to her apartment "right away" and he was going to hurt her. Rabal testified she became so frightened she sat up with a bat and Mace, and later bought a gun. She stated she expected Wesson to come that night to hurt her, and perhaps kill her.

The tapes of telephone messages showed that Wesson threatened repeatedly to show up at Rabal's place of employment, and said he would make her life miserable, ruin her, make it his business to destroy her, wreak havoc upon her, and hurt her badly. In one telephone call, Wesson left the following message: "You can go straight to hell, and I'm going to do everything that I can do in my power to hurt you, and I will do it." Wesson later left the message, "I'm very sorry that I ever met you in my life. You

better hope to God that I don't turn where I want to hurt you, because I can. I really can, and I will." Three days later, Wesson's tape-recorded message provided the following:

> For the last time, if you ever hang up on me again, will be absolutely the last time that you will ever [hang] up on [me] again, and I really appreciate the way that you're feeling right now with your new little life. But no one will ever love you like I loved you. So, you go on with those guys, and I'll come back, and I'll do what I have to do.

And the same day, Wesson was recorded in a different message as stating:

> Do it again [hang up on him], and then I'll do my damnedest to hurt you. I really will. God damn it, if you won't even speak to me after living with you for a year and a half, I'm going to set my path to hurt you.

Wesson argues the foregoing calls and messages were intended as threats to harm Rabal emotionally. Of course, a person's state of mind at the time of a crime is seldom apparent. *Tarentino* v. *State*, 302 Ark. 55, 786 S.W.2d 584 (1990). Since intent cannot be proven by direct evidence, the fact finder is allowed to draw upon his or her own common knowledge and experience to infer it from the circumstances. *Id.* Because of the difficulty in ascertaining a person's intent, a presumption exists that a person intends the natural and probable consequences of his acts. *Id.*

Here, the trial judge, in hearing the evidence above, reasonably found that Wesson intended to terrorize Rabal with threats of harm. While Wesson argues those threats were of emotional harm, the fact remains that Rabal had ended her relationship with Wesson and from her view, no emotional link existed with which Wesson could hurt Rabal. Coupled with Wesson's earlier repeated and threatening messages, Wesson's pronouncement to Rabal on May 10 that he was coming over to her apartment "right away" to hurt her at the very least supports the finding that Wesson intended to cause Rabal serious physical injury. Based on the foregoing, we hold substantial evidence existed to support Wesson's conviction for second degree stalking.

Affirmed.

Craig DRUMMOND *v.* STATE of Arkansas

CR 94-1433 897 S.W.2d 553

Supreme Court of Arkansas
Opinion delivered May 1, 1995
[Rehearing denied May 30, 1995.]

Doug Norwood, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Craig Alan Drummond appeals from a judgment of conviction for the offense of underage driving while under the influence of alcoholic beverages. The legislation making underage DUI an offense was Act 863 of 1993 and is now codified at Ark. Code Ann. § 5-65-303 (Repl. 1993). Drummond raises three points on appeal, none of which has merit. We affirm the judgment of conviction.

On December 27, 1993, at about 4:30 a.m., a patrolman for the City of Rogers, Scott Charles, watched Drummond cross the center line twice, while driving south on Dixieland Road. He then "paced" Drummond's car at 45 miles per hour in a 30 mile per hour zone. At that point, Patrolman Charles stopped Drummond. When the police officer approached Drummond's car, he smelled a "pretty strong" odor of alcoholic beverages emanating from the vehicle. He requested Drummond to take several field sobriety tests, and Drummond agreed. The walk-and-turn test involved nine heel-to-toe steps, a pivot, and nine more comparable steps. Drummond lost his balance, missed several steps,

and generally failed this test. He was then asked to stand on one leg, and he passed this test. He was also given a portable breath test.[1] Based on his observations and the results of the tests, Patrolman Charles arrested Drummond for DUI.

Drummond was transported to the local hospital where blood was drawn approximately an hour and ten minutes after arrest. That sample was later analyzed by the State Health Department, and the blood/alcohol content was shown to be .07 percent. He was charged in Rogers Municipal Court with speeding and with underage DUI. He was age 19 at the time. He pled guilty and was sentenced to a $500 fine with $400 suspended, community service work for two days, a 90-day suspension of his driver's license, attendance at an alcohol safety course, and court costs of $69.25.

He next appealed to Benton County Circuit Court for a *de novo* trial. Prefatory to the bench trial, defense counsel asserted that one section of the underage DUI statute, § 5-65-306, which mandates public service work for a DUI conviction "of the type and for the duration as deemed appropriate by the court," was unconstitutional. The Deputy City Attorney conceded that this punishment was "probably unconstitutional," but argued that it was severable from Act 863. The trial court took the matter under advisement and heard testimony. It then found Drummond guilty of underage DUI but not guilty of speeding. The court further declared the public service section to be unconstitutional, though no evidence or argument was presented on this issue, but found the balance of Act 863 to be constitutional. The court suspended Drummond's driver's license for 90 days, fined him $150, and assessed court costs of $190.25.

We first consider Drummond's argument that there was insufficient evidence to support his judgment of conviction for underage DUI. Our oft-stated test in determining the sufficiency of the evidence to sustain a judgment is whether the evidence is substantial, that is, forceful enough to compel a conclusion one way or the other and pass beyond mere suspicion and conjecture. *Tigue* v. *State*, 319 Ark. 147, 889 S.W.2d 760 (1994); *Moore* v. *State*, 315 Ark. 131, 864 S.W.2d 863 (1993).

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[1]The record does not reflect the results of the portable breath test.

Our standard of review is to look at the evidence in the light most favorable to the appellee and to consider only that evidence which tends to support the judgment. *Tigue* v. *State, supra.*

We turn then to the pertinent section of the underage DUI law:

> (a) It is unlawful and punishable as provided in this subchapter for any underage person to operate or be in actual physical control of a motor vehicle while under the influence of an alcoholic beverage or similar intoxicant.
>
> (b) It is unlawful and punishable as provided in this subchapter for any underage person to operate or be in actual physical control of a motor vehicle if at that time there was one-fiftieth of one percent (0.02%) but less than one-tenth of one percent (0.10%) by weight of alcohol in the person's blood as determined by a chemical test of the person's blood or breath or other bodily substance.

Ark. Code Ann. § 5-65-303 (Repl. 1993).

The evidence in this case of driving under the influence easily qualifies as substantial. Drummond was driving erratically. Officer Charles detected an odor of alcoholic beverages in Drummond's car. Drummond failed at least one field sobriety test and tested at .07 percent blood/alcohol a little more than an hour after his arrest, which is more than three times the level of the .02 percent statutory presumption. There was no opportunity for him to consume alcoholic beverages between time of arrest and time of testing. The total circumstances are enough to support a judgment of conviction for driving a car "while under the influence of an alcoholic beverage." *See* Ark. Code Ann. § 6-65-303(a) (Repl. 1994).

Drummond contends, however, that there was no expert proof that his blood/alcohol level at time of testing (.07 percent) related back or was in any wise probative of his level at the time of his arrest. We disagree. The test was certainly probative of some alcohol in his blood at time of arrest though perhaps not of the exact percentage, and because of the high level, it raises a reasonable inference that the .02 percent content was exceeded. In addition, this court has recognized that blood/alcohol content generally dissipates over the passage of time. *State*

v. *Johnson*, 317 Ark. 226, 876 S.W.2d 577 (1994); *David* v. *State*, 286 Ark. 205, 691 S.W.2d 133 (1985); *Elam* v. *State*, 286 Ark. 174, 690 S.W.2d 352 (1985); *Munn* v. *State*, 257 Ark. 1057, 521 S.W.2d 535 (1975).

We are aware that blood/alcohol levels may vary following consumption depending on absorption and metabolism rates. *For discussion generally see McLean* v. *Moran*, 963 F.2d 1306 (9th Cir. 1992). But in the case before us, unlike the *Moran* case, the trial court did not state that he was considering only the blood/alcohol test and was deeming that to be conclusive of guilt. What the trial court did do was acknowledge the fact that the .07 percent blood/alcohol content was "substantially above the amount that's prescribed by the statute." That is an entirely reasonable circumstance to consider, as already mentioned. The Ninth Circuit Court of Appeals' decisions are not binding on this court, but, regardless, the facts of *McLean* v *Moran, supra*, are distinguishable.

For his next point, Drummond urges that the public service section of Act 863 is unconstitutional and that this defect vitiates the Act in its entirety. The State counters that the public service penalty is severable from the balance of the Act, which is what the trial court in essence ruled.

We expressly do not consider the constitutionality of the public service penalty — § 5-65-306 — in this appeal. The State Attorney General pointedly refused to concede that the section is unconstitutional in its brief on appeal. Furthermore, we will not strike down a legislative act on constitutional grounds without first having the benefit of a fully developed adversary case. Full development is lacking in this case, and we take no position on the constitutional question.

Turning to the severability point, we find no error in the trial court's conclusion that the public service section was severable and the remainder of the Act was constitutional. Drummond cites us to *U.S. Term Limits* v. *Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994), in support of his position that the public service section is mutually connected and interwoven throughout Act 863. Yet, he gives us no reason or argument why § 5-65-306 jeopardizes the entire act. His mere conclusion that this is so is not sufficient or persuasive. As we said in *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977), we decline the invitation to make

Drummond's case for him. Moreover, we have no doubt that this section is readily severable. Not only does Act 863 contain a severability clause, it also embraces other penalties, such as fines and drivers education, which are separate and apart from the public service component. This point presents no basis for reversal.

For his last point, Drummond contests the increase in the assessed court costs in circuit court from $69.25 to $190.25, but, again, he presents no argument or authority for why the court's award is suspect. Drummond questions the amount of the costs and the fact that Benton County and not the City of Rogers will be the beneficiary. We are left in the dark, though, as to why this is inappropriate. We will not attempt to divine the basis for Drummond's assertion. *See Dixon* v. *State, supra.*

Affirmed.

Gus M. PANNELL *v.* STATE of Arkansas

CR 94-452 897 S.W.2d 552

Supreme Court of Arkansas
Opinion delivered May 1, 1995

Karen R. Baker, for appellant.

No response.

PER CURIAM. Appellant was convicted of first degree battery. He appealed. We dismissed the appeal because no effective notice of appeal was filed. *Pannell* v. *State*, 320 Ark. 250, 895 S.W.2d 911 (1995). Appellant's attorney subsequently filed a motion styled "Motion For A Belated Appeal" and has filed a pleading admitting it was her error that resulted in the failure to give an effective notice of appeal. She asks that, because of her error, we grant a belated appeal.

Under authority of A.R.Cr.P. Rule 36.9, we grant belated appeals because of attorneys' errors, but those are granted before the case has been submitted to an appellate court. *See, e.g., Krein v. State*, 318 Ark. 172, 883 S.W.2d 481 (1994). This case, however, has already been taken under submission and decided, and a signed opinion has been handed down. *See* Ark. Sup. Ct. R. 5-2(a). In a comparable case, one of the petitioners, Hogrobrooks, attempted to appeal from a criminal contempt order. No effective notice had been filed. We noted that under Rule 36.9 we could act upon and decide a case when a good reason was shown for the omission. However, because no good reason had been shown *by the time the case was submitted*, we dismissed the appeal with prejudice. *Davis* v. *State*, 319 Ark. 171, 889 S.W.2d 769 (1994).

After the signed opinion was handed down in this case, the petitioner could have timely filed a petition for rehearing, but a petition for rehearing is limited to calling attention to specific errors of law or fact which the opinion is thought to contain. Ark. Sup. Ct. R. 2-3(g). A rehearing does not encompass a set of new facts, new briefs, and new arguments. Yet, that is precisely what would occur if we granted a motion for a belated appeal after an appellate opinion was handed down. If we were to allow such a practice there would be much less finality to appellate opinions.

Accordingly, the petition for a belated appeal is denied.

James Eldridge PHILLIPS *v.* STATE of Arkansas

CR 95-379 896 S.W.2d 890

Supreme Court of Arkansas
Opinion delivered May 1, 1995

Robert Meurer, for appellant.

No response.

PER CURIAM. The appellant, James Eldridge Phillips, has filed a motion for rule on the clerk. His attorney, Robert Meurer, failed to give timely notice of appeal, and, as a result, the clerk has refused to file the transcript. We will treat this acknowledgment as a motion for belated appeal and grant the motion. A copy of this opinion will be forwarded to the Committee on Professional Conduct. *See Harkness* v. *State*, 264 Ark. 561, 572 S.W.2d 835 (1978).

Benny REED *v.* STATE of Arkansas

CR 95-392 897 S.W.2d 556

Supreme Court of Arkansas
Opinion delivered May 1, 1995

John D. Lightfoot, for appellant.

No response.

PER CURIAM. Appellant Benny Reed, by his attorney, has filed a motion for rule on the clerk.

The motion admits that the record was not timely filed, but neither appellant nor his current attorney, admit fault. As such, the motion for rule on the clerk does not state good cause for granting the motion as discussed in our per curiam issued February 5, 1979, 265 Ark. 964. If appellant's current attorney, John D. Lightfoot, will concede by affidavit that it was his fault that the record was not filed, or if other good cause is shown, then the motion will be granted. The present motion for rule on the clerk is denied.

Carl Eugene WEBSTER *v.* STATE of Arkansas

CR 95-373 896 S.W.2d 890

Supreme Court of Arkansas
Opinion delivered May 1, 1995

Paul Petty, for appellant.

No response.

PER CURIAM. Carl Eugene Webster was convicted of possession of a controlled substance, fleeing, resisting arrest, and disorderly conduct and was sentenced to a combined total of 6 years in the Arkansas Department of Correction and a $100 fine. Webster filed a motion for a new trial, but the motion was filed before the judgment and commitment order was entered. The motion was, therefore, untimely and ineffective. See Ark. R. Civ. P. 59; Ark. R. App. P. 4(b). Because the motion for new trial was ineffective and the notice of appeal filed by Webster's attorney, Paul Petty, was based on the motion for new trial and filed more than 30 days after the judgment, the notice of appeal also was of no effect.

Mr. Petty assumes responsibility for not verifying that the judgment and commitment order had been filed prior to the filing of the motion for new trial. Because he has assumed responsibility, we treat the motion for rule on the clerk as a motion for belated appeal, and we grant it. We direct that a copy of this order be filed with the Committee on Professional Conduct. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979).

Kathy June TAYLOR *v.* C. Michael RIDDELL, M.D.

94-880 896 S.W.2d 891

Supreme Court of Arkansas
Opinion delivered May 8, 1995

[redacted]

Karr, Hutchinson & Stubblefield, by: *Charles Karr*, for appellant.

Friday, Eldredge & Clark, by: *Calvin J. Hall* and *Tonia P. Jones*, for appellee.

JACK HOLT, JR., Chief Justice. This is a medical malpractice case in which the appellant, Kathy June Taylor, contended that the appellee, Dr. C. Michael Riddell, was negligent in causing and failing to diagnose a vesicovaginal fistula that developed following her abdominal hysterectomy. Ms. Taylor raises three points for reversal of a jury verdict in favor of Dr. Riddell, asserting that the trial court erred in (1) refusing to give her requested instruction on *res ipsa loquitur*; (2) giving the second paragraph of AMI Civil 3d 1501 (duty of physician, etc.) relating to expert witnesses because that paragraph is a comment on the evidence in violation of the Arkansas Constitution; (3) giving AMI Civil 3d 603 (no presumption of fault from happening of injury) because it is a comment on the evidence in violation of the Arkansas Constitution. None of these arguments has merit, and we affirm the judgment of the trial court.

Facts

Dr. Riddell is a board-certified obstetrician and gynecologist at the Millard-Henry Clinic in Russellville. Ms. Taylor, though not a regular patient of his, went to Dr. Riddell when she was having problems with her menstrual periods. After two office visits and an examination, Dr. Riddell scheduled Ms. Taylor for surgery. On August 30, 1991, he performed an abdominal hysterectomy on her at St. Mary's Hospital in Russellville.

Ms. Taylor was discharged from the hospital by Dr. Riddell on September 4, 1991. She returned to the Millard-Henry Clinic on September 6, 1991, to have her staples removed. She did not see Dr. Riddell at that time or subsequently. Ms. Taylor stated that she experienced nausea and pain during this period. On September 13, 1991, she returned to the clinic for some lab work but did not see a physician. Her efforts to contact Dr. Riddell at various times were unavailing. According to Ms. Taylor, the pain persisted, and, on September 15, 1991, she went to the St. Mary's Hospital emergency room, where she was seen by another physician, who diagnosed her as suffering from a urinary tract infection and noted that she was incontinent. This was the first occasion of record on which Ms. Taylor reported her problem.

It is Ms. Taylor's assertion that urine flowed continuously through her vagina while she was recovering in the hospital and after she had returned to her home. On October 9, 1991, she saw Dr. Paul Kradel, a Fort Smith obstetrician and gynecologist, at the Johnson County Regional Hospital in Clarksville. Dr. Kradel discovered that Ms. Taylor had a vesicovaginal fistula, *i.e.*, a small opening in the walls of the bladder and the vagina through which urine leaks from the bladder into the vagina and is discharged in an uncontrolled manner.

Dr. Kradel referred Ms. Taylor back to the Millard-Henry Clinic, and, while she refused to see Dr. Riddell, she agreed to make an appointment with his partner, Dr. Jody C. Calloway. On October 14, 1991, Ms. Taylor saw Dr. Calloway, who confirmed the diagnosis of vesicovaginal fistula and referred her to Dr. David Barclay, a Little Rock gynecologist. Ms. Taylor saw Dr. Barclay on October 24, 1991. Dr. Barclay also confirmed the diagnosis of vesicovaginal fistula and scheduled Ms. Taylor for surgery to repair the condition. On November 6, 1991, Ms. Taylor was successfully operated upon. Since that time, she has had no further urinary problems.

Ms. Taylor filed a complaint in the Johnson County Circuit Court on April 16, 1992, alleging, among other things, that Dr. Riddell negligently punctured her bladder during surgery and failed to discover the puncture or to repair it before the incision was closed. She further pleaded that "Subsequent examinations revealed a vasico-vaginal fistula just above the vaginal cuff anteriorly." Ms. Taylor also asserted that "[t]he doctrine of *res ipsa loquitur* applies."

A three-day trial was conducted in January 1994. The jury returned a unanimous verdict in favor of Dr. Riddell, and the circuit court dismissed the complaint with prejudice. From that judgment, this appeal arises.

I. Res ipsa loquitur

In her first argument for reversal, Ms. Taylor contends that the trial court erred in refusing to give her requested instruction on the applicability of the doctrine of *res ipsa loquitur*.[1] At the

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[1]The doctrine of *res ipsa loquitur* (Latin for "the thing speaks for itself") had its

conclusion of the testimony, Ms. Taylor tendered Plaintiff's Requested Instruction No. 1, based on AMI Civil 3d 610:

> With respect to the question of whether Defendant was negligent, Plaintiff has the burden of proving each of the following two propositions:
>
> First: That the injury was attributable to the surgery while the operative site or field was under the exclusive control of defendant.
>
> Second: That in the normal course of events, no injury would have occurred if Defendant had used ordinary care while the operative site or field was under his exclusive control.
>
> If you find that each of these two propositions has been proved by Plaintiff, then you are permitted, but not required, to infer that Defendant was negligent.

The trial court ruled that the proffered instruction was "not proper in this case pursuant to the Supreme Court's holding in *Schmidt* v. *Gibbs*."

[redacted] In *Schmidt* v. *Gibbs*, 305 Ark. 383, 807 S.W.2d 928 (1991), a wrongful-death medical malpractice case, we set forth those circumstances in which the doctrine of *res ipsa loquitur* may be invoked:

> 1. The defendant owes a duty to the plaintiff to use due care;
>
> 2. The accident is caused by the thing or instrumentality under the control of the defendant;

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origins in a 19th-century English case, *Byrne* v. *Boadle*, 159 Eng. Rep. 299 (1863), in which a barrel of flour rolled out of a warehouse window and fell upon a pedestrian beneath. The classic statement of the doctrine was formulated in *Scott* v. *London & St. Katherine Docks Co.*, 159 Eng. Rep. 665 (1865): "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." *See* Keeton, *Prosser and Keeton on the Law of Torts* 243-244 (5th ed. 1984).

> 3. The accident which caused the injury is one that, in the ordinary course of things[,] would not occur if those having control and management of the instrumentality used proper care;
>
> 4. There is an absence of evidence to the contrary. [Citations omitted.]
>
> If each of the elements for the application of the doctrine of *res ipsa loquitur* is present, then "the accident from which the injury results is prima facie evidence of negligence and shifts to the defendant the burden of proving that it was not caused through any lack of care on its part." [Citation omitted.]

305 Ark. at 387, 807 S.W.2d at 931.

[redacted] We went on, in *Schmidt*, to survey the "confusing and unclear" history of the application of the doctrine of *res ipsa loquitur* in Arkansas,[2] noting that from *Routen* v. *McGee*, 208 Ark. 501, 186 S.W.2d 779 (1945), onward, cases and treatise writers had concluded that Arkansas did not recognize the doctrine's applicability to the practice of medicine and surgery. Clarifying the case of *Brown* v. *Dark*, 196 Ark. 724, 119 S.W.2d 529 (1938), which had been misconstrued in *Routen*, we expressly held that "the doctrine of *res ipsa loquitur* may apply in cases of medical malpractice on the part of any and all medical care providers as defined by the Medical Malpractice Act if the essential elements for application of the doctrine exist." 305 Ark. at 389, 807 S.W.2d at 932.

The *Schmidt* opinion is directly on point and requires a close reading. There, the appellant, acting as administrator of his wife's estate, sought to hold the appellees (a surgeon, an anesthesiologist, attending nurses, a hospital, and its carrier) liable under *res ipsa loquitur* for the death of his wife nearly two weeks after an

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[2]Arkansas has not been singular in that regard. Professor Prosser noted that "the use of the phrase itself has become a definite obstacle to any clear thought, and it might better be discarded entirely." Prosser, *Handbook of the Law of Torts* 213 (4th ed. 1971). It has also been noted that "there is nothing distinctive about the doctrine" and that "[i]n a formal sense, . . . the logic used in res ipsa loquitur cases is the same as that in all cases of circumstantial evidence." Harper, James, & Gray, 4 *The Law of Torts* 27 (2d ed. 1986).

operation in which a six-inch flame shot from her throat as she was undergoing a tracheostomy procedure. This court held that the appellant was not entitled to the application of the doctrine of *res ipsa loquitur* against the anesthesiologist and his nurse because, with respect to the fourth requirement, there was "evidence to the contrary" that indicated the use of "proper care":

> The expert witness selected by the appellant has testified in clear and unequivocal terms that the care and treatment offered by Dr. Browning and Nurse Ray was not below the standard of care required. In addition, the appellees' expert witness, Dr. Robert G. Valentine, corroborates Dr. Jeffries' opinion that Dr. Browning and Nurse Ray had met the requisite standard of care.
>
> Appellant attempts to maintain the potential liability of Dr. Browning and Nurse Ray by submitting Dr. Jeffries' affidavits opining that the type of fire which occurred in this case could not happen absent negligence on behalf of someone on the surgical team. . . . However, this evidence is insufficient to overcome Dr. Jeffries' testimony that the actions of Dr. Browning and Nurse Ray were not below the standard of care required. This testimony constitutes "evidence to the contrary" thereby preventing the application of the doctrine of *res ipsa loquitur.*

Id.

On the other hand, we held that, with respect to the hospital's insurance carrier, the second element of *res ipsa loquitur* had been established because "[t]he operating room, equipment, and nurses were all things or instrumentalities under the control or management of Baptist Medical Center." 305 Ark. at 390, 807 S.W.2d at 932. Further, we declared that expert testimony had set forth facts that, "if believed, would satisfy each of the remaining elements necessary for the application of the doctrine of *res ipsa loquitur.*" *Id.*

The difference in the respective situations of the anesthesiologist and nurse and the insurance carrier was explained thus:

> [T]here was clear and unequivocal testimony that Dr. Browning and Nurse Ray had met the standard of care. The testimony concerning the care provided by nurses who

> were employees of Baptist Medical Center is not so clear and unequivocal.
>
> The evidence before the trial court concerning the care provided by the nurses and Baptist Medical Center consisted of the deposition and two affidavits of plaintiff's expert witness, Dr. Mervyn Jeffries. In his deposition, Dr. Jeffries stated that he was not "in any way critical of the nurses in the care they provided during the tracheostomy procedure." This testimony is not an unequivocal statement that the nurses met the requisite standard of care. In Dr. Jeffries' affidavits he opines that the type of fire that occurred in this case could not happen absent negligence on the part of someone on the surgical team comprised of Dr. Gibbs, Dr. Browning, Nurse Ray, and the nursing team. If believed, these facts, in our view, would warrant the application of the doctrine of *res ipsa loquitur.*

305 Ark. at 390, 807 S.W.2d at 932-933.

In the present case, only the first necessary element of *res ipsa loquitur* was present. A physician-patient relationship existed between Dr. Riddell and Ms. Taylor, and it is undisputed that the former owed a duty to the latter to use due care.

According to Ms. Taylor, the operative site and the surgical instruments were under the exclusive control of Dr. Riddell and his assistant, Linda Bolte, a certified operating-room technician. Yet testimony differed on whether the "accident" (as the *Schmidt* phrasing has it) was caused by the "thing or instrumentality" under the control of Dr. Riddell and his assistant.

The "accident" at issue was the formation of the vesicovaginal fistula. Ms. Taylor presented the videotaped testimony of Dr. Bernard Nathanson of New York, who surmised that a misplaced suture caused the opening. No proof was adduced to support this view. Indeed, Dr. Nathanson's speculation was explicitly refuted by Dr. Calloway, who stated that there was no evidence of a misplaced suture and that blood would have been present in the urine had the bladder been punctured during surgery. Dr. Calloway also noted that, prior to the hysterectomy, Ms. Taylor had undergone three Caesarean sections and "already had a lot of scar tissue present." Consequently, there was a decreased blood

flow to the area around the bladder and vaginal cuff. Dr. Calloway suggested the likelihood that when Dr. Riddell operated on Ms. Taylor, "he probably further compromised that tissue," thereby decreasing the blood flow and leading to the necrosis, or death, of the tissue and its sloughing off.

Dr. Barclay, who repaired the fistula, also testified that, based on "the sequence of events," it was his opinion that "there was a thinned area of the bladder. It underwent necrosis over a period of seven to ten days after which [Ms. Taylor] began noticing leakage." Moreover, he disagreed with Dr. Nathanson's assessment that the presence of a fistula of itself indicates negligence on the part of the physician, pointing out that "any surgeon who has done a lot of pelvic surgery, *particularly on women who have had sections* or have other complications of the pelvis, eventually there is going to be a vesicovaginal fistula; and that's just the way it is no matter how good he might be."

In his own testimony, Dr. Riddell described the Caesarean-section scar tissue connecting Ms. Taylor's bladder and vaginal cuff as having been "glued down like cement." He explained that, if he had entered the bladder during surgery, he would have seen urine spilling out immediately, and blood would have been detected in the urine. Ms. Taylor's urine, however, "was clear through the case." Dr. Riddell stated that the fistula occurred because Ms. Taylor "had a decreased blood supply to a small area of the bladder that allowed it to basically dissolve away, and it took time for this to occur, and subsequently the urine found a way to escape from the bladder and go through — erode into the vagina."

Dr. John David McClanahan, a obstetrician and gynecologist from Fort Smith, testifed as an independent witness for Dr. Riddell that the normal course of fistula formation following surgery is two weeks or later. Given the description of clear urine in the post-operative nurses' notes, Dr. McClanahan concluded that "there would have been no puncture to the bladder as this would have manifested itself in some blood noticed in the urine, and there was no evidence of any significant urinary leakage post-operatively according to the hospital records." He suggested that the fistula formed after Ms. Taylor visited the hospital emergency room on September 15, 1991. Dr. McClanahan opined that

the fistula resulted from "a development of tissue necrosis and sloughing with the bladder tissue eroding through the vaginal wall." He characterized the presence of the fistula as a "maloccurrence" rather than as a result of negligence because the physician "was working with tissue that had already been operated on three times previously, and there had been considerable dissection and difficult dissection required in the operation just prior to the operation he performed." Contradicting Dr. Nathanson, Dr. McClanahan found no objective evidence of a misplaced suture.

The record reveals an imposing volume of testimony pointing to a cause of Ms. Taylor's vesicovaginal fistula other than a "thing or instrumentality" under the control of Dr. Riddell. The trial court was thus able to determine, as a matter of law, that the second prong of the *Schmidt* test had not been met.

Regarding the third element of the *Schmidt* requirements, Ms. Taylor failed to establish that the "accident" that caused the injury was one that, in the ordinary course of things, would not have occurred if those having control and management of the instrumentality had used proper care. As in *Schmidt* v. *Gibbs, supra*, there was clear and unequivocal testimony that Dr. Riddell had met the requisite standard of care.

It was Ms. Taylor's expert witness, Dr. Nathanson, who in essence established the context for considering the standard of proper care. In his videotaped deposition, he explained that Dr. Riddell, although practicing in Russellville, Arkansas, was subject to the same standard of care that applies to all board-certified obstetricians and gynecologists nationwide: "the local standard is a national standard. . . . [T]he physicians here are all Board certified; Dr. Riddell, Dr. Calloway, Dr. Barclay, and so on. . . . There is no such thing as a local standard, when one speaks of being Board certified."

In light of that "national standard," the testimony of the witnesses indicates that the complication of a vesicovaginal fistula is, as Dr. Barclay put it, "a recognized risk of hysterectomy in the best hands." Even Dr. Nathanson acknowledged that Ms. Taylor was at increased risk for such a complication due to scarring from her three Caesarean sections. Dr. Barclay stated that Dr. Riddell did not deviate from the standard of care in performing the surgery. Dr. McClanahan emphasized that the presence of a

genital urinary fistula is "not necessarily a result of negligence" and that Dr. Riddell "exercised the standard of care appropriate to this area." Hence, the third element of the *Schmidt* test was not present.

Finally, the fourth part of the *res ipsa loquitur* requirements, an "absence of evidence to the contrary," was not satisfied. The foregoing summary of testimony from Drs. Calloway, Barclay, Riddell, and McClanahan illustrates the abundance of credible evidence placed before the trial court to counter the assertions of Ms. Taylor and Dr. Nathanson. Further, apart from Ms. Taylor's diary entries (the earliest of which she acknowledged had been written "after a few days") that noted a problem with leakage during the period of her hospitalization, the nurses' records of bed-linen changes and other evidence indicated nothing of the kind.

It cannot be said that the trial court erred as a matter of law in denying the requested *res ipsa loquitur* instruction.

II. AMI 1501

For her second point for reversal, Ms. Taylor argues that the trial court's inclusion of the second paragraph of AMI Civil 3d 1501 in Instruction No. 8 amounted to a comment on the evidence in violation of the Arkansas Constitution. The disputed language reads as follows:

> Now, in deciding whether Doctor Michael Riddell applied the degree of skill and learning which the law required of him, you may consider only the evidence presented by the surgeons called as expert witnesses.

Ms. Taylor contends that this portion of the instruction unconstitutionally comments on the evidence by calling particular attention to the testimony of the physicians appearing as expert witnesses. However, the authorities on which she relies — all of them criminal cases[3] — are inapposite to the circumstances of the present case.

The second paragraph of AMI 1501 should be used only when the plaintiff asserts that the doctor failed to apply the

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[3]*Walker* v. *State*, 239 Ark. 172, 388 S.W.2d 13 (1965); *Bing* v. *State*, 52 Ark. 263, 12 S.W. 559 (1889); *Keith* v. *State*, 49 Ark. 439, 5 S.W. 880 (1887).

requisite degree of skill and learning. *See* "Note on Use," AMI Civil 3d 1501. Ms. Taylor's claim, grounded in her expert's supposition that the fistula was formed during surgery by a misplaced suture, is certainly an attack on Dr. Riddell's skill, necessitating the introduction of and reliance upon expert testimony. This court has held that, while expert testimony is not required when the asserted negligence lies within the comprehension of a lay jury, such as a surgeon's failure to sterilize instruments or to remove a sponge before closing an incision, when the applicable standard of care is not a matter of common knowledge, the jury must have the assistance of expert witnesses in coming to a conclusion on the issue of negligence. *Napier* v. *Northrum*, 264 Ark. 406, 572 S.W.2d 153 (1978); *Graham* v. *Sisco*, 248 Ark. 6, 449 S.W.2d 949 (1970). Here, the occurrence of a vesicovaginal fistula clearly lies outside the bounds of common knowledge.

[redacted] An instruction that merely sets out the law applicable to the issue is not an improper comment on the evidence. *Dawson* v. *Pay Less Shoes #904 Co.*, 269 Ark. 23, 598 S.W.2d 83 (1980). The second paragraph of AMI 1501 does not provide for the testimony of any particular expert witness to be given greater weight; rather, it simply instructs the jury that, when a physician's skill or learning has been challenged, the applicable standard of care is to be determined exclusively through the assistance of expert testimony. When a model instruction is applicable in a case, it shall be used unless it does not accurately state the law. *Boyd* v. *Reddick*, 264 Ark. 671, 573 S.W.2d 634 (1978). The trial court did not err in giving the second paragraph of AMI 1501.

[redacted] Ms. Taylor also contends that the trial court erred in refusing to give her requested Instruction No. 3, based on AMI Civil 3d 102, pertaining to the jury's personal observations and experiences. This instruction, however, may not be used when AMI 1501 is given, except in conjunction with an issue that does not require expert testimony. *See* "Note on Use," AMI Civil 3d 102; *Duke* v. *Lovell*, 262 Ark. 290, 556 S.W.2d 416 (1977). As the circumstances of the present case with reference to the standard of care imposed on board-certifiied obstetricians and gynecologists required the introduction of expert testimony from those with similar qualifications, the trial court correctly rejected the instruction based on AMI 102.

III. AMI 603

Ms. Taylor's third and final point on appeal is that the trial court erred in giving Instruction No. 7, based on AMI Civil 3d 603:

> Now, the fact that an injury occurred is not, of itself, evidence of negligence on the part of anyone.

She asserts that the instruction violates the ban in Ark. Const. Art. 7, § 23, on the charging of juries with regard to matters of fact, reasoning that an injury is a fact, and, as such, it is impermissible for the trial court to comment upon it.

To support her position, Ms. Taylor cites a Georgia tort case, *Tolbert* v. *Duckworth*, 423 S.E.2d 229 (1992), in which the supreme court of that state held that the Georgia pattern jury charge on accident should be eliminated in civil cases. That instruction, however, defined the word "accident" and bears no resemblance to AMI 603. Moreover, the *Tolbert* case did not involve the issue of whether such an instruction was an unconstitutional comment on the evidence.

[redacted] In any event, AMI 603 has been declared a correct statement of the law. *Pilkington* v. *Riley Paving Co.*, 271 Ark. 746, 610 S.W.2d 570 (1981). It was, therefore, not error for the trial court to give the instruction.

Affirmed.

COLUMBIA MUTUAL CASUALTY
INSURANCE COMPANY *v.* Trehlan INGRAHAM

94-1162 896 S.W.2d 903

Supreme Court of Arkansas
Opinion delivered May 8, 1995

Roy & Lambert, by: *Jerry L. Love*, for appellant.

John W. May Law Office, by: *John W. May*, for appellee.

DAVID NEWBERN, Justice. Trehlan Ingraham, the appellee, applied for casualty insurance to be provided by the appellant, Columbia Mutual Casualty Insurance Company (Columbia), for a residence he owned. He did so at the Rowe Insurance Agency in Farmington where he was assisted by Ms. Spears, an agency employee. The application form Mr. Ingraham signed included a 30-day binder. He gave Ms. Spears a check for the premium covering one year. Columbia rejected the application within the 30-day period and so informed the Rowe Agency which did not inform Mr. Ingraham of the rejection. Some 56 days after the application was executed the residence burned. The issues before the Trial Court were primarily whether the written binder agreement had been modified orally to extend coverage beyond the 30 days and whether Ms. Spears had authority to agree to modify the binder on behalf of Columbia. A jury awarded Mr. Ingraham $26,000, the amount for which the residence was insured. We agree with Columbia's contention that its motion for directed verdict should have been granted.

Mr. Ingraham's contention at the trial and now is that his conversation with Ms. Spears resulted in an oral modification of the written agreement shown on the application form provided to the Rowe Agency by Columbia. He testified Ms. Spears told him the dwelling would be insured the minute he walked out the agency door, and that "it was supposed to last for a year." He testified Ms. Spears told him he would have to install gas heat with a thermostat instead of the wood-burning device then in place. Ms. Spears testified she was not surprised that Mr. Ingraham assumed the dwelling was covered for a year. She testified she "held herself out" as having the authority to bind Columbia to provide insurance until a policy was issued or rejected. She did not, however, testify that she told Mr. Ingraham that; nor did she tell him the binder was only for 30 days. She did say she "could have" told him her opinion that the binder was good beyond a 30-day period. Both testified they did not discuss the binder language, and Mr. Ingraham said he did not read it.

The question before us is not simply whether an oral modification was reached. We need not even reach that issue in view

of our conclusion that the evidence was insufficient to show Ms. Spears had the authority to bind Columbia beyond the terms of the written application and binder.

In *Dodds* v. *Hanover Ins. Co.*, 317 Ark. 563, 880 S.W.2d 311 (1994), we distinguished between a general insurance agent and a soliciting agent:

> A general agent is ordinarily authorized to accept risks, to agree upon the terms of insurance contracts, to issue and renew policies, and to change or modify the terms of existing contracts. A soliciting agent is ordinarily authorized to sell insurance, to receive applications and forward them to the company or its general agent, to deliver policies when issued and to collect premiums. *Holland* v. *Interstate Fire Ins. Co.*, 229 Ark. 491, 316 S.W.2d 707 (1958). In addition, a soliciting agent has no authority to agree upon the terms of the policies or to change or waive those terms, nor can his knowledge be imputed to the company he represents. *Id. See also Continental Ins. Cos.* v. *Stanley*, 263 Ark. 638, 569 S.W.2d 653 (1978).

An oral agreement to insure will be enforced if made by a general agent. *Commercial Standard Ins. Co.* v. *Moore*, 237 Ark. 845, 376 S.W.2d 675 (1964). Counsel for Mr. Ingraham conceded in oral argument that he is not contending Ms. Spears was or worked for a general agent but that she, by virtue of having told Mr. Ingraham to change his heating system, and by her other actions, presented apparent authority to bind Columbia in excess of the written agreement. The only evidence whatsoever that Columbia had clothed Ms. Spears or her agency with such authority was her deposition testimony, apparently introduced by way of impeachment on cross-examination. She said someone at Columbia once told her that a binder was effective during the usual "turn-around period." Ms. Spears testified the turn-around time was often in excess of 30 days. She could not remember the name of the Columbia employee who said a binder could last longer than 30 days.

Penny Moore, an underwriter working for Columbia, testified Columbia's normal turn-around time from receipt of application until issuance of a policy or rejection of the application was two or possibly three weeks. In this case, it was nine days.

She also testified that Columbia records showed no money was forwarded to Columbia with the application of Mr. Ingraham.

In *Henry* v. *Gaines-Derden Enter., Inc.*, 314 Ark. 553, 863 Ark. 828, (1993) we reiterated the definition of apparent authority:

> Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. . . .

A statement that some unknown person at Columbia once told Ms. Spears that a binder remained good during the usual turn-around time hardly constitutes substantial evidence that Ms. Spears was clothed with apparent authority to extend the coverage period of a written binder-application agreement.

In *Dixie Life & Acc. Ins. Co.* v. *Hamm,* 233 Ark. 320, 344 S.W.2d 601 (1961), we quoted with approval the following language from earlier cases:

> "A principal is not bound by the acts and declarations of an agent beyond the scope of his authority. A person dealing with an agent is bound to ascertain the nature and extent of his authority. No one has the right to trust to the mere presumption of authority, nor to the mere assumption of authority by the agent."

Cf. General Cas. Co. of America v. *State*, 229 Ark. 485, 316 S.W.2d 704 (1958), in which we held that one dealing with an agent clothed with a broad power of attorney was not considered to be on notice of secret limitations placed on the agency by the principal.

Mr. Ingraham has presented nothing from which a jury could reasonably conclude Ms. Spears or the Rowe Agency had apparent authority, beyond that of a soliciting agent. Nothing was presented to show they had the authority, apparent or otherwise, to bind Columbia beyond the terms of the form it had provided the Rowe Agency for insurance applications.

Reversed and dismissed.

Greta SOSEBEE *v.* COUNTY LINE SCHOOL DISTRICT

94-318 897 S.W.2d 556

Supreme Court of Arkansas
Opinion delivered May 8, 1995
[Rehearing denied June 12, 1995.*]

*Brown, J., would grant rehearing.

Mitchell, Blackstock & Barnes, by: *Clayton R. Blackstock*, for appellant.

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., by: *Dan F. Bufford* and *Brian Allen Brown*, for appellee.

DAVID NEWBERN, Justice. This is a Teacher Fair Dismissal Act case. See Ark. Code Ann. §§ 6-17-1501 through 6-17-1510 (Repl. 1993). The Act provides for an appeal to circuit court of a school board's decision to dismiss a nonprobationary teacher. It allows a circuit court to take "[a]dditional testimony and evidence . . . to show facts and circumstances showing that the termination or nonrenewal was lawful or unlawful." § 6-17-1510(d). The main issue before us is whether the Act creates a special proceeding or one in which the Arkansas Rules of Civil Procedure apply. Ark. R. Civ. P. 81(a). We hold the Rules apply.

Greta Sosebee, the appellant, was a nonprobationary teacher, having been employed for eleven years by the appellee, County Line School District (the District). *See* § 6-17-1502(a)(2) and (b). On May 1, 1992, her teaching contract was renewed for the 1992-1993 school year. On May 22, 1992, the District Superintendent recommended that Ms. Sosebee's 1992-1993 contract be terminated due to alleged absences and instances of tardiness. The School Board for the County Line School District held a hearing on June 25, 1992, and voted in favor of terminating the contract.

Section 6-17-1510(d) requires an appeal to circuit court of a school board decision be taken within 75 days of the date of

written notice of the board's action. On September 4, 1992, which was within the 75-day period, Ms. Sosebee appealed the decision to the Franklin Circuit Court. She claimed the District violated the Teacher Fair Dismissal Act, its own personnel policies, and her Fourteenth Amendment right to due process of law. Ms. Sosebee voluntarily nonsuited her case on January 13, 1993. The Trial Court's order was as follows: "Plaintiff has informed the Court she is nonsuiting this case and the case is, therefore, dismissed without prejudice."

On October 12, 1993, Ms. Sosebee filed another notice of appeal which, unlike her initial notice, contained no mention of deprivation of constitutional rights. The District moved to dismiss, claiming the notice had not been filed within 75 days of the Board's decision. The District argued the Act contained no provision which would allow refiling after a voluntary nonsuit and that Ark. R. Civ. P. 41(a) was inapplicable. On December 8, 1993, Ms. Sosebee filed an amended notice of appeal, this time including her constitutional claim. At a later time on that same date, the order granting dismissal, which had been signed days earlier, was filed. Ms. Sosebee then moved to set aside the dismissal, contending the court had not been aware of her amended notice.

Ms. Sosebee claims her case should not have been dismissed for three reasons; (1) Rule 41(a) permitted the dismissal without prejudice, (2) Ark. Code Ann. § 16-56-126 (1987) allows her to refile her case within one year, and (3) even if her appeal pursuant to the Act is barred, her due process claim should not have been dismissed because it was brought within the three years allowed by the statute of limitations applicable to such a claim. Ark. Code Ann. § 16-56-105 (1987). She is correct on the first two points. We discuss the third point having to do with constitutional claims only to the extent of pointing out that they were not mentioned in her second notice of appeal, were not brought to the attention of the circuit court, and are not before us as a part of that which was dismissed.

1. Special proceedings

Ms. Sosebee contends the Arkansas Rules of Civil Procedure, and thus Rule 41(a) in particular, apply to the case pursuant to Ark. R. Civ. P. 81. Rule 81(a) states:

> Applicability in General. These rules shall apply to all civil proceedings cognizable in the circuit, chancery, and probate courts of this State except in those instances where a statute which creates a right, remedy or proceeding specifically provides a different procedure in which event the procedure so specified shall apply.

The Rules thus apply to a proceeding unless a statute, which creates a right, specifically provides for different procedure. Ms. Sosebee argues the right in question in this case is the right to sue for a breach of contract which is rooted in common law even though her contract was created pursuant to the Teacher Fair Dismissal Act. She also argues the Rules apply because, even if the Act were held to create a right, it does not specifically provide a procedure "different" from the nonsuit without prejudice procedure found in Rule 41(a).

Since the advent of our original Civil Code, there have been two types of proceedings in Arkansas law. One is a civil action; the other is a special proceeding. *Coleman* v. *Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1974). The Arkansas Rules of Civil Procedure apply to civil actions. Rule 2. A civil action is an ordinary proceeding in a court of justice by one party against another for the enforcement or protection of a private right or the redress or prevention of a private wrong. *Id.* It may also be brought for the recovery of a penalty or forfeiture. *Rockafellow* v. *Rockafellow*, 192 Ark. 563, 93 S.W.2d 321 (1936). All proceedings not covered by the definition of "civil action" are special proceedings. *Garrett* v. *Andrews*, 294 Ark. 160, 741 S.W.2d 257 (1987).

In *Weidrick* v. *Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), we held Ark. R. Civ. P. 3 superseded statutory provisions purporting to govern the procedure for commencing a medical malpractice action. In the process of reaching that decision it was necessary for us to consider whether the medical malpractice action had been made a "special proceeding" as that term is used in Rule 81(a).

An action brought pursuant to the Medical Malpractice Act of 1979, as amended, now codified at Ark. Code Ann. §§ 16-114-201 through 16-114-209 (1987 and Supp. 1993), was a much better candidate for "special proceeding" status than the Teacher Fair Dismissal Act. The Medical Malpractice Act provided not

only the means of commencing the action, but it dealt with burden of proof, the means of alleging damages, regulation of expert witnesses, and costs in the event of "false and unreasonable pleadings." In contrast, the Teacher Fair Dismissal Act only states a time limit for appealing to a circuit court which may then take evidence and decide whether a school board's action was "lawful or unlawful." No special rules are provided.

We held the medical malpractice action was not a special proceeding, however, because the basis of the action "did not originate as a right, remedy, or proceeding created legislatively; it had its origins at common law." We pointed out that the action was recognized long before the enactment of the legislation in question and then said:

> A Reporter's Note to Rule 81(a) provides this commentary on the Rule 81(a) exception: "The exception would be those proceedings established by statute and the statute prescribes a different procedure." That is precisely correct. The Rule 81(a) exception is limited to special proceedings created exclusively by statute where a special procedure is appropriate and warranted. It was never the intention of this court to accede to the General Assembly on matters of civil procedure for civil actions.

Just as we observed roots of medical malpractice actions long antedating the statute in the *Weidrick* case, we observe very thick and long breach of contract roots extending from the Teacher Fair Dismissal Act. We said as much in *Springdale Sch. Dist.* v. *Jameson*, 274 Ark. 78, 621 S.W.2d 860 (1981). In that case, Michael Corso had unsuccessfully sought redress before the Springdale School Board pursuant to the Teacher Fair Dismissal Act for nonrenewal of his teaching contract. He filed a notice of appeal in circuit court in which he alleged that the Springdale School District violated the Teacher Fair Dismissal Act and the Arkansas Teachers' Salary Law. The Springdale District moved to dismiss and, in the alternative, to transfer to chancery. Both motions were denied, and the Springdale District sought a writ of prohibition. We denied the writ on the ground that the Circuit Court had jurisdiction because the action was for "an alleged breach of a contract implied by law." Although that was a misstatement, as the reference should have been to breach of a con-

tract implied in fact, we most certainly found the action to be, as Ms. Sosebee describes it in this case, "rooted" in contract.

Before departing from this point, we refer to *Wilson* v. *C & M Used Cars*, 46 Ark. App. 281, 878 S.W.2d 427 (1994), which has been cited by the District in support of its position that the dismissal in this case was with prejudice. A municipal court awarded damages to Shirley Wilson in a breach of contract action. C & M Used Cars appealed to circuit court which dismissed the appeal for lack of prosecution. Later the court entered an order proclaiming that the dismissal had been without prejudice in accordance with Rule 41(b) and that the municipal court order "became invalid or set aside" by the order of dismissal. The Court of Appeals reversed and correctly held that the judgment of a municipal court remains effective on appeal to circuit court. Arkansas R. Inf. Ct. 9 provides for a supersedeas bond in such cases on appeal.

The Court of Appeals based its decision on *Watson* v. *White*, 217 Ark. 853, 233 S.W.2d 544 (1950), and *Fowlkes* v. *Central Supply Co.*, 187 Ark. 201, 58 S.W.2d 922 (1933). In the *Fowlkes* case, Central Supply Co. sued Mr. Fowlkes in a justice of the peace court where judgment was rendered in favor of Mr. Fowlkes. Central Supply Co. perfected its appeal to circuit court and then declared it was taking a nonsuit without prejudice. It then refiled its suit in circuit court. Mr. Fowlkes pleaded *res judicata*, but his plea was overruled, and judgment was entered for Central Supply Co. On appeal we held the dismissal was with prejudice and the justice court judgment was entitled to *res judicata* status. We recognized the statutory right, now found in Rule 41, of a claimant to dismiss without prejudice in most circumstances but held it did not apply in appeals from justice courts. In the *Watson* case, we applied the same holding to dismissal of a counter claim.

The *Wilson* case, the *Watson* case, and the *Fowlkes* case all involved appeals from a lower court to a circuit court. All involved the issue of preservation of a lower court's judgment in the face of an appeal which had been dismissed. The case now before us is about a very different sort of appeal. There was no court judgment of any sort on appeal to a circuit court. Rather, we have on appeal a decision by none other than one of the parties to the litigation, *i.e.*, the County Line School District. There has been no

prior adjudication of Ms. Sosebee's claim. Although the circuit court may take into consideration the record of the administrative proceedings, it is apparent that a trial of the claim may ensue, with evidence presented by the parties. No doubt the Rules of Civil Procedure will have to be used for that purpose, just as they were apparently used as the bases of pleadings and discovery in the case now before us. The first adjudication between the parties was in the Franklin Circuit Court.

[redacted] We are unwilling to say that, just because § 6-17-1510(d) refers to a nonprobationary teacher's exclusive judicial remedy as an "appeal" to circuit court, it becomes a special proceeding. Using the terminology of Rule 81(a), we hold that the right being pursued by Ms. Sosebee was not created by the Teacher Fair Dismissal Act. While that Act provides administrative procedures for pursuit of a nonprobationary teacher's breach of contract claim preceding an appeal to circuit court, once the matter is before a circuit court, no procedures are prescribed other than by the Arkansas Rules of Civil Procedure. The Rules apply.

2. Savings statute

[redacted] From the decision that Rule 41(a) permitted the voluntary nonsuit without prejudice, it follows that § 16-56-126 allows the appeal to be refiled within one year. The Statute provides, in pertinent part:

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

The District argues, without citation to authority, that § 16-56-126 is not applicable because Ms. Sosebee's appeal to the circuit court is not an "action" as the term is used in the statute. That is reiteration of the special proceeding argument dealt with above.

[redacted] The District also contends that the 75-day limit for appeals is not a statute of limitation but is a jurisdictional require-

ment and outside the scope of § 16-56-126, citing *Searcy County* v. *Holder*, 257 Ark. 435, 516 S.W.2d 901 (1974). There it was held that Sheriff Holder's claims for expenses were barred because he failed to appeal a county court denial of the claims within six months as required by law.

Unlike that of Sheriff Holder, Ms. Sosebee's initial appeal was timely.

3. Constitutional claims

Finally, Ms. Sosebee contends her action should not have been dismissed because her notice of appeal also contained allegations that her rights to due process had been violated. As the applicable statute of limitation, § 16-56-105, allows three years for a constitutional claim, she contends her deprivation of constitutional rights complaint was erroneously dismissed because the 75-day notice of appeal requirement does not apply to such a claim and Rule 41(a) permits her to take a nonsuit of it without prejudice to refiling it.

Although, technically speaking, Ms. Sosebee amended her second notice of appeal to include her constitutional rights deprivation claim prior to the filing of the order of dismissal, she did not do so prior to the time the judge signed the order of dismissal. The constitutional claim in her first notice was nonsuited. There is no evidence whatsoever that the constitutional issue was brought to the Court's attention prior to the order of dismissal being signed and filed of record. We do not reverse a trial court for having failed to consider a matter which was not brought to his or her attention by the party seeking to have it considered. *Bell* v. *Estate of Bell*, 318 Ark. 483, 885 S.W.2d 877 (1994); *City of Ft. Smith* v. *Driggers*, 305 Ark. 409, 808 S.W.2d 748 (1991). We make no ruling on the viability of the constitutional claim at this point. We say only that it does not form a basis of any issue presently before us.

Reversed and remanded.

Special Justice BILL R. HOLLOWAY joins in this opinion.

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

GLAZE, J., not participating.

ROBERT L. BROWN, Justice, dissenting. The opinion handed down today represents a major shift with far-reaching impact. For the first time, we have applied the Rules of Civil Procedure to appeals from school board actions on teacher dismissals. That runs directly counter to the express language of Ark. Code Ann. § 6-17-1510 (Repl. 1993). This is analogous to applying the Rules of Civil Procedure to judicial review of administrative decisions which we have refrained from doing in the past. *See Wright* v. *Arkansas State Plant Bd.*, 311 Ark. 125, 842 S.W.2d 42 (1992); *Whitlock* v. *G.P.W. Nursing Home, Inc.*, 283 Ark. 158, 672 S.W.2d 48 (1984). That, however, is the next logical step under the rationale of today's opinion.

The statutory language at issue is this:

> (d) The exclusive remedy for any nonprobationary teacher aggrieved by the decision made by the board shall be an appeal therefrom to the circuit court of the county in which the school district is located, within seventy-five (75) days of the date of written notice of the action of the board. Additional testimony and evidence may be introduced on appeal to show facts and circumstances showing that the termination or non-renewal was lawful or unlawful.

Ark. Code Ann. § 6-17-1510 (Repl. 1993). The clear language is that these are *appeals* and that they must be filed within 75 days of notice of the board action.

The majority's opinion would have it that a notice of appeal from school board action is an original civil action commenced in circuit court for breach of contract. It is not. Rule 2 of the Arkansas Rules of Civil Procedure refers to one form of action known as "civil action" filed in chancery or circuit court. Under our statutes, "civil action" is defined more precisely as "an ordinary proceeding in a court of justice by one (1) party against another for the enforcement or protection of a private right or the redress or prevention of a private wrong. A civil action may also be brought for the recovery of a penalty or forfeiture[.]" Ark. Code Ann. § 16-55-102(a)(2) (1987). An appeal is a different procedure as we all know. It represents a complaint to a higher tribunal to correct the injustice done or error committed by the inferior tribunal. *Black's Law Dictionary*, p. 96 (6th Ed. 1990).

The effect of today's decision is to rewrite the statute. "Appeal" now becomes "civil action for breach of contract." The 75-day time frame is apparently eliminated altogether. It is replaced by the statute of limitations prescribed for civil actions by the General Assembly, as well as the Savings Statute (Ark. Code Ann. § 16-56-126 (1987)). This is not a case where a civil action — medical malpractice — is involved, and one of our rules of civil procedure supersedes a legislative act. *See, e.g., Weidrick* v. *Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992). Rather, in this case the majority opinion changes the teacher-appeal statute and *applies* the civil procedure rules to an administrative appeal.

Teacher appeals to circuit court are special proceedings expressly excepted from the Rules of Civil Procedure and have always been treated as such. Rule 81(a) states:

> (a) Applicability in General. These rules shall apply to all civil proceedings cognizable in the circuit, chancery, and probate courts of this State except in those instances where a statute which creates a right, remedy or proceeding specifically provides a different procedure in which event the procedure so specified shall apply.

That is precisely what we have in the case before us — a statute creating a different proceeding. The fact that evidence may be introduced in these appeals does not convert them into original actions. Evidence may also be taken in circuit court concerning alleged procedural irregularities before an administrative agency in any administrative appeal under the Administrative Procedure Act. *See* Ark. Code Ann. § 25-15-212(g) (Repl. 1992). We certainly have not deemed judicial review of administrative actions to be original actions, as already indicated in this dissent. *See Wright* v. *Arkansas State Plant Bd., supra; Whitlock* v. *G.P.W. Nursing Home, Inc., supra.*

The majority's attempt to distinguish the Court of Appeals case, *Wilson* v. *C & M Used Cars*, 46 Ark. App. 281, 878 S.W.2d 427 (1994), is not successful. That case clearly holds that Ark. R. Civ. P. 41(b) pertaining to nonsuits is inapplicable to appeals from municipal court to circuit court. The reasoning of the Court of Appeals was that Rule 41(b) did not apply to a continuation of the municipal court action but only to "original actions in circuit court." 46 Ark. App. at 286, 878 S.W.2d at 429. An administrative appeal does not qualify.

In my judgment, both parties in this litigation will rue the day that civil procedure rules were applied to these matters because flexibility is lost, appeals will be delayed, and the proceedings by necessity will become more cumbersome. That inures to the benefit of neither the teacher nor the school district. Moreover, Ms. Sosebee has not lost her constitutional claim of deprivation of due process. She still has time to commence a civil action on this basis within three years from the board action. *See, e.g., Casada* v. *Booneville School Dist. No. 65*, 686 F. Supp. 730 (W.D. Ark. 1988).

There is a scene in *Through the Looking-Glass* where this colloquy occurs between Alice and Humpty Dumpty:

> "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more or less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."

I believe in this instance the language of § 16-17-1510(d) is clear. We should withstand the temptation to have an "appeal" mean an original "civil action." I respectfully dissent.

HOLT, C.J., joins.

ARKANSAS OFFICE OF CHILD SUPPORT ENFORCEMENT *v.* Stanley HOUSE

94-1178 897 S.W.2d 565

Supreme Court of Arkansas
Opinion delivered May 8, 1995

Henry, Walden & Halsey, for appellant.

Hugh W. Harrison, Jr., for appellee.

TOM GLAZE, Justice. On October 13, 1980, appellee Stanley House was ordered to pay $26 per week for support of his minor child pursuant to a divorce decree. On December 17, 1993, the custodial parent, proceeding through the appellant Arkansas Office of Child Support Enforcement (Office), filed a petition to increase

child support payments and a petition for order to show cause. In the order to show cause filed March 14, 1994, the Office alleged that House was behind in his child support payments in the amount of $8,615.40. House responded by pleading the five-year statute of limitations under Ark. Code Ann. § 16-56-115 (1987) and stating the child support amount sought was barred. Citing *Johnson* v. *Lilly*, 308 Ark. 201, 823 S.W.2d 883 (1992), House further contended that a more recent ten-year statute of limitations, Act 525 of 1989 [Ark. Code Ann. § 16-56-129 (Supp. 1993)], did not apply. House also claimed overpayment of $1,274.78 during the five-year period not barred by the statute of limitations.

Following a hearing, the chancellor entered his order increasing the support payments to $32 per week, and barring all arrearages prior to December 17, 1988. He limited the amount of arrearages in child support based upon the five-year statute of limitations, § 16-56-115, applied up to the date (Dec. 17, 1993) the Office filed its petition to show cause. The court further ordered that $1,237.20 in overpayments made subsequent to December 17, 1988, was to be credited against future weekly payments at the rate of $16 per week until the amount of overpayment was liquidated.

The Office appealed the lower court's July 1, 1994 order, arguing the chancellor erred in applying the five-year limitation. Although not argued in the proceeding below, the Office now claims the chancellor should have applied Act 870 of 1991 [Ark. Code Ann. § 9-14-236 (Repl. 1993)]. The Office contends Act 870 somehow entitles it and the custodial parent to additional arrears because the Act provides for an "enlarged" statute of limitations. House argues that because the Office made no mention of Act 870 below, it is precluded from making the argument now on appeal. We agree. The rule is well-established that this court will not reverse on an issue not presented to the trial court. *Hubbard* v. *Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993). We have also said that we will not consider arguments raised for the first time on appeal or where a ruling from the trial court has not been obtained. *Mobley* v. *Harmon*, 313 Ark. 361, 854 S.W.2d 348 (1993).

We point out that the Office not only failed to mention or argue Act 870 to the chancellor, it also made no argument stat-

ing why the five-year statute of limitations provided in § 16-56-115 should not have been applied to the October 13, 1980 child support order in issue. The Office's counsel's only remark made concerning the limitation issue raised by House was as follows: "I think the statute of limitations [defense counsel] is referring to is a normal five years . . . with regard to child support and that there's different statutes passed that extend that. I think that the *Court's policy is that it goes back ten years*, if I'm correct." (Emphasis added.) Defense counsel responded, "No, it's five." The court agreed. Again, the Office urged no argument as to why the trial court should not apply the five-year limitation.

In conclusion, we note that, aside from its failure to preserve its argument below, the Office's argument on appeal is convoluted and difficult to understand without speculating, at times, what the Office means — which we refuse to do. Suffice it to say, we think the Office suggests, by its argument, that Act 870 of 1991 supplants or perhaps repeals the five or ten-year statutes of limitations that have previously been utilized by Arkansas courts in child support arrearage situations. Certainly, Act 870 does not specifically amend or repeal Arkansas's earlier limitation laws, §§ 16-56-115 and 16-56-129, applied in child support arrearage cases. Nonetheless, if this is part of the Office's argument for reversal, that argument needed to be presented to the chancellor below so he could have ruled on the issue. Moreover, even if the Office's position is that the General Assembly's passage of Act 870 enlarged (or did away with) the earlier court's limitation laws, the question still remains whether the arrears House owed had already been barred under the earlier limitation laws. As stated in *Johnson*, 308 Ark. 201, 823 S.W.2d 883, this court has long held that the General Assembly cannot expand a statute of limitations so as to revive an action already barred. Once again, the chancellor was never given the opportunity to address this issue below. Accordingly, because the Office's arguments on appeal were not made or preserved below, we affirm the chancellor's decision.

Dwayne Edward STEPHEN *v.* STATE of Arkansas

CR 94-1411 898 S.W.2d 435

Supreme Court of Arkansas
Opinion delivered May 8, 1995
[Rehearing denied June 12, 1995]

[redacted]

Doug Norwood, for appellant.

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

DONALD L. CORBIN, Justice. Appellant, Dwayne Edward Stephen, appeals a judgment of the Washington County Circuit Court convicting him of driving while intoxicated, fining him $250.00 plus court costs, suspending his driver's license for ninety days, and sentencing him to serve thirty days in jail (conditionally suspended) and to attend the Ozark Guidance Center. Jurisdiction of this case is properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(3). Appellant asserts two points for reversal. We find no error and affirm.

FACTS

The facts in this case are not disputed. Arkansas State Police Officer Robert Gibson was dispatched at approximately 3:57 p.m. on October 30, 1993 to the scene of a one-vehicle accident near Spring Valley. Gibson arrived on the scene at 4:25 p.m. and discovered an unattended smashed vehicle overturned on State Highway 412, which he later testified was a "very busy road." Gibson observed a half-full bottle of liquor in the vehicle. The vehicle's driver, Gibson later testified, was on his way to the hospital.

Gibson called Arkansas State Police Officer Larry Boone and instructed him to go to the hospital and, if alcohol appeared to be involved, to collect a sample from the driver for blood alcohol testing. The blood alcohol chemical test report later showed that appellant's blood sample was collected by Boone at 4:52 p.m. and contained 0.15% blood alcohol.

After clearing the highway accident scene, Gibson arrived at the hospital where he found appellant in bed being treated by a physician for injuries to his right arm. The physician told Gibson he could talk to appellant. In response to Gibson's questions, appellant identified himself, and stated he was the driver and owner of the vehicle, and had been drinking prior to driving. Both Gibson and Boone later testified that appellant smelled of intoxicants at the hospital.

Gibson stated: "I then after I got my information, I advised him that I would be arresting him in the room at that particular time." Gibson then "left out and let the doctor finish." When the medical treatment was finished, the treating physician told Gibson that appellant needed to go home and rest. Gibson and appellant walked to Gibson's vehicle where Gibson wrote out citations against appellant for DWI, driving left of center, and not wearing a seatbelt. Gibson then drove appellant home.

Appellant was convicted in the Springdale Municipal Court on January 14, 1994 of DWI, driving left of center and not wearing a seatbelt. He appealed to the Washington County Circuit Court, where, on April 21, 1994, a bench trial was held. Officers Gibson and Boone were the state's only witnesses. Appellant's blood alcohol test report was admitted into evidence without objection. The defense presented no evidence. The trial judge dismissed the driving left of center and no seatbelt charges for lack of proof, but found that appellant was guilty of DWI. The trial court's judgment and sentence was filed on August 3, 1994. This appeal arises therefrom.

SUFFICIENCY OF EVIDENCE

Appellant challenges the sufficiency of the evidence and asserts the state did not prove he was the operator of the vehicle involved in the accident, or that his blood alcohol level at the time of the accident was in excess of the legal limit.

Appellant first argues that the only evidence that he was the operator of the vehicle was his pre-arrest statement to Gibson that he was the driver. Appellant characterizes this statement as an out-of-court confession which was insufficient to support his conviction unless accompanied by other proof that the offense was committed. Ark. Code Ann. § 16-89-111(d) (1987). The state

responds that appellant's statement did not amount to a confession and, thus, did not require corroboration. The state is correct.

[redacted] We are relegated to the traditional meaning of the word "confession" as it is used in section 16-89-111(d), a provision which was added to our criminal code in 1868 without an emergency clause or other document descriptive of legislative intent. *Bishop* v. *State*, 294 Ark. 303, 742 S.W.2d 911 (1988). This court has stated "'[a] confession is an admission of guilt as to the commission of a criminal act.'" *Id.* at 307, 742 S.W.2d at 914 (quoting *Workman* v. *State*, 294 Ark. 103, 589 S.W.2d 21 (1979)).

[redacted] Appellant's statement that he was the driver of the vehicle is not an admission of guilt as to the commission of the criminal act of DWI because that crime is defined as the operation or actual physical control of a motor vehicle by a person who is intoxicated or whose blood alcohol level at that time is 0.10% or more by weight as determined by chemical test. Ark. Code Ann. § 5-65-103 (Repl. 1993). The term "intoxicated," for purposes of this crime, is defined as follows:

> (1) "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians.

Ark. Code Ann. § 5-65-102 (Repl. 1993). Appellant's statement did not constitute a confession of DWI because it contains no admission that appellant was intoxicated or that his blood alcohol level was in excess of the legal limit at the time of the accident. Appellant's statement that he was the operator of the vehicle merely constituted an admission of one element of the offense of DWI, rather than a confession of the crime. *Snyder* v. *City of DeWitt*, 15 Ark. App. 277, 692 S.W.2d 273 (1985); *see also Azbill* v. *State*, 285 Ark. 98, 685 S.W.2d 162 (1985) (holding that appellant's admission to a law enforcement officer, at the scene of appellant's vehicle stuck in the highway median, that he had come from Jonesboro and was the only person around the vehi-

cle was considered a confession of use and control of the vehicle, which, combined with other circumstantial evidence led to the logical conclusion that appellant was DWI). Even if appellant's statement that he was the driver of the vehicle is combined with his pre-arrest statement to Gibson that he was drinking prior to driving the vehicle, there is no confession of DWI because there is still no admission of intoxication or excessive blood alcohol level as defined by our criminal code. Therefore corroboration was not required.

Appellant's second challenge to the sufficiency of the evidence is his assertion that the only evidence that his blood alcohol level was 0.10% or more at the time of the accident was the blood alcohol test report which, he argues, was insufficient to sustain his conviction because no evidence was introduced to relate his blood alcohol level as tested to his blood alcohol level at the actual time of the accident. Therefore, appellant argues, his conviction should be reversed. We reject appellant's argument because we hold substantial evidence existed for the trial court to find that appellant was guilty of DWI on the ground of intoxication.

The crime of DWI is committed whether the act is violated by a motorist who is intoxicated or by a motorist whose blood alcohol level is in excess of the legal limit; these two conditions are two different ways of proving a single violation. *Yacono* v. *State*, 285 Ark. 130, 685 S.W.2d 500 (1985). In deciding whether the evidence is substantial, the general rule is:

> The evidence to support a conviction, whether direct or circumstantial, must be of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. [Citation omitted.] We will affirm the verdict of the trial court, if it is supported by substantial evidence, and circumstantial evidence may constitute substantial evidence. [Citation omitted.] To be sufficient to sustain a conviction, the circumstantial evidence must exclude every other reasonable hypothesis consistent with innocence. [Citation omitted.]

Walker v. *State*, 313 Ark. 478, 481, 855 S.W.2d 932, 933 (1993) (quoting *Igwe* v. *State*, 312 Ark. 220, 849 S.W.2d 462 (1993)).

In this case, the evidence and all reasonable inferences deducible therefrom are viewed in the light most favorable to the state as the party which is relying upon the evidence. *Yacono*, 285 Ark. 130, 685 S.W.2d 500.

Ark. Code Ann. § 5-65-206(a) (Repl. 1993), the statute governing presumption of intoxication on the basis of chemical analysis of the defendant's blood, is silent in the situation where the test is taken more than two hours after the alleged offense or the test result reflects a blood alcohol content of 0.10% or more[1]. Subsection (b) of that statute states that the provisions of subsection (a) are not to be construed as limiting the introduction of any other relevant evidence bearing upon the issue of whether the motorist was intoxicated.

In deciding whether evidence is substantial, appellate courts take notice of the unquestioned laws of nature. *Yacono*, 285 Ark. 130, 685 S.W.2d 500. Consistent with this principle, this court has repeatedly observed that blood alcohol content decreases with the passage of time. *State* v. *Johnson*, 317 Ark. 226, 876 S.W.2d 577 (1994); *David* v. *State*, 286 Ark. 205, 691 S.W.2d 133 (1985); *Elam* v. *State*, 286 Ark. 174, 690 S.W.2d 352 (1985). In this case, it is undisputed that appellant's blood alcohol test sample was collected approximately fifty-five minutes after Gibson was initially dispatched to the accident scene. Because appellant's overturned vehicle was located in the middle of a busy highway, it is reasonable to infer that the accident was reported to the state police and that appellant was transported to the hospital shortly after the accident occurred. It is reasonable to infer that appellant did not consume alcohol while he was being transported from the accident scene to the hospital or while he was at the hospital. Therefore, it is reasonable to infer from the facts of this case that, at the time the alleged offense occurred, appellant's blood alcohol level was higher than its reported post-accident level of 0.15%, in excess of the legal limit.

Proof of the motorist's blood alcohol content is not

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[1]Under former law, a presumption that the motorist was under the influence of intoxicating liquor arose in cases where his blood alcohol test result was 0.10% or more. This presumption was deleted by Act 549 of 1983.

necessary for a conviction of DWI on the ground of intoxication. *Wilson* v. *State*, 285 Ark. 257, 685 S.W.2d 811 (1985). However, proof by chemical test that the motorist's blood alcohol content was in excess of the legal limit is admissible as evidence tending to prove intoxication. *Elam*, 286 Ark. 174, 690 S.W.2d 352; *Yacono*, 285 Ark. 130, 685 S.W.2d 500. In this case, the blood alcohol test report, coupled with the recited facts contained in the testimonies of Officers Gibson and Boone, constituted substantial evidence from which the trial court could find that appellant was intoxicated at the time of the accident.

AUTOMOBILE ACCIDENT REPORT PRIVILEGE

Secondly, appellant asserts his pre-arrest statements to Gibson constituted privileged information which should have been suppressed at trial. Appellant argues these statements were privileged because they were made in discharge of his statutory duty under Ark. Code Ann. § 27-53-202(a) (Repl. 1994) to report his traffic accident to the Arkansas State Police, and, as such, were precluded from use as evidence against him at trial under Ark. Code Ann. § 27-53-208(b)(1) (Repl. 1994).

Ark. Code Ann. §§ 27-53-201 to -209 (Repl. 1994) govern accident reports which are required to be filed by persons other than law enforcement officers. Section 27-53-202(a) requires the driver of a vehicle involved in an accident resulting in injury or death to any person or apparent property damage in excess of $50.00 to forward a written report of the accident to the Arkansas State Police within forty-eight hours. Section 27-53-208(b)(1) provides that no report shall be used as evidence in any resulting civil or criminal trial. Section 27-53-208(b)(1) is an example of a statute which grants the so-called "automobile accident report privilege." *See generally* John A. Tarantino, *Defending Drinking Drivers* § 586 (2d ed. 1991).

Ark. Code Ann. §§ 27-53-301 to -306 (Repl. 1994) govern accident reports which are required to be filed by law enforcement officers. Sections 27-53-303(a) and (b)(2) required Gibson, as the investigating officer, to prepare and file a report of his investigation of appellant's accident. Sections 27-53-301 to -306 contain no automobile accident report privilege provision.

It is undisputed that appellant filed no written report of his

accident with the state police. The only written report of the accident was prepared and filed by Gibson. Appellant, however, asserts the statutory automobile accident report privilege barred Gibson's testimony as to appellant's pre-arrest statements because those statements were used by Gibson in the preparation of the report which was filed.

Appellant's only authority for his argument is *Norstrom* v. *State*, 587 So. 2d 1148 (Fla. Dist. Ct. App. 1991), in which the Florida District Court of Appeal held the trial court erred in admitting the taped statement of motorist Norstrom, given while in police custody and after he had waived his *Miranda* rights, during the investigation of a vehicular homicide. The court of appeal ruled the statement inadmissible because it was made during the accident investigation and was privileged under Florida's automobile accident report privilege provision, Fla. Stat. ch. 316.066 (1988). We find appellant's reliance upon *Norstrom* misplaced. The court of appeal's decision was subsequently quashed in part by the Florida Supreme Court which held that the automobile accident report privilege did not apply on the facts of that case, and remanded the case for consideration of other issues not relevant to this discussion. *State* v. *Norstrom*, 613 So.2d 437 (Fla. 1993), *on remand*, 616 So. 2d 592 (Fla. Dist. Ct. App. 1993).

Appellant argues then, without persuasive authority, that the automobile accident report privilege rendered inadmissible Gibson's testimony as to appellant's pre-arrest statements, and that the trial court's ruling permitting the testimony was reversible error. Although this argument is apparently one of first impression in this state, it has been addressed by other jurisdictions. *See* John A. Tarantino, *Using The Automobile Accident Report Privilege To Bar Police Officer Testimony*, 4 DWI Journal 6 (Jan. 1989). The reported weight of authority, we have found, is that, in most criminal proceedings, testimony by police officers relating to admissions by drivers for the purpose of preparing automobile accident reports is admissible. See Randy R. Koenders, Annotation, *Admissibility of Police Officer's Testimony At State Trial Relating to Motorist's Admissions Made In Or For Automobile Accident Report Required By Law*, 46 A.L.R.4th 291, §§ 2[a]; 4[a] & [b] (1986 & Supp. 1994).

We find appellant's argument is without merit. A plain

reading of section 27-53-208(b)(1) shows the automobile accident report privilege is expressly extended only to the report itself[2]. By its express terms, the statute does not shield testimony of the investigating officer as to that officer's observations made in preparing his report, including statements made to the officer by the motorist. Other state courts interpreting identical or similar automobile accident report privilege statutes have likewise concluded the privilege does not bar the testimony of the investigating officer. *See, e.g., Creary* v. *State*, 663 P.2d 226 (Alaska Ct. App. 1983); *Spradling* v. *State*, 628 S.W.2d 123 (Tex. Ct. App. 1981). We also note with interest that, since the *Norstrom* case, the State of Florida has amended its automobile accident report privilege statute to specifically permit testimony of the investigating officer to the extent the motorist's privilege against self-incrimination is not thereby violated. *State* v. *Riley*, 617 So. 2d 340 (Fla. Dist. Ct. App. 1993).

The fundamental concern addressed by those courts which have extended the automobile accident report privilege to bar testimony of the investigating officer is to protect against a violation of the reporting motorist's federal constitutional right against self-incrimination under the Fifth Amendment. *See, e.g., Riley*, 617 So. 2d 340; *People* v. *Gilbert*, 154 N.W.2d 800 (Mich. Ct. App. 1967). In the instant case, appellant argues his statutory duty to report the accident to the state police was the reason he provided privileged information to Gibson. However, there is no evidence in the record showing appellant was aware of or was attempting to comply with his statutory duty to report the accident. There is no evidence that appellant believed he was compelled to answer Gibson's investigatory pre-arrest questions. There is no evidence that Gibson coerced appellant's statements, or indicated to appellant in any way that appellant was required to answer Gibson's questions. At trial, appellant stated, through

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[2]Although section 27-53-208(b)(1) does not expressly refer to a written report, the statute plainly contemplates a writing, consistent with the provisions of sections 27-53-201 to -210. *See, e.g.*, section 27-53-202(a) (requiring the driver to file a written automobile accident report with the state police); section 27-53-206 (requiring the state police to prepare and supply automobile accident report forms); section 27-53-209 (mandating public access to the automobile accident reports); section 27-53-210 (authorizing procedures for obtaining photostatic or written copies of automobile accident reports from the state police).

his counsel, that his pre-arrest statements to Gibson were not made in the context of a custodial interrogation. In addition, although section 27-53-201 subjects to statutory fine or suspension of license to drive any motorist who fails to render a required automobile accident report, we are aware of no such penalty for a motorist who refuses to answer the questions of the investigating officer. On this record, the evidence does not indicate that appellant's statements were obtained in violation of his constitutional right against self-incrimination.

Our standard for reviewing the trial court's ruling admitting the challenged testimony is abuse of discretion pursuant to A.R.E. Rule 103. *McVay* v. *State*, 312 Ark. 73, 847 S.W.2d 28 (1993). On this record, we find no abuse.

Appellant also argues on appeal that admission of Gibson's testimony as to his pre-arrest statements violated his rights under the U.S. Const. amend. 4 and Ark. Const. art. 2, § 15. We do not address this argument which is raised for the first time on appeal. *Aaron* v. *State*, 319 Ark. 320, 891 S.W.2d 362 (1995).

The trial court's judgment is affirmed.

Dustin VICKERS *v.* STATE of ARKANSAS

CR 94-1131 898 S.W.2d 26

Supreme Court of Arkansas
Opinion delivered May 8, 1995

J. Blake Hendrix, for appellant.

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

DONALD L. CORBIN, Justice. Appellant, Dustin Vickers, was convicted by a Pulaski County jury of first degree murder and sentenced to life imprisonment. This court affirmed the judgment of his conviction. *Vickers* v. *State*, 313 Ark. 64, 852 S.W.2d 787 (1993). Subsequent to the appeal, appellant filed a petition for post-conviction relief pursuant to A.R.Cr.P. Rule 37. The only claims presented in the petition which are relevant to this appeal are three collateral attacks on the sentence relating to a claim of ineffective assistance of counsel. *See* A.R.Cr.P. Rule 37.1(d). After conducting two hearings, the Pulaski County Circuit Court entered an order denying appellant's petition for post-conviction relief. Jurisdiction of this appeal from the denial of post-conviction relief is properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(5).

We consider appellant's first and second points for reversal together, as they are so closely related. First, appellant contends his counsel was ineffective for failing to renew a motion to hold Dale Larque an accomplice as a matter of law. At the close of the state's case at trial, appellant's counsel moved to have Larque declared an accomplice as a matter of law. The trial court reserved its ruling on the motion and counsel never renewed the motion or obtained a ruling on it. Appellant's second point is that his counsel was ineffective for withdrawing an accomplice instruction. Counsel tendered an accomplice instruction, but later withdrew it believing it was not applicable. On direct appeal, appellant raised the issue of Larque's status as an accomplice. However, this court could not address the issue because the issue was not preserved for review. *Vickers*, 313 Ark. at 67, 852 S.W.2d at 789.

Appellant argues the evidence presented at his trial proves Larque was an accomplice as a matter of law. The significance of Larque's status as an accomplice derives from Ark. Code Ann. § 16-89-111(e)(1) (1987), which provides that a defendant cannot be convicted of a felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the crime. Appellant argues that it is undisputed that he and Larque agreed to drive from their hometown of Stuttgart to Little Rock to purchase drugs. Since there was testimony showing Larque intended to use a gun to kill anyone who tried to rip them off, appellant's argument continues, a natural and probable consequence of their agreement to purchase drugs was that someone might be killed, and Larque was therefore an accomplice to the murder. Appellant argues further that he was prejudiced because there was no evidence to corroborate Larque's testimony as required by section 16-89-111(e)(1), and but for counsel's failure to have Larque declared an accomplice, the jury would have entertained reasonable doubt as to appellant's guilt of first degree murder.

The state contends it is not the testimony at trial that is relevant to this appeal, rather it is the testimony of appellant's trial counsel at the Rule 37 hearing that we should consider. Contrary to the state's assertion, we may consider the testimony given and evidence received at trial and abstracted in appellant's brief because the entire trial transcript was admitted as an exhibit at

the Rule 37 hearing. Although we have carefully considered the evidence presented at appellant's trial, we do not repeat it here due to its length and because, for the reasons developed below, resolution of appellant's claim of ineffective assistance of counsel does not require that we determine whether Larque was an accomplice as a matter of law.

Counsel, J.W. Green, Jr., testified at the Rule 37 hearing that he had practiced law for thirty years and had been a prosecuting attorney as well as public defender when he was retained by appellant. Counsel stated that in his early discussions with appellant, counsel eliminated self-defense as a possible defense theory due to the location of the victim's gunshot wounds. In later discussions with appellant in which appellant denied committing the murder, counsel determined the defense should be a complete denial of any participation in the murder. Counsel stated he thought complete denial would be the best theory of defense because, even though only Larque and appellant were present when the murder occurred, he thought the physical evidence would corroborate Larque's testimony. The state points out that appellant agreed to the defense of denial and chose to testify at trial. His trial testimony was wholly consistent with the defense of denial.

This court will reverse a trial court's denial of post-conviction relief only if its findings are clearly erroneous or clearly against the preponderance of the evidence. *Pettit* v. *State*, 296 Ark. 423, 758 S.W.2d 1 (1988). This court summarized the standard of review applicable to ineffective assistance of counsel claims in *Pogue* v. *State*, 316 Ark. 428, 432-33, 872 S.W.2d 387, 389 (1994):

> [C]laims of ineffective counsel . . . 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. *Wainwright* 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).

The state contends that appellant's argument amounts to second-guessing counsel's trial strategy. This court has repeatedly held that matters of trial tactics and strategy, which can be matters of endless debate by experienced advocates, are not grounds for post-conviction relief. *Monts* v. *State*, 312 Ark. 547, 851 S.W.2d 432 (1993); *see Pogue*, 316 Ark. 428, 872 S.W.2d 387. We agree with the state that counsel's decision not to have Larque declared an accomplice was one of strategy, not one of ineffectiveness. Counsel testified he believed that the physical evidence would corroborate Larque's testimony and that appellant himself completely denied participating in the murder. With only Larque and appellant present, and suicide ruled out due to the victim's wounds, we cannot say counsel's decisions not to have Larque declared an accomplice and not to have the jury so instructed were anything but tactical, and therefore incapable of analysis as effective or ineffective. Moreover, counsel's decisions were entirely consistent with the information his client, appellant, had given him. Appellant assured his counsel he did not participate in the murder. To have Larque declared an accomplice would require an admission of some participation on appellant's part and would thus be entirely inconsistent with the defense of complete denial. Appellant cannot have it both ways. Appellant cannot tell his counsel he did not participate in the murder and then have his counsel declared ineffective for failing to present a defense theory entirely inconsistent with the denial, for that result would be akin to the doctrine of invited error. This court has previously held that the failure to defend a criminal charge on the basis of inconsistent defenses normally is not evidence of ineffective counsel. *Jeffers* v. *State*, 280 Ark. 458, 658 S.W.2d 869 (1983). Counsel's actions are presumed to be within the wide range of reasonable and professional assistance, *Pogue*, 316 Ark. 428, 872 S.W.2d 387, and appellant has fallen woefully short of carrying his burden to prove otherwise.

Merely for the sake of argument, we observe that,

even if we make the assumption that the theory of defense presented on the facts of this case was erroneous or amounted to ineffective assistance, appellant cannot demonstrate prejudice, the second prong of the test for ineffective assistance of counsel. *Id.* The record clearly supports counsel's determination that there was indeed other evidence to corroborate Larque's testimony. Larque testified that appellant drove them both to Little Rock in a family member's Nissan pick-up truck, where they picked up the victim, Kenneth Jackson, and continued to drive around Little Rock looking for drugs to buy. According to Larque, appellant drove down Pratt Road and stopped at a building, where appellant and Jackson exited the truck. Larque testified that he had just exited the truck when he heard a gunshot; he then saw appellant standing over the victim's body and saw appellant fire a second shot. The physical evidence showed that footprints at the scene indicated appellant exited his truck, walked behind the truck to the victim's body, and returned to the truck. Only one footprint was associated with Larque; it was found on the right side of the truck, within two to three feet of the victim's tracks. The medical examiner testified the victim was shot twice in the head. The first shot was from a distance of eighteen inches to four feet and from an angle higher than the victim's head. The second shot was fired from very close or point blank range. Thus, even assuming Larque had been declared an accomplice, there was other substantial evidence from which the jury could have found corroboration of Larque's testimony. Therefore, appellant has not demonstrated any prejudice from his counsel's failure to have Larque declared an accomplice, or from counsel's withdrawal of the accomplice instruction.

Appellant's third argument for reversal is that counsel was ineffective for withdrawing instructions on the lesser included offenses of second-degree murder and manslaughter. As the state contends, this court effectively answered this argument on direct appeal when we held that, because appellant's defense was complete denial, there was no rational basis for giving instructions on the lesser included offenses. *Vickers*, 313 Ark. at 68, 852 S.W.2d at 789-90. Since we have determined in the instant appeal that counsel's decision to present the defense of complete denial was entirely within the range of reasonable professional assistance, we find his decision not to pursue the instruc-

tions on lesser included offenses was likewise entirely reasonable and consistent with effective assistance. In fact, as we stated on direct appeal, the instructions were simply not available given the particular defense presented. *Id.*

This appeal is wholly without merit and the judgment denying post-conviction relief is affirmed.

CITY OF LITTLE ROCK *v.* Kevin Scott CAMERON

94-1334 897 S.W.2d 562

Supreme Court of Arkansas
Opinion delivered May 8, 1995

Office of the City Attorney, by: *Thomas M. Carpenter* and *Anthony W. Black*, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Sarah Presson* and *Julia Busfield*, for appellee.

ROBERT L. BROWN, Justice. This case involves an appeal from a grant of a directed verdict in favor of the appellee, Kevin Scott Cameron. The City of Little Rock, as appellant, contends that the trial court erred in its ruling. We do not agree and affirm.

At approximately midnight on March 5, 1992, Cameron left the Bobbisox Lounge at the Holiday Inn by the Little Rock Airport. He had been drinking alcoholic beverages. He went to a Waffle House across the street and left there at about 2:00 a.m. He drove into downtown Little Rock. It was raining. At the intersection of West Markham and McKinley, his car struck a traffic

signal pole and destroyed it. The City sued Cameron for negligence and for damages in the amount of $4,562.70 for the destruction of the pole.

At the resulting jury trial, the City called Officer Linda Barron as a witness. Officer Barron testified that she was the investigating officer and that two vehicles were involved in the accident: Cameron's 1987 Ford Taurus and a 1989 G.M.C. pickup driven by Othlea Patterson. Officer Barron testified that she smelled alcohol on Cameron's breath. She stated that Cameron told her that the pickup truck had entered his lane and that he had swerved to miss it and struck the pole. She noted that Cameron's vehicle had hit the pickup but stated that Cameron was unaware of this at the time. No citations were issued to the driver of either vehicle, and the police officer's accident report noted no contributing causes for the wreck.

Officer Roy Howard of the Little Rock Police Department testified that he administered a portable breathalyzer test to Cameron at the scene and that Cameron tested for a blood/alcohol level of .05 percent. He stated that he did not believe that Cameron was "impaired to an extreme point," though he did state he believed that drinking alcoholic beverages does impair one's ability to drive.

The City rested its case after providing proof of its damages. Cameron moved for a directed verdict, and it was granted.

The City urges on appeal that the trial court erred in granting Cameron's motion for directed verdict. In determining the correctness of the trial court's ruling, we view the evidence in the light most favorable to the party against whom the verdict is sought and give it the highest probative value, taking into account all reasonable inferences deducible from it. *Bice* v. *Hartford Acc. & Indem. Co.*, 300 Ark. 122, 777 S.W.2d 213 (1989). A motion for directed verdict should be granted only if the evidence so viewed would be so insubstantial as to require a jury verdict for the party to be set aside. *Id.; Campbell Soup Co.* v. *Gates*, 319 Ark. 54, 889 S.W.2d 756 (1994). Evidence is insubstantial when it is not of sufficient force or character to compel a conclusion one way or the other or if it does not force a conclusion to pass beyond suspicion or conjecture. *See Allred* v.

Demuth, 319 Ark. 62, 890 S.W.2d 578 (1994); *Moore* v. *State*, 315 Ark. 131, 864 S.W.2d 863 (1993).

In the case before us, the trial court found that there was insufficient evidence to support a claim of negligence. To establish a prima facie case in tort, a plaintiff must show that damages were sustained, that the defendant was negligent, and that such negligence was a proximate cause of the damages. *Arkansas Kraft* v. *Cottrell*, 313 Ark. 465, 855 S.W.2d 333 (1993). We reiterated our definition of negligence in *Cottrell*:

> Negligence is the failure to do something which a reasonably careful person would do. A negligent act arises from a situation where an ordinarily prudent person in the same situation would foresee such an appreciable risk of harm to others that he would not act or at least would act in a more careful manner. *White River Rural Water Dist.* v. *Moon*, 310 Ark. 624, 839 S.W.2d 211 (1992).

313 Ark. at 470, 855 S.W.2d at 337. While a party can establish negligence by direct or circumstantial evidence, he cannot rely upon inferences based on conjecture or speculation. *Id.*

The mere fact that Cameron had been drinking alcoholic beverages is not sufficient evidence of negligence, standing alone, for this claim, to withstand a directed verdict. Cameron was not legally intoxicated based on his percentage of blood/alcohol content. *See* Ark. Code Ann. § 5-65-103(b) (Repl. 1994). But even had he been intoxicated, a distinguished treatise on torts concludes that the fact of intoxication is not negligence *in itself*, but it must be shown to have caused the actor's behavior to have deviated from that of a reasonable person and to have caused the plaintiff's injuries. *See Prosser and Keaton on Torts* § 32, pp. 178-179 (5th Ed. 1984); *see also Restatement (Second) of Torts* § 283C, Comment D. In this vein, we have stated that voluntary intoxication may be a factor to be considered by the trier of fact in determining negligence. *Jernigan* v. *Cash*, 298 Ark. 347, 767 S.W.2d 517 (1989).

We can readily agree with Officer Howard that drinking alcoholic beverages may impair one's ability to drive. Here, though, there was no evidence that Cameron was intoxicated or otherwise impaired at the time of the accident or that his liquor

consumption either evidenced a lack of reasonable care on Cameron's part or caused the wreck in any way. In sum, we agree that the City's proof does not give rise to an inference of negligence but only to conjecture and speculation. *See Sanford* v. *Ziegler*, 312 Ark. 514, 851 S.W.2d 418 (1993). The trial court did not err in granting the directed verdict.

Affirmed.

GLAZE and CORBIN, JJ., dissent.

DONALD L. CORBIN, Justice, dissenting. I dissent.

The case should have been submitted to the jury for decision. The facts of the appellee's drinking mixed with a collision with another vehicle he did not know he hit and his collision with a traffic light pole should have been submitted to the jury to resolve whether he was negligent in the operation of his vehicle. One does not have to be intoxicated under a legal definition of 0.10% before having his mental and reaction time slowed down by the drink. *See Stephens* v. *State*, 320 Ark. 426, 898 S.W.2d 435 (1995). When all of this is coupled with rain slicked streets, it would be a proper issue for a jury to draw upon their individual experiences to determine if, under all of these conditions, negligence existed. I would reverse and remand for trial.

GLAZE, J., joins in this dissent.

Christine M. JONES *v.* Jerry A. JONES

94-1088 898 S.W.2d 23

Supreme Court of Arkansas
Opinion delivered May 8, 1995

The Perroni Law Firm, P.A., by: *Samuel A. Perroni* and *J. Nicole Graham*, for appellant.

Helen Rice Grinder, for appellee.

ROBERT L. BROWN, Justice. This case involves the parties' minor son, Cameron Jones, and the chancellor's dismissal of a contempt petition against appellee Jerry A. Jones for his failure to release Cameron on a certain date to appellant Christine Jones for visitation purposes. It further involves the constitutionality of alleged local rules employed by the chancellor and legal fees assessed against appellant Christine Jones for filing the contempt petition.

The parties were married in 1981 and divorced on November 13, 1990. The chancellor granted custody of Cameron to Christine Jones as part of the divorce. On December 14, 1992, a temporary change of custody was granted to Jerry Jones, and on March 7, 1994, the custody grant was made permanent with visitation rights provided to Christine Jones. The March 7, 1994 order expressly states that visitation shall be in accordance with the Handbook for Domestic Relations Litigants used by the Twentieth Chancery District of Arkansas which includes Faulkner, Van Buren, and Searcy Counties. The visitation language in the March 7, 1994 order that stands at the core of this lawsuit reads: "(d) the [appellant] shall have summer visitation with the minor child beginning on the third Sunday following the last day the child is required to attend school of the spring term. . . ." This

language is taken word-for-word from the Domestic Relations Handbook.

During the 1993/94 school year, Cameron as a four-year-old was not required by law to attend public schools. He attended a preschool in Conway named the UCA Child Study Center, and the last day of that school was May 13, 1994. On May 31, 1994, Christine Jones filed a motion for contempt against Jerry Jones for his violation of the March 7, 1994 order due to his refusal to release Cameron to her on May 29, 1994, which was the third Sunday following the last day of Cameron's preschool at the UCA Child Study Center. Jerry Jones responded that the last day of the Conway public schools was the operable date to be used because Cameron was not required to attend school and that date meant the third Sunday fell on June 12, 1994.

Following a hearing on Christine Jones's contempt motion on June 15, 1994, the chancellor dismissed the petition and granted Jerry Jones's request for attorney's fees in the amount of $650.

Christine Jones first contends that the chancellor abused his discretion in refusing to hold Jerry Jones in contempt. On *de novo* review, we disagree and hold that the result reached by the chancellor was correct but not for the reasons stated by the chancellor in open court.

[redacted] Our standard of review when a chancellor has refused to punish an alleged contemnor is abuse of discretion. *Warren* v. *Robinson*, 288 Ark. 249, 704 S.W.2d 614 (1986). For a person to be held in contempt for violating a court order, that order must be clear and definite as to the duties imposed upon the party, and the directions must be expressed rather than implied. *Id.* A person cannot be held in contempt for failing to do something which the trial court did not order. *McCullough* v. *Lessenberry*, 300 Ark. 426, 780 S.W.2d 9 (1989); *Waldon* v. *Waldon*, 34 Ark. App. 118, 806 S.W.2d 387 (1991).

[redacted] In the case at hand, the chancellor found no basis for contempt because when interpreting the required-school language in the Domestic Relations Handbook, the local practice had always been to rely on the public school schedule for determining the last day of school. We refuse to countenance this justification as a legitimate precept for interpretation. Local practices and local

interpretations work to the disadvantage of parties and attorneys outside of the district, the same as do local rules. *See In the Matter of the Adoption of Parsons*, 302 Ark. 427, 791 S.W.2d 681 (1990). We note as an adjunct to this point that this controversy could have been easily avoided had the parties used language specifically related to this case in the March 7, 1994 order rather than boilerplate language from the Domestic Relations Handbook. Also related to this point is the question of whether this matter is moot due to Cameron's change of schools. There was testimony from Jerry Jones that Cameron would be attending a different pre-school in the 1994-95 school year. But the record is not definite on whether this actually occurred so as to obviate the dispute before us in this appeal. We have opted, therefore, to consider the merits.

[redacted] We conclude that the required-school language in the March 7, 1994 order is ambiguous. Christine Jones interprets those words as pertaining to the last day of the school Cameron actually attended. Jerry Jones, on the other hand, interprets them in accordance with the public school schedule since Cameron was not yet required to go to school. We believe that both interpretations are reasonable. Because the language at issue is imprecise and unclear, we affirm the chancellor's dismissal of the contempt motion.

[redacted] Christine Jones next raises two points: (1) the chancellor erred in using local rules and local interpretations in this case, and (2) use of the Domestic Relations Handbook by the chancellor violates the doctrine of separation of powers in that it removes judicial discretion. Though local practice and interpretation of what is required school is more the issue here, we decline to entertain both issues because they are being presented for the first time on appeal. *See Bell* v. *Estate of Bell*, 318 Ark. 483, 885 S.W.2d 877 (1994). The appellant urges in contravention of this conclusion that she had no opportunity to raise these issues because reliance on the Domestic Relations Handbook and local practice first occurred in the chancellor's ruling and that in any event, this court reviews chancery matters *de novo* on appeal and, accordingly, can decide the questions.

The appellant, however, was well aware that the Domestic Relations Handbook was being used by the chancellor prior to

his ruling and order dismissing her contempt petition. The Handbook was expressly referenced in the March 7, 1994 order. It was also very much at issue when the question of required school was extensively debated at the contempt hearing on June 15, 1994. Indeed, the chancellor made reference to the fact that Christine Jones had known about the Handbook for two years. She also was aware that local practice was being used as an interpretative tool against her. The chancellor explained that fully at the hearing. Yet, she did not object.

In sum, at no point did she raise the two issues that she now presents to this court. *De novo* review does not mean that this court can entertain new issues on appeal when the opportunity presented itself for them to be raised below, and that opportunity was not seized. *Henry* v. *Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992); *Walker* v. *Walker*, 262 Ark. 648, 559 S.W.2d 716 (1978). In deciding these two issues as we do, we do not in any way intend to suggest that the Domestic Relations Handbook represented anything other than a local rule. *See In re: Changes to the Arkansas Rules of Civil Procedure and the Arkansas Rules of Appellate Procedure, Abolishment of the Uniform Rules of Circuit and Chancery Court, and Publication of Administrative Orders*, 294 Ark. 664, 742 S.W.2d 551 (1987). We simply do not reach these issues.

For her last point, Christine Jones urges that the award of sanctions under Ark. R. Civ. P. 11 was an abuse of the chancellor's discretion. We recognize the fact that chancery courts can and often do award attorney fees to the prevailing party. *See, e.g., Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986). We further are aware that the chancellor's order does not state for what reason he was granting Jerry Jones's request for attorney fees in the amount of $650.

Be that as it may, the events surrounding the fee award lead ineluctably to the conclusion that the award was in the nature of Rule 11 sanctions. For one thing, Jerry Jones expressly asked for attorney's fees as a Rule 11 penalty in his Response to Motion for Contempt. He also testified that the contempt hearing was "a form of harassment and needless cost of litigation." These are elements of a Rule 11 violation. He added that the hearing had inconvenienced him and caused him to miss the entire morning

at his office. He stated that the legal fees for the hearing would be for five hours at the rate of $125 an hour and that he was asking that Christine Jones pay that fee.

The chancellor in rendering his decision from the bench stated:

> Well, Ms. McNutt [appellant's counsel], if you had checked into this, . . . this hearing would never have been necessary. I've always been of the opinion that a local attorney has a very definite edge over an out-of-town attorney, because you know the local situations. I know that when I went out of town to court, if I didn't know the judge and know what was likely to be done, I always inquired of local attorneys what was going on, to make sure that I knew.
>
> We have used this standard, because it gives the greatest fairness to all of the parties. Next year, Dr. Jones could have had the child in some school that goes halfway through the summer, and thereby defeating Mrs. Jones' visitation. So, for that reason, unless there's some compelling reason to deviate, we've always used the public school year, just so the parties would know what to expect.
>
> Now, I have something that's even more — that bothers me, even more. Christine Jones testified that she had never seen that Blue Book [Domestic Relations Handbook]. This Court has personal knowledge of the fact that she has. Over two years ago — or, approximately two years ago, this Court put a sign on the outside of its office door — its chambers door stating Court Personnel Only. After this case was commenced, Christine Jones came through that, despite that sign, came into the office, and obtained a Blue Book. I did not personally talk with her, but I did see her when she did it. And, I discussed this, at a later time, with her attorney. . . .

A colloquy ensued among the chancellor, Christine Jones, and her counsel. The chancellor then concluded that the purpose of the sign on his door was to keep litigants out, and he announced that he was dismissing the contempt petition and awarding Jerry Jones $650 in attorney's fees.

Viewing these events in sequence, it is apparent that the

chancellor was sanctioning Christine Jones under Rule 11 for harassment and for increasing the cost of litigation. Both parties to this appeal seemingly agree because both couched their fee arguments in their briefs in terms of Rule 11 sanctions.

We conclude that granting the sanctions constituted an abuse of discretion, primarily for the reason already stated. Christine Jones's interpretation of the March 7, 1994 order was reasonable, if not prevailing. She surely had other avenues of relief apart from a contempt motion. But we discern no improper motives on her behalf or absence of a factual or legal foundation in making her motion. We, therefore, reverse the order with respect to the award of attorney's fees and remand for an order consistent with this opinion.

Affirmed in part. Reversed in part and remanded.

THOMSON NEWSPAPER PUBLISHING, INC.,
d/b/a Northwest Arkansas Times, and S. D. "Dave" Stokes,
Individually and as Publisher of Northwest Arkansas Times
v. Dan COODY

94-908 896 S.W.2d 897

Supreme Court of Arkansas
Opinion delivered May 8, 1995
[Rehearing denied June 12, 1995.]

Warner & Smith, by: *G. Alan Wooten* and *J. Randall McGinnis*, for appellants.

Rose & Van Winkle, by: *Jim Rose III* and *John Van Winkle*; and *John J. Watkins*, for appellee.

Williams & Anderson, by: *John E. Tull III* and *Katharine R. Cloud*, for amicus curiae Arkansas Press Association.

ANDREE LAYTON ROAF, Justice. This appeal involves a libel action filed by appellee Dan Coody against the appellants, Thomson Newspaper Publishing, Inc., d/b/a *Northwest Arkansas Times* (*Times*), and S. D. "Dave" Stokes, individually and as publisher of the *Times*. A jury awarded Dan Coody $275,000.00 in com-

pensatory and punitive damages. Appellants raise four points for our review: (1) appellee failed to submit any evidence of libel upon which the jury could base a verdict for appellee; (2) appellee failed to prove actual malice on the part of the appellants by clear and convincing evidence; (3) the trial court erred in allowing evidence of common law malice on the issue of constitutional malice; and (4) the trial court erred in allowing an award of compensatory damages to appellee based upon insufficient and speculative evidence. We hold that the evidence was insufficient to support a finding of actual malice and the judgment is accordingly reversed.

FACTS

Dan Coody and his spouse, Deborah, relocated to Fayetteville from Texas in 1987. The Coodys had been self-employed home builders in Texas and engaged in home remodeling and carpentry work after moving to Fayetteville. In November 1990, Coody was elected to a four-year term on the City Board of Directors of Fayetteville. Prior to his election, Coody had a strong interest in historical preservation and environmental issues and actively opposed such measures as the location of a bar next to an elementary school. After his election, he opposed the development of a new regional airport in the Bentonville area. In May 1992, Fayetteville voted to change its form of government from city manager to mayor-alderman effective January 1, 1993, and an election was to be held in November 1992 for the new mayoral and aldermanic positions.

Coody announced his decision to run for the position of mayor in August 1992. At the time of his announcement, appellant Dave Stokes was the publisher of the *Times* and had come to Fayetteville in September 1991 to assume this position. Coody had been openly critical of the *Times* and Stokes in the months prior to the election, questioning the paper's journalistic integrity and objectivity, and criticizing the relationship between Stokes and the local Chamber of Commerce. Coody had also attempted to divert the city's legal advertising away from the *Times* to a competing area newspaper.

During his campaign for mayor, Coody began hearing rumors that he was secretive about his past prior to moving to Fayetteville, because he had been involved in criminal activities while

in Texas. The rumored activities varied from armed robbery, writing hot checks, and conviction for a drug offense. It was also rumored that Coody was abusive to women. Coody paid a visit to Stokes' office in late September 1992 to inquire if Stokes had heard the rumors and to deny that he had ever been in trouble with the law. Stokes acknowledged hearing the rumors. Coody's offer to provide Stokes with information to repudiate the rumors was declined. Stokes stated that "[w]e have ways of finding these things out."

In late September, Coody wrote the Texas Department of Public Safety and the Arkansas State Police, submitting his full name, birthdate and fingerprints, and requested information regarding any felony or misdemeanor conviction. He received replies from both stating that no criminal records were found. Coody delivered copies of these replies to a reporter from the *Times* and also to the *Springdale Morning News.*

The election was scheduled for Tuesday, November 3, 1992. On Thursday, October 29, 1992, Stokes learned of a poll which showed that Coody was in the lead for the mayor's race. On Friday, October 30, 1992, one of Coody's opponents, Glenn Sowder, held a press conference and aired a recording of a message left by Coody on a telephone answering machine in which Coody, using profanity, complained about one of Sowder's supporters having accused him of being abusive to his wife and other women. On that same day, Stokes engaged a private investigator to delve into Coody's background in Texas. Stokes also claimed to have received information on Thursday, October 29, 1992, concerning Coody's criminal history from a Fayetteville resident who was Coody's high school classmate in Beaumont, Texas; however, the informant testified that she was not contacted by Stokes until Monday, November 2, 1992, at the earliest.

On Saturday, October 31, 1992, the first of the two articles at issue in this case was published on the editorial page of the paper and attributed to Dave Stokes, publisher. The two column article was captioned in large, bold letters, "It's time for Coody's facade to come off," alleged Coody "set up" a letter writing campaign supporting his candidacy, and mentioned that the author had begun "hearing rumors about Coody" shortly after he declared for mayor but "did not give credence to these rumors," because of the desire

to keep the campaign as clean as possible. The article stated that "it's time for the gloves to come off" and went on to accuse Coody of attempting to "mislead the public about who he is and what he stands for," and of exhibiting behavior which casts doubt on his ability to perform under stress. The article included a transcript of the telephone message left for Sowder by Coody with abbreviations and dashes for the profanity used and went on to question, "What's Coody so nervous about?" The article further accused Coody of attacking the newspaper and Stokes because he could not get his way and dictate what the paper printed, accused him of making slurs against Fayetteville, accused him of making accusations without substance in his capacity as councilman and then backing down when his hand was called, and concluded by stating that Coody's rhetoric about loyalties for Fayetteville is a "thin facade covering his real loyalty — to himself."

On Monday, November 2, 1992, Stokes received the private investigator's report which contained no adverse information on Coody and Stokes also contacted the informant. Coody held a press conference on Monday and provided information regarding his background and work history and also published a full page ad in the Times to counter-act the effect of the "facade" article.

On Tuesday, November 3, the morning of the election, the *Times* ran the second article, an interview of Stokes, under the byline of reporter Rusty Garrett. The article was captioned "Times publisher defends probe into past of mayoral candidate." The article stated that Stokes had "taken a leading role" in researching the life and activities of Coody prior to his arrival in Fayetteville and admitted to the employment of a private investigator. The article quoted Stokes as stating he had "uncovered some major discrepancies between information contained in the [investigative] report and that he subsequently received from former Beaumont [Texas] residents who say they knew Coody in high school." Stokes further alleged that the investigation was necessary because Coody "continually refused to answer [questions about his past] throughout the campaign," and it was conducted to "get the real truth" concerning Coody. Stokes explained that a similar investigation was not conducted on the other four mayoral candidates because they "had not been the subject of rumors with the 'severity' of those circulated about Coody."

Stokes went on to state that the investigation revealed that Coody's early life was "very admirable," and he questioned why Coody had not used information concerning his activities in Texas in his campaign. Stokes stated that the probe failed to turn up any information on Coody's life between the mid 1970's and 1986 when he moved to Fayetteville and that the report "had created more questions than it had answered." Stokes accused Coody of not providing details about his past or outlining his past year-by-year.

After losing the election, Coody filed an action for damages against appellants, alleging that the editorial and article published on October 31 and November 2, 1992, contained defamatory and libelous statements which were made with actual and common law malice. He asked for compensation for actual damages to his emotional well-being, personal dignity, disruption of relationships with friends and family, damage to business reputation, standing in the community, and public image, and also requested that punitive damages be awarded. Appellants appeal from the judgment entered in favor of Coody and from the order denying their motion for judgment notwithstanding the verdict. It is undisputed on appeal that Coody was a public figure.

A defamation action turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation. *Little Rock Newspapers* v. *Dodrill*, 281 Ark. 25, 660 S.W.2d 933 (1983). Furthermore, "[a] public figure may not recover damages for a defamatory falsehood without clear and convincing proof that the false 'statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1988) (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964)). The Supreme Court has recognized that where the first amendment is involved, the appellate court is obligated to make an independent examination of the whole record to make sure the judgment does not constitute a forbidden intrusion on the field of free expression. *Harte-Hanks, supra; Fuller* v. *Russell*, 311 Ark. 108, 842 S.W.2d 12 (1992). However, the heightened standard of appellate review applies only to review of the finding of actual malice, and not to the determination of libel. *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). The

standard of review for the issue of defamation and other factual findings is whether the jury's verdict can be supported by substantial evidence. *Allred* v. *DeMuth*, 319 Ark. 62, 890 S.W.2d 578 (1994); *Little Rock Newspapers, supra.*

EVIDENCE OF LIBEL

The jury found, from a preponderance of the evidence, that stated or implied facts published by the appellants in the two articles, were defamatory and false. Coody's principal contention was that the articles accused him of concealing a criminal past and that he had proven by his own denial and the reports submitted by him from the Texas and Arkansas authorities that he had no such past. Because the articles did not specifically mention the nature of the rumors about Coody's past but instead indicated that he was misleading the public and had something to hide, his claim was one of defamation by innuendo. *See Pritchard* v. *Times Southwest Broadcasting*, 277 Ark. 458, 642 S.W.2d 877 (1982). Also, Coody contends the statements regarding the letter writing campaign, his attempts to control to whom the appellants should listen, and the allegations that he was attempting to mislead the public about who he was and what he stood for were defamatory comments on his fitness and desirability as a mayoral candidate. *See Harte-Hanks, supra.*

For purposes of this case, we need not review the findings of the jury that the articles in question contained stated or implied facts which were defamatory and false. Appellee, as a public figure, had the additional burden of proving that such false statements were made with actual malice, and he has failed to meet this burden.

ACTUAL MALICE

This court must conduct an independent review to determine whether there was clear and convincing evidence that the statements were made with actual malice. *Harte-Hanks, supra; New York Times, supra.* The question of whether the evidence in the record is sufficient to support a finding of actual malice is a question of law. *Id.* In discussing the actual malice standard the court has recognized:

> [T]he plaintiff in such an action must prove that the defam-

> atory publication "was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."
>
> . . . .
>
> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.
>
> . . . .
>
> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.

Fuller v. *Russell*, 311 Ark. 108, 842 S.W.2d 12 (1992) (quoting *St. Amant* v. *Thompson*, 390 U.S. 727, 728, 731, 732 (1968)).

At trial, Stokes testified he believed his statements to be true, but this is of little consequence in making the actual malice determination. *Id.* However, the appellee has failed to present convincing evidence of appellants' awareness of the probable falsity of the statements. Coody testified he did not conduct a letter writing campaign; however, there is no evidence that Stokes was aware that there was no campaign. Further, Coody testified he did not tell Stokes who "he should and should not listen to" in a conversation they had shortly after Stokes came to Fayetteville to assume the position as publisher of the *Times*. Based upon the verdict, the jury apparently believed that Coody, in fact, did not make such a statement to Stokes. However, in *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), the Supreme Court examined the effect of an "inaccurate description of what Seligson [the author] had actually perceived." The Court noted that the "language chosen was 'one of

a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challanges for the writer." *Id.* The Court concluded that the choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella.

Although *Bose, supra*, addressed the writer's opinion regarding the quality of a loudspeaker system, we find the principles discussed apply generally to a listener's perception. Thus, Stokes' perception, even though possibly mistaken, of a conversation which admittedly occurred must be protected. Coody's testimony of the event simply does not constitute clear and convincing evidence of actual malice.

As to the rumors and the assertions that Coody was misleading the public, the evidence does not support a finding of actual malice. The chronology of events surrounding the publication of the rumors is as follows: the testimony clearly established that rumors of Coody's alleged criminal past were circulating prior to October of 1992. Stokes testified he contacted the informant, Ms. Flynn, on the evening of October 29, and, as a result of that conversation, he decided to hire a private investigator. On Friday, October 30, 1992, Stokes hired a private investigator to research Coody's past. Stokes testified he received the investigator's report on Monday and he contacted the informant to verify her version.

Ms. Flynn, however, testified she did not remember talking to Stokes prior to the publication of the October 31 article. She testified that, to the best of her knowledge, she was first contacted on Monday, November 2. Ms. Flynn testified she told Stokes that she thought Coody had a questionable, at best, reputation in high school. She believed Coody had been involved with the police, but she did not provide any specifics, and further stated that she informed Stokes these were merely her impressions because she did not have any factual information.

The appellee submits that although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is a different matter. *Harte-Hanks, supra.* However, there is no convincing proof that the appellants purposefully avoided the truth. Although there are discrepancies regarding when Stokes contacted Ms. Flynn, there is no proof

that Stokes "entertained serious doubts as to the truth of his publication."

In addition, the appellee cites evidence that Stokes was "hostile" towards Coody. Other employees of the *Times* testified that Stokes was motivated by his desire not to see Dan Coody in office, that Stokes did not believe Coody was a good candidate, and that he believed he had something to hide. A former employee of the *Times* testified Stokes stated in June of 1992 that he thought Coody had been involved in illegal activities and he was going to hire a private investigator.

It has been recognized that ill will is admissible circumstantial evidence of actual malice. *Harte-Hanks, supra.* However, even though there is some circumstantial evidence, the proof does not establish actual malice with convincing clarity. Coody seems to argue that both the hiring of the investigator and then not waiting for his report is evidence of actual malice. Coody also points out that Stokes did not talk to Ms. Flynn prior to the October 31 article, because of her testimony that Stokes first contacted her on Monday, November 2. Nevertheless, reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing, but whether he, in fact, entertained serious doubts as to the truth of the publication. *Harte-Hanks, supra.* Appellee has simply not met his burden of proving actual malice by clear and convincing evidence.

CONSTITUTIONAL MALICE AND AWARD OF COMPENSATORY DAMAGES

For appellants' third and fourth points, they argue that the trial court erred in allowing evidence of common law malice on the issue of "constitutional malice," and that the trial court erred in allowing an award of compensatory damages based upon insufficient and speculative evidence. Because we reverse on the issue of actual malice, we do not address these issues.

Reversed and dismissed.

Jennings and Mitzi OSBORNE *v.*
Arleta POWER, Dick Wallace, Joe H. Smith, Dennis Lucy,
Tom Fiser, Catherine Cockrill

93-1303 896 S.W.2d 905

Supreme Court of Arkansas
Opinion delivered May 8, 1995

The Perroni Law Firm, P.A., by: *Samuel A. Perroni* and *John R. Pagan*, for appellants.

Gary D. Corum, for appellees.

PER CURIAM. On December 5, 1994, this court affirmed a ruling by the chancery court that appellants' Christmas light display constituted a nuisance where located. The opinion provided that the Osbornes were free to maintain an unrestricted display at an appropriate location, but issued an injunction directing them to substantially reduce the size and extravagance of the display located in their residential neighborhood. *Osborne* v. *Power*, 318 Ark. 858, 890 S.W.2d 570 (1994).

On December 16, 1994, this court denied a stay of the mandate. *Osborne* v. *Power*, 319 Ark. 52, 890 S.W.2d 574 (1994). On December 19, 1994, appellees filed a motion in which they alleged that appellant Jennings Osborne disobeyed the court's order by lighting massive portions of the display. Appellees asked that Jennings Osborne be held in contempt of court. In response this court ordered Jennings Osborne to appear and show cause why

he should not be held in contempt for willfully disobeying the injunction. *Osborne* v. *Power*, 319 Ark. 177, 890 S.W.2d 575 (1994). Jennings Osborne appeared and pleaded not guilty in the original action in this court.

On January 9, 1995, this court issued a per curiam order appointing The Honorable George Cracraft as a Special Master to hear the contempt matter. *Osborne* v. *Power*, 319 Ark. 239, 890 S.W.2d 577 (1995); *see also* ARCP Rule 53.

On January 23, 1995, a petition for rehearing on the merits of the original appeal was denied. Other motions, which are not material to this opinion, have been filed and ruled upon.

On March 31, 1995, the transcript from the contempt hearing was filed, and on April 4, 1995, the Master's report was filed. The Special Master reports that Jennings Osborne substantially reduced the size and extravagance of the display; that the 1994 display was not calculated to and did not attract unusual numbers of visitors to the neighborhood; that there was little or no sound generated by the display; and that all of Osborne's actions, if contemptuous, were taken on advice of counsel. Appellees filed a notice of appeal from the Special Master's report, and appellant Jennings Osborne moved to strike the notice of appeal. We treat the notice of appeal as an objection to the Special Master's report, *see* ARCP Rule 53(e)(2), and treat Jennings Osborne's motion to strike as a motion to strike the objection. We deny the motion to strike the objection. We will hear the objection and response thereto by briefs. The Clerk of the Court will notify the parties the dates their briefs are due. The request for oral argument is denied.

Jennings Osborne filed a motion with the Special Master asking that the contempt citation be dismissed on the ground that this court has lost jurisdiction of the contempt proceeding. We deny the motion.

The Special Master has filed a petition for allowance of fees. We grant the motion and fix the amount of fees at $3,500.00.

NEWBERN and BROWN, JJ., not participating.

Special Justices WILLIAM S. ARNOLD and ERNIE WRIGHT join in this per curiam.

William R. SIMPSON, Jr., Public Defender for the Sixth Judicial District *v.* PULASKI COUNTY CIRCUIT COURT

CR 95-432 899 S.W.2d 50

Supreme Court of Arkansas
Opinion delivered May 10, 1995

William R. Simpson, Jr., Public Defender, for appellant.

Pamela Dean Walker and *Clifford Paul Block*, for appellee.

PER CURIAM. Petitioner William R. Simpson, Jr., Public Defender for the Sixth Judicial District, urges in his motions for writ of certiorari, temporary stay of proceedings, and expedited consideration on an emergency basis that there is an intolerable conflict between himself and the criminal defendant he was

appointed to represent and that we should issue a writ of certiorari ordering the Second and Seventh Divisions of Pulaski County Circuit Court to relieve him as counsel in two pending capital murder cases. As of this date two partial transcripts have been filed with this Court.

The State has filed motions for writ of certiorari, temporary stay, and expedited consideration that support the position taken by the public defender. Meanwhile, Pulaski County has filed a motion for permission to intervene as an interested party or, in the alternative, for permission to file an *amicus curiae* memorandum, as well as a motion to join in Mr. Simpson's motion for temporary stay. In its response to Pulaski County's motion, the State has indicated that it has no objection to the motion to intervene or for permission, in the alternative, to file an *amicus curiae* memorandum.

Mr. Simpson was appointed to represent Ledell Lee in a capital murder case in Pulaski County Circuit Court, Second Division (Chris Piazza, Judge), No. CR 93-1249; a capital murder case in Pulaski County Circuit Court, Seventh Division (John B. Plegge, Judge), No. CR 93-2052; and three rape cases in Pulaski County Circuit Court, First Division (Marion A. Humphrey, Judge), No. 93-1797, No. 93-2110 and No. 94-480. On February 17, 1995, Lee, acting *pro se*, represented to Judge Humphrey that a conflict of interest existed between Mr. Simpson and himself and requested that Mr. Simpson be relieved as counsel in the First Division rape cases. After hearing Lee's testimony and Mr. Simpson's response, Judge Humphrey found that a conflict existed and granted Lee's request, relieving Mr. Simpson from the First Division cases and appointing Dale E. Adams to represent the defendant in those cases.

According to Mr. Simpson, the alleged facts in the First Division rape cases also figure in the Second and Seventh Division capital murder cases. In the Second Division case, set for Monday, May 15, 1995, the State is seeking the death penalty and has announced that it intends to employ the three rape charges as the aggravating circumstances that warrant imposition of the death penalty. In the Seventh Division case, the State has announced that it intends to introduce the three rape allegations in its case-in-chief under Ark. R. Evid. 404(b) ("Other Crimes,

Wrongs, or Acts"), although Judge Plegge has ruled, at this point, that the State will not be permitted to use the evidence.

Following his removal from the First Division rape cases, Mr. Simpson filed motions on his behalf, as Public Defender and on behalf of the Office of Public Defender for the Sixth Judicial District in the Second and Seventh Divisions to be relieved from further representation of Lee in the two capital murder cases. In a hearing on the status of the public defender's office, held on February 22, 1995, Judge Piazza noted that "My position is that whatever has happened in some other court doesn't govern this." At a hearing on March 8, 1995, Judge Piazza heard Lee's motion to determine the status of the Public Defender's Office. Addressing Lee, Judge Piazza stated that "I understand what Judge Humphrey has done . . . but I have not seen a conflict which would cause this court to relieve [the Public Defender's Office] from their duty and for me to appoint independent counsel to represent you." He again stressed that Judge Humphrey's decision was "not going to be precedent in this court" and refused to relieve the public defender.

At a later hearing, on March 23, 1995, Judge Piazza considered Lee's amended motion for clarification of status of the Office of Public Defender. Finding that there was no conflict between Lee and his counsel, Judge Piazza refused to relieve the public defender but agreed to sit *en banc* to resolve the issue of the public defender's representation. On April 21, 1995, the Second Division Circuit Court heard statements from Lee's counsel regarding a civil lawsuit that the defendant intended to file against the public defender. Judge Piazza also heard evidence of Lee's uncooperativeness with counsel. On April 25, 1995, Judge Piazza entered an order refusing to relieve the public defender from representation of Lee in Case No. CR 93-1249.

The proceedings in the Seventh Division of Pulaski County Circuit Court paralleled those in the Second Division. On March 8, 1995, Judge Plegge heard Lee's motion to determine the status of the Office of Public Defender and, finding that no conflict existed between the defendant and his counsel, refused to relieve the public defender. Subsequently, on March 23, 1995, Judge Plegge entertained Lee's amended motion for clarification of status of the Office of Public Defender and again found that no con-

flict existed and refused to relieve the public defender but did agree to sit *en banc* to resolve the issue. On April 24, 1995, Judge Plegge heard statements from Lee's counsel regarding a civil suit that the defendant intended to file against the public defender and evidence of Lee's uncooperativeness with the public defender, which is of record. Once again, in an order entered on April 25, 1995, Judge Plegge declined to relieve the public defender from representing Lee in Case No. CR 93-2052. The orders entered by Judge Piazza and Judge Plegge on April 25, 1995, mirror each other, consisting of exactly the same phraseology.

Under Ark. Const., Art. 7, § 4, this Court has general superintending control over all inferior courts. However, a circuit court has the discretion to deny counsel's motion to withdraw from representing an indigent defendant in a criminal case. *Davis* v. *State*, 308 Ark. 481, 825 S.W.2d 584 (1992). Moreover, a writ of certiorari will not lie to control judicial discretion unless a plain, manifest, clear, great, or gross abuse of discretion is shown. *Skokos* v. *Gray*, 318 Ark. 571, 886 S.W.2d 618 (1994). The petitioner for certiorari bears a very heavy burden. *Id.*

Although the second volume of the partial record before us reflects that the Seventh Division of the Pulaski County Circuit Court heard statements from Lee and his counsel, neither volume contains transcriptions of any of the hearings on March 8, March 23, or April 24, 1995, that resulted in Judge Plegge's findings. Further, no transcription of any hearing before Judge Humphrey, First Division, has been included. At most, we have Judge Humphrey's order of March 14, 1995, relieving the public defender from representation of Lee in the three rape cases.

What is available to this Court, having been filed with the Clerk, is a transcription of hearings before Judge Piazza, Second Division, and it is upon this portion of the record that we are obliged to focus in order to determine whether an abuse of discretion occurred. From a review of the partial record, it is evident that Judge Piazza afforded the parties opportunities to be heard concerning the issue of the status of the public defender on four different dates — February 22, March 8, March 23, and April 21, 1995.

On the basis of the partial record before us, we cannot say that Judge Piazza committed a plain, manifest, clear,

great, or gross abuse of discretion in refusing to relieve the public defender. Further, we decline to hold that Judge Plegge abused his discretion where the Seventh Division order of April 25, 1995, was entered on the same date and contained the identical language as the Second Division order and where both orders were approved as to form by the deputy prosecutor and the public defender.

Therefore, we deny the petition for writ of certiorari and the alternative motion for stay of proceedings.

GLAZE, J., would grant a stay and direct the consolidation of the three separate criminal proceedings pending against Ledell Lee below for the limited purpose to permit the respective parties to supplement the record so as to allow them to brief the issue on whether a conflict of issue exists in the Pulaski County Circuit Court, First Division, which should preclude defense counsel in that court proceeding from serving in Lee's cases pending in the Second and Seventh Divisions of the Pulaski County Circuit Court.

CORBIN and BROWN, JJ., dissent.

DONALD L. CORBIN, Justice, dissenting. I view with dismay the action — or should I say the inaction — of my respected colleagues in the matter before us.

Their inaction is premised upon the rule of law that a writ of certiorari will not lie to control judicial discretion, *unless* a plain, manifest, clear or gross abuse of discretion is shown. *Skokos* v. *Gray*, 318 Ark. 571, 886 S.W.2d 618 (1994) (emphasis added). My colleagues then proceed to determine, based upon a grossly incomplete record, that no manifest abuse of discretion has been demonstrated. They compound this error further by proceeding to deny the alternative motion for stay.

The bare minimum action called for in these proceedings necessarily involves granting a stay until we can get a complete and consolidated record of the proceedings in the three divisions of the Pulaski County Circuit Court as it relates to the public defender's ability to serve as the attorney for Ledell Lee.

A prima facie case of a conflict of interest has been presented to the court by the Petitioner William R. Simpson, Jr. This

is evidenced by the order of Judge Marion A. Humphrey finding that a conflict of interest existed between Mr. Simpson and the defendant Ledell Lee and relieving Mr. Simpson as counsel in the three rape cases against Lee.

This court should exercise its superintending control over the trial courts in an attempt to reconcile what appears at this time to be differences of opinion among three sitting circuit judges —if for no other reason. More importantly, this court should act now to avoid any possible prejudice to the state's cases against Mr. Lee that are pending before Judges Humphrey, Piazza and Plegge. Instead of protecting the investment of judicial time already expended, best indications are that a more wasteful expenditure of time will occur. I find our action today to be harmful to the confidence of attorneys in our system of jurisprudence in this state. I strongly believe this court is making a very grave mistake in judgment this day.

I am authorized to state that Justice Robert L. Brown joins in this dissent.

Melonie MAHAN, and Melonie Mahan as Next and Best Friend of Shawn Mahan *v.* Keith HALL, d/b/a Keith Hall Rodeo

94-1341 897 S.W.2d 571

Supreme Court of Arkansas
Opinion delivered May 15, 1995

Throesch & Throesch, by: *John Throesch*, for appellants.

Tom Garner, for appellee.

JACK HOLT, JR., Chief Justice. This is a negligence case. The appellant, Melonie Mahan, brought suit against the appellee, Keith Hall, d/b/a Keith Hall Rodeo, and the Sharp County Fair Association, on behalf of herself and her minor son, Shawn Mahan, who was injured while attending a rodeo produced by Mr. Hall. The case was settled as to the Sharp County Fair Association, and at trial, the court directed a verdict in favor of Mr. Hall, which is the basis for Ms. Mahan's sole point of error on appeal. As Ms. Mahan failed to prove that Mr. Hall was negligent, we affirm.

Facts

On July 8, 1992, sixteen-year-old Shawn Mahan attended a rodeo in Sharp County which was produced by the appellee, Keith Hall, d/b/a Keith Hall Rodeo. Shawn and a friend, Derrick Kildow, went to watch another friend ride in the rodeo, which was located on property owned by the Sharp County Fair Association. While Shawn and Derrick were standing near a gate outside the arena, but in an area open to the public, a bucking horse broke through the gate, which in turn struck Shawn, causing injuries to his face.

In a complaint against both Mr. Hall and the Sharp County Fair Association, Ms. Mahan alleged that Shawn was a business invitee of Mr. Hall and the Association, each of whom "owed him a duty to use ordinary care to prevent injuries to him." Ms. Mahan sought damages for personal injury, both temporary and permanent, pain and suffering, mental anguish, lost wages, and compensatory damages for medical treatment. While Mr. Hall admitted in his answer that the rodeo was open to the public, he denied that he was negligent.

The case settled as to separate defendant Sharp County Fair Association, but proceeded to trial as to Mr. Hall. At trial, Shawn testified that on the night in question, he and Derrick arrived at the arena and sat down in the bleachers before going over to a concession stand to get something to drink. From the concession stand, the two left the arena and walked over to a horse trailer where saddles and rodeo items were being sold and where some smaller children were playing around. According to Shawn, he and Derrick were standing outside the arena watching a rodeo event when the horse bucked off its rider, circled the inside of the arena, then broke through the gate, injuring him. It was also Shawn's testimony that the rodeo announcer was standing in front of the gate, approximately one foot away from where he and Derrick were standing, and that the announcer blocked his view when the horse came through the gate.

Shawn further testified that his cheekbone was crushed as a result of the accident, and that he was unable to move his mouth for approximately three months afterward. According to Shawn, he underwent surgery, and has no feeling on the left side of his face. He further stated that he had problems with his jaw, that he

was suffering from frequent headaches, that he was unable to work at his job at IGA for three months, and that he was no longer able to play football. Ms. Mahan corroborated her son's testimony regarding the extent of his injuries, adding that he was "scared to eat" for a long time after the accident, and that she had incurred medical expenses in the amount of $5372.35.

Derrick Kildow testified that he too was injured when the horse came through the gate, as he had to have stitches after being hit above his right eye. According to Derrick, he and Shawn did not have time to react or to get out of the way when the horse struck the gate, as the announcer was obstructing their view and did not move until the horse got to him and came through the gate.

At the close of Ms. Mahan's case, Mr. Hall moved for directed verdict on the grounds that Ms. Mahan had failed to show that he had breached a duty of care owed to Shawn or that he was negligent. Ms. Mahan responded that Shawn had paid an admittance to get into the rodeo on the date in question, and, as such, was a business invitee of Mr. Hall, who owed him a duty of care to secure the gate and to see that he was not injured. When the trial court inquired as to the presence of any testimony indicating that Mr. Hall did not secure the gate, Ms. Mahan responded that the fact that the horse came through the gate was "in itself evidence that the gate wasn't secure," that Mr. Hall had been producing rodeos for several years and had knowledge of the dangerous propensities of the animals, and that the gate was not maintained in a reasonably safe condition. Mr. Hall argued that Arkansas Model Jury Instruction (Civil) 603 states that "[t]he fact that an injury, collision or accident occurred is not of itself evidence of negligence or fault on the part of anyone." The trial court agreed, finding that while Ms. Mahan had proved an accident and had shown where it had occurred, she had not shown any breach of duty on the part of Mr. Hall. It is from the trial court's granting of Mr. Hall's motion for directed verdict that Shawn appeals.

Directed verdict

[redacted] As Ms. Mahan challenges the trial court's decision to direct a verdict in favor of Mr. Hall, we will review the evidence in a light most favorable to Ms. Mahan, the non-moving party, and give it its highest probative value, taking into account all

reasonable inferences. *Miller* v. *Nix*, 315 Ark. 569, 868 S.W.2d 498 (1994); *Mankey* v. *Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993). A motion for directed verdict may only be granted if there is no substantial evidence to support a jury verdict. *Id.*

We have said that the plaintiff has the burden of proving that he sustained damages, that the defendant was negligent, and that such negligence was the cause of his damages. *Sanford* v. *Ziegler*, 312 Ark. 524, 851 S.W.2d 418 (1993); *Fuller* v. *Johnson*, 301 Ark. 14, 781 S.W.2d 463 (1989). Here, there is no question that Shawn sustained injury and resulting damages; rather, the issue before us is whether there was substantial evidence of Mr. Hall's negligence. *See Sanford* v. *Ziegler, supra.* Negligence is the failure to do something which a reasonably careful person would do; a negligent act arises from a situation where an ordinarily prudent person in the same situation would foresee such an appreciable risk of harm to others that he would not act or at least would act in a more careful manner. *Sanford* v. *Ziegler, supra; White River Rural Water Dist.* v. *Moon*, 310 Ark. 624, 839 S.W.2d 211 (1992).

Ms. Mahan contends that because Shawn purchased a ticket to see the rodeo, he was an invitee of Mr. Hall, who, as the producer of the rodeo, owed Shawn a duty to exercise ordinary care to maintain the premises in a reasonably safe condition. *See Black* v. *Wal-Mart Stores, Inc.*, 316 Ark. 418, 872 S.W.2d 56 (1994). While Ms. Mahan asserts that the gate was not maintained in a reasonably safe condition, she presented no such testimony or other evidence to prove this assertion. And while the trial court and counsel for both Ms. Mahan and Mr. Hall allude to testimony that the gate was tied or chained, we find no such testimony in the abstract. It is fundamental that the record on appeal is confined to that which is abstracted. *Davis* v. *State*, 318 Ark. 212, 885 S.W.2d 292 (1994).

While Ms. Mahan maintains that the fact that the horse came through the gate was "in itself evidence that the gate wasn't secure," we agree with Mr. Hall's assertion that "[t]he fact that a injury, collision or accident occurred is not of itself evidence of negligence or fault on the part of anyone." *See* AMI 603. Granted, Ms. Mahan, her son Shawn, and Derrick Kildow

offered testimony that an accident occurred and that Shawn suffered damages, yet they simply presented no evidence that Mr. Hall was negligent. For this reason, we affirm the trial court's decision to direct a verdict in Mr. Hall's favor.

Affirmed.

Tangie MARTIN *v.* Susan JETKINS, et al.

94-1364 897 S.W.2d 567

Supreme Court of Arkansas
Opinion delivered May 15, 1995

Frye, Mickel & Boyce, P.A., by: *Phillip D. Cook, Jr.*, for appellant.

Cheryl K. Maples, for appellees.

ROBERT H. DUDLEY, Justice. Plaintiffs filed a tort suit against defendant Martin. Service was had on the resident defendant on March 23, 1994, but defendant did not answer until April 15, 1994, which was more than twenty days after service was completed. *See* ARCP Rule 12(a). Plaintiffs filed a motion to strike the untimely answer. Defendant filed a response to the motion. The trial court heard arguments from both parties, found that the answer was untimely and "not excusable under ARCP Rule 55(c)," and struck the answer. No reversible error is shown.

Defendant first argues that the trial court erred in striking the answer because its untimeliness was due to mistake, inadvertence, or excusable neglect as contemplated by ARCP Rule 55(c). However, no evidence was presented in the trial court. Both sides argued the matter in the trial court, and now argue it on appeal, as if there were some understanding or stipulation about the facts. The abstract does not reflect such an agreement, and it would be improper for this court to assume one. Moreover, even if there were a stipulation of facts, and even if defendant proved excusable neglect, defendant still would not prevail.

Both parties treat the trial court's order as one refusing to set aside a default judgment, *see* ARCP Rule 55(c), and, even if defendant had made a threshold showing of mistake, inadvertence, or excusable neglect, she also would have to show that she had a meritorious defense to the cause of action. Rule 55(c) provides that a "party seeking to have the judgment set aside must *demonstrate a meritorious defense* to the action." [Emphasis added.] In interpreting this provision, we have defined "meritorious defense" as the following:

> [E]vidence (not allegations) sufficient to justify the refusal to grant a directed verdict against the party required to show the meritorious defense. In other words, it is not necessary to prove a defense, but merely present sufficient defense evidence to justify a determination of the issue by a trier of fact.

Tucker v. *Johnson*, 275 Ark. 61, 66, 628 S.W.2d 281, 283-84 (1982).

In this case, defendant only *alleged* that she had a

meritorious defense. She did not present any evidence to justify a determination of the issue by a trier of fact. Consequently, we affirm.

Mary R. HADDEN *v.* Charles HADDEN

94-1319 897 S.W.2d 568

Supreme Court of Arkansas
Opinion delivered May 15, 1995
[Rehearing denied June 19, 1995.]

Roachell & Street, by: *Richard W. Roachell*, for appellant.

Appellee, pro se.

DAVID NEWBERN, Justice. Charles Hadden, the appellee, brought an action for divorce against Mary R. Hadden, the appellant, in 1992. Mrs. Hadden contested the divorce and counterclaimed for separate maintenance. Both parties' claims were denied because the Chancellor found each at fault and applied the doctrine of recrimination. The Chancellor entered support orders against Mr. Hadden in favor of Mrs. Hadden and the parties' minor daughter. Mr. Hadden later filed a second divorce complaint alleging 18 months separation, and the divorce was granted. The latter order divided the parties' marital property and awarded alimony to Mrs. Hadden and support for the minor daughter. Mrs. Hadden contends there was error in the division of the parties' property and in failure to award support of an adult daughter. Because the Chancellor erroneously declined to divide a particular marital asset without adequate explanation, we must reverse and remand the case.

Mrs. Hadden contends the Chancellor erred by declaring in the divorce decree that the earlier proceeding "resulted in an Order . . . which in effect granted the Defendant a divorce from bed and board; [and] that all property and property rights accruing to or purchased by each of the parties since January 21, 1993,

are now found to be non-marital property . . . ." In particular, she contends she should have received half of the money Mr. Hadden spent prior to the divorce on attorney's fees as well as half of money he withdrew from a checking account to spend on their adult daughter's college expenses when they separated in 1992.

1. The support order

In *Mason* v. *Mason*, 248 Ark. 1177, 455 S.W.2d 851 (1970), a divorce decree was denied by the Chancellor due to failure of the plaintiff to present corroboration of grounds. The Chancellor nonetheless retained jurisdiction to enter a support order in favor of Mrs. Mason and held Mr. Mason in contempt for violation of it. We affirmed, citing *Crews* v. *Crews*, 68 Ark. 158, 56 S.W. 778 (1900), in which a divorce from bed and board was awarded in favor of the wife although absolute divorce was denied because both parties were at fault, with the wife being somewhat less at fault than the husband. Our opinion in the *Mason* case stated the Chancellor had, despite the lack of corroboration of grounds, "in effect" granted a divorce from bed and board, and we implied that was proper in the circumstances.

It is very important to note that in the *Mason* case there was no finding of a failure to show a ground for divorce or application of a defense, such as recrimination. There was only a failure of corroboration, and the complaint was not dismissed by the Chancellor. The support order entered was much the same as a temporary order of support which may be entered in a pending divorce action. *See* Ark. Code Ann. § 9-12-309 (Repl. 1993); *Womack* v. *Womack*, 247 Ark. 1130, 449 S.W.2d 399 (1970).

[redacted] From the perspective of hindsight, and in view of our current marital property laws, it would have been far better had we, in the *Mason* case, alluded to maintenance *pendente lite* rather than divorce from bed and board. The difficulty in the case now before us is created by the fact that our current law provides that property acquired by a spouse after a divorce from bed and board is not marital property. Ark. Code Ann. § 9-12-315(b)(3) (Repl. 1993). When a chancellor declines to award a divorce and enters nothing more than a support order necessitated by a family breakup, there is no divorce from bed and board, and there is no basis for holding that property acquired by the parties there-

after is other than marital property unless it falls within some other exception found in § 9-12-315.

As a general proposition, we agree with Mrs. Hadden's argument that, to the extent the Chancellor may have divided marital property as of the date the first divorce complaint was denied, it was error to do so. The marital property should have been divided and distributed at the time the divorce decree was entered as provided in Ark. Code Ann. § 9-12-315(a). The remaining question is whether Mrs. Hadden has demonstrated any prejudice as the result of the error, absent which we will not reverse. *Young* v. *Young*, 288 Ark. 33, 701 S.W.2d 369 (1986). She contends the Chancellor improperly failed to distribute her share of $3,356.07 taken by Mr. Hadden from a checking account as well as money he spent on attorney's fees during their separation and prior to the entry of the divorce decree.

2. The $3,356.07

In the divorce decree, the Chancellor stated:

> . . . the Court finds that the plaintiff [Mr. Hadden] had, at the time of his separation, cash in his checking account in the approximate amount of $3,600 which the Court declines to divide as of the date of separation because the plaintiff used the money to pay for . . . [the parties' adult daughter's] educational needs.

Mrs. Hadden contends she was entitled to half of that money in accordance with § 9-12-315 unless such a division was found to be inequitable by the Chancellor. She says the reason given by the Chancellor was inadequate. Mr. Hadden argues the Chancellor was only doing equity as contemplated by the statute.

Assuming, as do the parties, that the money in question was available as a marital asset to be divided upon entry of the divorce, the Chancellor erred in declining to grant an equal division of it without adequate explanation. Section 9-12-315(a) provides for distribution of one-half of marital property to each party unless the court finds such a division to be inequitable. It then lists nine factors to be taken into consideration if the division is to be other than equal. Subsection (b) requires the court to state its reasons in the order if an unequal division is declared.

[redacted] Support of an adult, college student daughter does not fall directly within any of the nine items listed in the statute to be considered in reaching an unequal distribution of a marital asset. The Chancellor's reason for declining to divide the money spent by Mr. Hadden on the parties' adult daughter's college expenses was inadequate. As we discuss below, Mr. Hadden had no obligation to support his adult daughter, thus the payment of her college expenses does not constitute a sufficient reason for refusal to divide the money. We, therefore, must reverse and remand the case to the Chancellor for reconsideration of that part of the decree.

3. Attorney's fee expenses

Mrs. Hadden argues that any money spent by Mr. Hadden on legal counsel for the divorce should be divided and one-half of the amount should be awarded to her. Implicit in this argument is the conclusion that the funds, if any, spent by Mr. Hadden on the procurement of counsel, were marital funds. It should be noted that the Chancellor made no finding that marital funds were used for this purpose; nor is there any evidence in the abstract or the record that Mr. Hadden used marital funds to pay attorney's fees.

[redacted] It is the appellant's burden to produce a record exhibiting prejudicial error. *See Smith* v. *Babin*, 317 Ark. 1, 875 S.W.2d 500 (1994); *Haynes* v. *State*, 314 Ark. 354, 862 S.W.2d 275 (1993). As there is no evidence in the record nor was there a finding to support any allegation that marital property was involved in the payment of Mr. Hadden's legal fees, we decline to reverse on this point.

4. Support for adult daughter

Although conceding that a parent usually has no legal obligation to support a child over the age of majority, Mrs. Hadden submits that the Chancellor should have ordered support for the parties' adult daughter because the evidence showed she suffered from clinical depression at the time she reached the age of majority. The daughter turned 18 in 1988, some four years before the parties separated.

Mrs. Hadden presented the testimony of a psychologist who said the daughter's depression problem originated during her

childhood. No evidence was presented, however, to show that treatment was sought prior to 1992. The Chancellor stated in the decree that Mr. Hadden would not be required to provide the support requested because the daughter "did not have special needs justifying . . . [Mrs. Hadden's] claim for support at the time she reached the age of majority."

The general rule is that once a child reaches majority and is not physically or mentally disabled, the legal duty of the parents to support that child ceases. *Towery* v. *Towery*, 285 Ark 113, 685 S.W.2d 155 (1985); *Hogue* v. *Hogue*, 262 Ark. 767, 561 S.W.2d 299 (1978). The law imposes no duty of support if the child becomes disabled at a later time.

Given the Chancellor's factual conclusion that the daughter in question had no special need when she reached the age of adulthood, we cannot disagree with the legal conclusion that Mr. Hadden had no duty to support her.

Reversed and remanded.

Marsha JENKINS, et al. *v.* HESTAND'S GROCERY, INC.

94-1370 898 S.W.2d 30

Supreme Court of Arkansas
Opinion delivered May 15, 1995

Childs & Harper, by: *Callis Childs* and *Ricky Ashlock*, for appellant.

Friday, Eldredge & Clark, by: *William M. Griffin III* and *Betty J. Demory*, for appellee.

DAVID NEWBERN, Justice. This is a negligence case. Summary judgment was granted in favor of the appellee, Hestand's Grocery, Inc. (Hestand's), with respect to a claim by appellants Marsha Jenkins and her husband, Mike Jenkins. Ms. Jenkins alleged she suffered a fall just outside the Hestand's grocery entrance on an incline built to aid shopping carts and wheel chairs in negotiating the curb between the sidewalk and Hestand's parking lot. Ms. Jenkins claimed Hestand's breached its duty to warn her of an unmarked and unanticipated dangerous condition and she suffered injuries to her neck, back, and nervous system as a result. Summary judgment was appropriate because there was no remaining factual issue in view of the Trial Court's correct conclusion that Hestand's had no such duty in the circumstances presented.

Deposition testimony of Ms. Jenkins and of Hestand's store manager, Mr. Getchall, as well as an affidavit of Ms. Jenkins were before the Trial Court. In her deposition Ms. Jenkins stated she entered the store door from the parking lot, made a purchase, exited, and was returning to her car when she fell. She said, "When I got out of the car and went in, I walked up the slope. When I came out of the store, the slope was still there. However, I didn't know the slope was there when I went in the front door." She stated also that her fall occurred when she stepped in the middle of the slope and her foot went forward from under her. She said it was a very slight slope which looked like there was no incline because the asphalt had been "brought right up to the sidewalk." She landed on her hands and knees which were scraped but did not feel any additional injury until later.

Mr. Getchall stated the store had operated with the same condition in place some 29 years, serving 3000 to 4000 cus-

tomers weekly without any such incident. He said Hestand's was unaware of any dangerous or hazardous condition on its parking lot or sidewalk.

In granting the summary judgment motion, the Trial Court remarked that there had been no presentation of an affidavit or other evidence by a person with requisite skills and training to say that the condition in question was dangerous. He also analogized to a situation of which he was personally aware and said in such a circumstance "There are thousands of people that walk there every day . . . . You've got to look and see that because you know it's there, and you got to miss it and avoid it. Here, we just have a slope, and . . . people have to kind of take care of themselves."

Ms. Jenkins contends there was a remaining genuine issue of material fact and thus summary judgment should not have been granted. Ark. R. Civ. P. 56(c). She argues the Trial Court erred by requiring her to "prove" her case and that her testimony was not properly evaluated.

The duty of Hestand's to its invitees, such as Ms. Jenkins, is clearly stated in Restatement of Torts 2d, § 343 as follows:

> A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and (c) invites or permits them to remain upon the land without exercising reasonable care
>
> (i) to make the condition reasonably safe, or
>
> (ii) to give a warning adequate to enable them to avoid the harm.

See *Kuykendall* v. *Newgent*, 255 Ark. 945, 504 S.W.2d 344 (1974), and *Dr. Pepper Co.* v. *DeFreece*, 234 Ark. 450, 352 S.W.2d 579 (1962), in which we cited the rule as found in the original Restatement.

Under this rule, the basis of a defendant's liability is

superior knowledge of an unreasonable risk of harm of which the invitee, in the exercise of ordinary care, does not or should not know. In *McClure* v. *Koch*, 433 S.W.2d 589 (Mo. App. 1968), the Missouri Court of Appeals was presented with a case which had been tried to a jury on facts remarkably similar to those presented on the summary judgment motion here. The Court affirmed a judgment for the defendant grocery store, and in discussing Restatement § 343 and the grocery store parking lot ramp said:

> The alternative duty to keep the premises in a reasonably safe condition for an invitee or to warn him of the dangerous condition applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls and the like, in that they are known to the invitor but not known to the invitee and would not be observed by the latter in the exercise of ordinary care. [Citation omitted.] It follows therefore that there is no liability by the occupier or possessor of the premises for injuries from dangers that are obvious, or as well known to the plaintiff injured as to the occupier or possessor of the premises. [Citation omitted.]

While the opinion in the *McClure* case continues with remarks about the familiarity of the plaintiff with the defendant's parking lot and the ramp in question, the emphasis could just as well have been on "dangers that are obvious" as opposed to "traps, snares, or pitfalls." It was held that the plaintiff had failed to make a "submissible case" for the jury to decide.

We agree with the Trial Court's apparent conclusion that no evidence was presented by Ms. Jenkins to show that the condition she alleges to have caused her fall constituted a "danger" or that it presented an "unreasonable risk" to invitees. In addition, there was nothing before the Trial Court to indicate the occupier of the premises, Hestand's, had any knowledge whatever that the ramp was dangerous or involved an "unreasonable risk" to its invitees.

Affirmed.

Carroll Don NEAL *v.* STATE of Arkansas

CR 94-1343 898 S.W.2d 440

Supreme Court of Arkansas
Opinion delivered May 15, 1995

Andrew J. Ziser, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. Carroll Don Neal was convicted of delivery of marijuana, possession of marijuana with intent to deliver, and possession of drug paraphernalia. He was sentenced as an habitual offender to 35 years in prison. Mr. Neal raises four points of appeal. (1) He contends Ark. R. Evid. 404(b) was violated by the admission into evidence of testimony about prior, uncharged drug sales. We hold the evidence was admissible to negate his testimony that the drugs found in a police search of his home had been "planted" there by some other person. (2) He argues an affidavit in support of a nighttime search was insufficient. We hold it was sufficient because it asserted that evidence was in danger of being lost if the search were not conducted immediately. (3) Mr. Neal contends the prosecutor misused the prosecutor's subpoena power. We do not reverse on that argu-

ment because no prejudice is shown. (4) Finally, he contends the Trial Court should not have permitted amendment of the information against him to charge he was an habitual offender on the basis of an expunged Kansas conviction. We hold the amendment was not improper. The judgment is affirmed.

In late 1992 and early 1993, the Carroll County Sheriff's Department investigated possible illegal drug activity at the home of Mr. Neal. In December 1992, a confidential informant purchased cocaine from Mr. Neal and recorded the transaction. On the evening of April 12, 1993, Lt. Hyatt of the Sheriff's Department arranged for two other confidential informants, Mitch Boyte and Randy Wagner, to attempt a marijuana purchase at Mr. Neal's home. Lt. Hyatt gave Mr. Boyte $60 in marked bills as buy money and outfitted him with a microcassette recorder.

Mr. Boyte testified that when he arrived at Mr. Neal's home, he accompanied Mr. Neal to the bedroom and a safe containing marijuana. Mr. Boyte arranged to buy marijuana for $50, gave Mr. Neal the three marked $20 bills, and received ten dollars in change. Mr. Boyte said he observed various items of drug paraphernalia and saw Mr. Neal sell marijuana to another man.

Mr. Boyte brought the marijuana and the tape to Lt. Hyatt. After listening to the tape, Lt. Hyatt made out an affidavit seeking a nighttime search warrant and presented it to Berryville Municipal Judge Kent Coxsey. In the affidavit, Lt. Hyatt set forth the circumstances of both the December 1992 cocaine transaction and the marijuana transaction that had occurred earlier that evening. He also stated facts showing reliability of the informants. In the final paragraph, he gave the reasons for his belief that a nighttime search was justified:

> It is further believed that the above described items are in danger of being removed from said premises or destroyed. A night time search warrant is needed because the marked money by its very nature is in imminent danger of being removed from the premises or otherwise disposed of. In addition, according to the statements of the informants there were a number of individuals at the residence who indicated that they were going to buy marijuana. Don Neal has indicated previously that he has sources of information which have alerted him to activities by the Carroll

> County Sheriff's Office in relation to him. Based on these circumstances it is believed that any delay of the service of the warrant may result in the destruction of the evidence.

Judge Coxsey issued a search warrant and indicated that it was to be served at nighttime because the house to be searched was difficult of speedy access and the evidence to be seized was in imminent danger of destruction or removal.

Lt. Hyatt and other officers executed the warrant about 9:00 p.m. on April 12, 1993. As a result, marijuana and various items of drug paraphernalia were seized.

Prior to trial, Mr. Neal moved to suppress the evidence that was seized as a result of the search. He stated that the affidavit did not adequately justify the need for a nighttime search, and that the informants whose testimony provided the basis for the warrant were unreliable. The motion was denied.

1. Rule 404(b)

Prior to trial, Mr. Neal moved in limine to prevent the State from offering the testimony of several witnesses who said they had bought marijuana from him in the past. He argued the State sought to introduce that evidence only to prove his bad character and predisposition to commit this type crime and that it was inadmissible according to Rule 404(b). The State responded that the evidence was being offered for other, independently relevant reasons. First, the State noted that Mr. Neal had made a statement claiming the drugs recovered in the search were placed in his home without his knowledge. Indeed, he ultimately testified that two men he did not know came into his home and insisted they owed him $50 and he had one of them throw the money down just to get rid of him. Accordingly, the prosecutor argued that the prior acts would be used to prove that there was an absence of mistake. The State also argued the prior acts could be used to show method of operation. The Trial Court denied Mr. Neal's motion in limine and allowed testimony concerning marijuana buys after December 3, 1992, "since they can be used to show lack of mistake or *modus operandi*."

[redacted] The State argues Mr. Neal failed to preserve this argument for appeal because he did not make an objection at trial

contemporaneous with the testimony he considered objectionable. We treat the merits of the matter. When a motion in limine seeking to exclude evidence has been denied, the objection raised in the motion may be pursued on appeal without its having been renewed when the evidence was received. *Massengale* v. *State*, 319 Ark. 743, 894 S.W.2d 594 (1995).

The State now argues only that the evidence was admissible because it showed method of operation.

Rule 404(b) provides:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We have strong doubts whether the evidence of prior drug sales was admissible to show a method of operation. *See Diffee* v. *State*, 319 Ark. 669, 894 S.W.2d 564 (1995). In view, however, of the defense asserted by Mr. Neal we have no hesitancy holding that the evidence was admissible. In *Sullivan* v. *State*, 289 Ark. 323, 711 S.W.2d 469 (1986), we wrote:

> We interpret Rule 404(b) as meaning that if the evidence of prior bad acts is relevant to show the offense of which the appellant was accused occurred, and is thus not being introduced to show only bad character, we will not exclude it. While we may not be able to tie the evidence specifically to proof of "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," if it has an independent relevancy we will regard it as being, in the words of the rule, "such as" one of those permissible objects of proof.

See also Vernon v. *State*, 2 Ark. App. 305, 621 S.W.2d 17 (1981).

In view of Mr. Neal's claim, which was made in his counsel's opening statement before the jury, that he had no knowledge of the presence of the marijuana in his home, the evidence of the prior sales was relevant to cast grievous doubt upon his testimony.

In his motion in limine, Mr. Neal included an argument that the introduction of the evidence would have a prejudicial effect which outweighed its probative value. Ark. R. Evid. 403. We agree the prejudicial effect was strong, but again in view of the defense Mr. Neal asserted, we cannot say the prejudice was unfair. The decision was within the Trial Court's discretion, *Robinson* v. *State*, 314 Ark. 243, 861 S.W.2d 548 (1993), and we cannot say that discretion was abused.

2. Nighttime search

Mr. Neal contends his motion to suppress the evidence, including bags of marijuana and drug paraphernalia, found in his home should have been granted because the search was illegal. He contends the affidavit supporting the warrant did not justify a nighttime search. In such instances we make an independent determination, based on the totality of the circumstances and reverse only if the Trial Court's ruling is clearly against the preponderance of the evidence. *Richardson* v. *State*, 314 Ark. 512, 863 Ark. 572 (1993); *Coleman* v. *State*, 308 Ark. 631, 826 S.W.2d 273 (1992).

Arkansas R. Crim. P. 13.2(c) provides that before a nighttime warrant is issued, the issuing judicial officer must have reasonable cause to believe that:

> (i) the place to be searched is difficult of speedy access; or
>
> (ii) the objects to be seized are in danger of imminent removal; or
>
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;. . .

Our requirement is that, to serve as a proper basis for a nighttime search, the evidence presented to the magistrate from whom a nighttime search warrant is sought must be of facts justifying such a warrant rather than mere conclusions. *Hall* v. *State*, 302 Ark. 341, 789 S.W.2d 456 (1990).

The affidavit of Lt. Hyatt revealed his chief reason for requesting a nighttime search warrant was his concern that the marked money used by the confidential informants to purchase marijuana from Mr. Neal would be removed from Mr. Neal's

home. He stated that the informants said there were others present who indicated they were going to purchase marijuana. Judge Coxsey could easily have concluded that in the course of doing business the marked money might have been dispatched from Mr. Neal's home. We hold the nighttime search was justified on the ground that it was necessary to conduct the search as quickly as possible after the purchase the confidential informants reported they had made from Mr. Neal.

3. Prosecutor subpoenas

A prosecutor or deputy prosecutor may subpoena witnesses to appear before him or her with respect to matters being investigated. Ark. Code Ann. § 16-43-212 (Repl. 1994). Mr. Neal argues that the statutory power was violated because defense witnesses were subpoenaed several months after the charges were filed and only one month prior to the original trial date. He argues that the prosecutor's subpoena power is reserved strictly for investigative purposes, and that the use of this power so late in the proceedings constitutes a clear abuse of that power.

A prosecutor may subpoena witnesses to prepare for trial after charges have been filed as long as the power is not abused. *Todd* v. *State*, 283 Ark. 492, 687 S.W.2d 345 (1984). Mr. Neal does not give us a reason for holding there was an abuse in this case. As the State points out, he has neither alleged nor shown any prejudice resulting from alleged misuse of the prosecutor's subpoena power. In the absence of prejudice, we do not reverse. *Parker* v. *State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

4. Expunged conviction

The information was amended to allege, and evidence was presented to show, that Mr. Neal was previously convicted in Douglas County, Kansas, of Concealing Property Subject to a Security Interest.

Mr. Neal argues the amendment to the information, made shortly before trial, was untimely. It is well settled that the State may amend an information up to a point after the jury has been sworn but before the case has been submitted to it, as long as the amendment does not change the nature or degree of the crime charged, if the accused is not surprised. *Kilgore* v. *State*, 313 Ark. 198, 852 S.W.2d 810 (1993).

Mr. Neal contends the Kansas conviction was subsequently expunged and should not have been used to enhance his sentence. In making this argument, he points out the similarities in the definitions of "expunge" and "pardon," and contends that, as we prohibit the use of a pardoned conviction to enhance a later sentence, an expunged conviction should also not be used for that purpose.

Although a pardoned conviction cannot be used to enhance a later sentence, *Duncan* v. *State*, 254 Ark. 449, 494 S.W.2d 127 (1973), our cases clearly support the use of an expunged conviction to enhance a sentence as an habitual offender. *Walters* v. *State*, 286 Ark. 166, 690 S.W.2d 192 (1985); *Gosnell* v. *State*, 284 Ark. 299, 681 S.W.2d 385 (1984).

Affirmed.

DUDLEY, BROWN, and ROAF, JJ., dissent.

ROBERT L. BROWN, Justice, dissenting. The majority affirms the introduction of myriad marijuana sales apart from the charge at issue for the reason that they are independently relevant under Rule 404(b). I disagree. As defense counsel argued in his motion in limine before trial, "Mr. Neal won't receive a fair trial if the jury hears twenty other incidents he's not being tried on and we're not prepared to defend on." The trial court denied the motion and stated that other marijuana buys could be used to prove lack of mistake or *modus operandi*. The majority opinion discounts those rationales and affirms for a different reason — independent relevancy. The majority opinion also refers to the fact that Neal's counsel denied selling marijuana in his opening statement. I do not believe that such a denial in opening statement should open the door to wholesale evidence of other crimes. Indeed, what defendant admits the crime in opening statement?

The following testimony was presented by the prosecutor in the State's case-in-chief: the testimony of Mitch Boyte (purchased marijuana from Neal 20 or 25 times and saw others buy 10 or 12 times), Jamie Edmondson (purchased marijuana from Neal and saw others buy marijuana from him), Mike Bryant (purchased marijuana from Neal 8 or 10 times), and John Shawn Bryant (purchased marijuana from Neal 30 or 40 times). Had Neal denied that he ever sold marijuana as part of his case, this

testimony would have been appropriate on rebuttal. *See Pyle* v. *State*, 314 Ark. 165, 862 S.W.2d 823 (1993). Alternatively, the prosecutor could have charged Neal with these sales and sought to join the various counts for trial. The prosecutor then would have had to show that the sales were part of a single scheme or plan, if severance was requested. *See* Ark. R. Crim. P. 22.2(a).

The landmark decision of *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954), addresses using other bad acts to prove a crime:

> No one doubts the fundamental rule of exclusion, which forbids the prosecution from proving the commission of one crime by proof of the commission of another. The State is not permitted to adduce evidence of other offenses for the purpose of persuading the jury that the accused is a criminal and is therefore likely to be guilty of the charge under investigation. In short, proof of other crimes is never admitted when its only relevancy is to show that the prisoner is a man of bad character, addicted to crime.

223 Ark. at 333, 266 S.W.2d at 806. In dealing with the same issue that confronts us in this case, we have stated:

> In the case at bar the issue for the jury was whether Sweatt had sold LSD to Robbie White. Proof that Sweatt had sold marijuana on other occasions had no relevancy except to show that Sweatt had dealt in drugs before and hence was likely to have done so again. That is precisely the type of proof that must be excluded.

Sweatt v. *State*, 251 Ark. 650, 652, 473 S.W.2d 913, 914 (1971).

True, we have approved the admissibility of past drug sales in certain cases but only in the limited context of what the defendant told the prosecuting witness about other drug sales he had made *that night* (*Young* v. *State*, 269 Ark. 12, 598 S.W.2d 74 (1980) (res gestae)); or in the context of a previous drug sale made to the same prosecuting witness (*Scroggins* v. *State*, 312 Ark. 106, 848 S.W.2d 400 (1993) (intent)); or in the context of a previous comment the defendant made to the prosecuting witness about selling drugs (*Holloway* v. *State*, 293 Ark. 438, 738 S.W.2d 796 (1987) (intent)).

To me, what happened at this trial in the State's case-in-chief was prejudicial. Had Neal mounted denial as a defense in his case, the four witnesses would have been appropriate for rebuttal. See Pyle v. State, supra. But this is not what transpired.

I respectfully dissent.

DUDLEY and ROAF, JJ., join.

Alge Ray WILLIAMS *v.* STATE of Arkansas

CR 95-25 898 S.W.2d 38

Supreme Court of Arkansas
Opinion delivered May 15, 1995

Janet L. Thornton, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen., and *Savannah Dyer*, Law Student Admitted to Practice Pursuant to Rule XV(E)(1)(b), for appellee.

ROBERT L. BROWN, Justice. Appellant Alge Ray Williams contests his 75-year sentence for selling one rock of crack cocaine on grounds of excessiveness. His appeal is without merit, and we affirm.

On December 14, 1993, informant Teresa Lavette Mitchell, accompanied by informant Deborah Box and undercover police officer Maria Bell, drove in one car to the parking lot across the street from the Chat-N-Chew eating establishment in Camden. They all wore body microphones. In the parking lot, Mitchell bought one rock of crack cocaine from Williams for $20. Williams carried the crack cocaine in a plastic film canister. The transaction was recorded on the body microphones of the women as well as by a video camera in the car.

The jury found Williams guilty of delivery of a controlled substance. During the penalty phase of the trial, the State introduced evidence that Williams had seven prior felony convictions: (1) burglary; (2) theft of over $100; (3) breaking and entering and theft of property; (4) escape in the second degree; (5) rape, burglary, and battery in the second degree; (6) escape in the second degree; and (7) possession of a controlled substance with intent to deliver. Williams did not contest the existence of the seven prior convictions. The jury returned a verdict of 75 years. Following the verdict, this colloquy occurred:

> THE COURT: Do you know of any legal reason why sentence should not be pronounced at this time?
>
> WILLIAMS: I don't know —
>
> DEFENSE COUNSEL: Tell him whatever you want.
>
> THE COURT: Do you know of any legal reason why sentence should not be pronounced at this time?
>
> WILLIAMS: Excuse me.
>
> DEFENSE COUNSEL: You can say whatever you

> want. That's what I'm telling you. If you want to say something to the Judge, then say it.
>
> WILLIAMS: At this moment, no, sir.

The trial court then sentenced Williams to 75 years.

Williams's one issue on appeal is that a 75-year sentence for selling one rock of crack cocaine was the result of passion and prejudice on the part of the jury and wholly disproportionate to the crime. He urges that we modify the sentence downward and cites *Collins* v. *State*, 261 Ark. 195, 548 S.W.2d 106 (1977), as authority for doing so.

This court has previously decided that the power to exercise clemency and reduce sentences is vested in the chief executive of this State and not in the courts. *Parker* v. *State*, 302 Ark. 509, 790 S.W.2d 894 (1990); *Osborne* v. *State*, 237 Ark. 5, 371 S.W.2d 518 (1963). If the sentence fixed by the trial court is within the limits set by the legislature, we are not at liberty to reduce it even though we might think it unduly harsh. *Id.* The exception to this rule is in death penalty cases. *See Nichols* v. *State*, 306 Ark. 417, 815 S.W.2d 382 (1991); *Andrews* v. *State*, 283 Ark. 297, 675 S.W.2d 636 (1984). We have further carved out extremely narrow exceptions to the general rule where the punishment resulted from passion or prejudice, or was a clear abuse of the jury's discretion, or was barbarous and unknown to the law, or was so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. *See Parker* v. *State*, 290 Ark. 94, 717 S.W.2d 197 (1986); *Stout* v. *State*, 263 Ark. 355, 565 S.W.2d 23 (1978); *Collins* v. *State, supra.*

Be that as it may, we refrain from deciding this case on the merits. Williams, based on the quoted colloquy, clearly voiced no objection to the 75-year sentence at trial. Moreover, he did not file a post-trial motion raising the issue but did so for the first time on appeal. We have steadfastly refused to review issues which were not preserved at trial. *Baker* v. *State*, 318 Ark. 223, 884 S.W.2d 603 (1994); *Henry* v. *Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992).

Affirmed.

ARKANSAS DEPARTMENT OF HUMAN SERVICES,
Division of Economic and Medical Services
v. Michelle KISTLER

94-1409 898 S.W.2d 32

Supreme Court of Arkansas
Opinion delivered May 15, 1995

Charles Mackey, for appellant.

Davis Duty, for appellee.

ANDREE LAYTON ROAF, Justice. Appellant, Arkansas Department of Human Services (DHS), Division of Economic and Medical Services, terminated appellee Michelle Kistler's participation in the Developmental Disabilities Services Alternative Community Services Waiver Program. Appellee Kistler filed a petition for judicial review pursuant to Ark. Code Ann. § 25-12-212 (Repl. 1992), and the circuit court reversed the appellant's decision. We affirm the circuit court's reversal of the appellant's decision.

Appellee Michelle Kistler, born January 8, 1974, has congenital spina bifida and scoliosis, meningomyelocele paraplegia, hydrocephalus VP shunt, and a neurogenic bowel and bladder. She has a Wechsler Adult Intelligence Scale - Revised (WAIS-R) performance IQ of 68, WAIS-R verbal IQ of 80, WAIS-R full-scale IQ of 73, and a Vineland Adaptive Behavior Score of 109 plus or minus 8. Further, she receives Supplemental Security Income and is Medicaid qualified. She currently lives with, and is cared for by, her mother, Mrs. Jennifer Kistler. Because she is paraplegic, the appellee is confined to a wheelchair, needs assistance

to get in and out of her wheelchair, needs assistance with bathing, and she cannot dress her lower extremities.

The Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35, Section 2176) allows states the option of providing home and community based services, as an alternative to institutionalization, to a limited number of individuals with a developmental disability who would otherwise require an ICF/MR (Intermediate Care Facility for the Mentally Retarded) Level of Care. In accordance with the act, the appellant instituted the Developmental Disability Services Alternative Community Services Waiver Program (Waiver Program) and adopted eligibility requirements for applicants. *See* Medical Services Policy 2075.1.

The appellee was admitted to participate in the Waiver Program on September 18, 1991, with an effective date of August 1, 1991. The appellee was notified on August 19, 1992, that she was no longer eligible to participate in the program and her benefits would be terminated August 29, 1992. The appellee requested a hearing, which was held on November 5, 1992, before Hearing Officer Diana Little of the Appeals and Hearings Section of DHS. On October 18, 1993, the hearing officer issued a decision upholding the termination of appellee's participation in the Waiver Program. Subsequently, the appellee filed a petition for judicial review in the Circuit Court of Sebastian County.

The Department of Human Services appeals from the circuit court's order reversing the agency decision. Appellant raises five points on appeal: (1) the trial court erred in awarding attorney's fees and costs; (2) the trial court erred in the standard of review it used; (3) the trial court erred in substituting its judgment for the judgment of the administrative hearing officer; (4) the trial court erred in reversing the administrative decision upon finding a violation of appellee's due process rights; and (5) the trial court erred in determining that appellant failed to file the entire administrative record and reversing the administrative decision on that ground.

I. Review of Agency Decision.

The appellant asserts the trial court erred in applying a preponderance of the evidence standard and in substituting its judgment for that of the administrative hearing officer. In reversing the termination of benefits, the circuit court stated:

> While it is not entirely clear whether or not the Defendant has formally adopted a specific criteria for entitlement to Alternative Medicaid Waiver Services by reason of mental retardation, the preponderance of the evidence reflects that if indeed any such criteria was established, either by formal action or by custom and usage, it was substantially identical to the criteria established for mental retardation under Section 12.05 C of Appendix 1, Subpart P, Regulation No. 4 (20 CFR § 404 et. seq.) adopted pursuant to the federal Social Security Act set out in Title II of the United States Code (42 USC); and that the criteria for mental retardation employed by the Vineland Adaptive Behavioral Test protocol is substantially identical to that prescribed by the federal guidelines and does not constitute a separate and additional mental retardation criteria; and that the Plaintiff, with a performance IQ of 68, verbal IQ of 80 and a full scale IQ of 73 and with other severe mental or physical impairments meets the aforesaid criteria for mental retardation.

[redacted] Review of administrative agency decisions both by the circuit court and by the Supreme Court on appeal is limited in scope. *Thomas* v. *Arkansas Department of Human Serv.*, 319 Ark. 782, 894 S.W.2d 584 (1995). Our review is not directed toward the circuit court but toward the decision of the agency recognizing that administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies. *Franklin* v. *Ark. Dep't of Human Serv.*, 319 Ark. 468, 892 S.W.2d 262 (1995). In addition, this court will not substitute its judgment for that of the agency unless the agency's decision is arbitrary and capricious. *Arkansas Bank & Trust Co.* v. *Douglass*, 318 Ark. 457, 885 S.W.2d 863 (1994). Finally, the evidence is given its strongest probative force in favor of the agency's ruling, and we do not reverse an agency decision when there is substantial evidence to support it. *Thomas, supra.*

Because our review is not directed toward the circuit court, we need only review the decision of the agency. On October 18, 1993, DHS issued its final decision terminating Kistler's participation in the Waiver Program. The sole basis for the hearing officer's decision to terminate benefits was the determination by

the Utilization Review Section of the Office of Long Term Care that Kistler did not meet the ICF/MR Level of Care criteria because of her WAIS and Vineland Adaptive Behavior Scores. The relevant findings of fact and conclusions of law were:

FINDINGS OF FACT

* * *

5. The summary of the Administrative Hearing was forwarded to the Utilization Review Section on December 15, 1992.

6. An EMS-704 dated January 12, 1993 was received in the Appeals and Hearings Office which indicated a decision that Ms. Kistler did not meet the criteria for DDS Waiver Services.

7. According to a memorandum from Walter O'Neal, M.D., Medical Director, Economic and Medical Services, dated January 14, 1993, Ms. Kistler was determined to not meet the criteria for ICF/MR level of care because her WAIS-R and Vineland Adaptive Behavior scores exceeded 70, which represents the upper limit of eligibility for ICF/MR level of care.

CONCLUSIONS OF LAW

1. Medical Services Policy 2075 states that Public Law 97-35, Section 2176, the Omnibus Reconciliation Act of 1981 allows states the option of providing home and community-based services, as an alternative to institutionalization, to a limited number of individuals with a developmental disability who would otherwise require an ICF/MR Level of Care.

2. Medical Services Policy 2075.1 lists eligibility requirements that must be met by Waiver applicants, including *(#1) that individuals must be developmentally disabled as determined by the Division of Developmental Disabilities Services (DDS), and (#10) that individuals must be determined by the LTC Utilization Review Committee to require an ICF/MR level of care.*

3. Medical Services Policy 2075.3 #1 states prior to Waiver

acceptance, DDS will administer a comprehensive Diagnosis and Evaluation to determine that applicants are individuals with developmental disabilities. DDS will route form EMS-703, psychological reports, and medical reports to the OLTC Utilization Review Committee.

4. Medical Services Policy 2075.3 #2 states upon receipt of the EMS-703 and other reports, the Utilization Review Committee will determine if the applicant meets the ICF/MR Level of Care requirements. The results will be routed by EMS-704 to the County Office.

5. Medical Services Policy 2075.3 #2 also states if at any time an individual does not meet the requirements for an ICF/MR Level of Care, he/she will not be Waiver eligible.

6. *The Level of Care Criteria issued by the Office of Long Term Care* governing medical necessity eligibility for the developmentally disabled to be medicaid eligible for services provided in an Intermediate Care Facility for the Mentally Retarded provide that a client must have a diagnosis of developmental disability, due to a severe, chronic disability which: (1) *is attributable to a mental or physical impairment or combination thereof*; (2) is manifested before age 21; (3) is likely to continue indefinitely; (4) results in substantial functional limitations in 3 or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, economic self-sufficiency; and (5) reflects the client's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of life-long or extended duration and are individually planned and coordinated; further, a pre-admission/pre-reimbursement evaluation of the client performed by an interdisciplinary team (including the areas of psychology, medical, nursing, social and habilitation, as a minimum) must determine the need for active treatment, outline the areas of active treatment needed by the client, and state that the needs of the client will be met as a resident in an ICF/MR.

DECISION

> In order to be certified for Alternate Waiver Services, an individual must meet the eligibility requirements specified in MS 2075.1, including the need for an ICF/MR level of care. At the time of Ms. Kistler's annual reevaluation, *the Utilization Review Section of the Office of Long Term Care determined that she did not meet the ICF/MR Level of Care criteria, based on her WAIS and Vineland Adaptive Behavior Scores, and this determination was not reversed upon reconsideration of her eligibility following the appeal. One element of the medical necessity determination for an ICF/MR level of care classification considers the degree of functional limitations in the areas of major life activities, which is measured by the Vineland Adaptive Behavior test. Ms. Kistler's score in this testing did not support a substantial limitation; therefore, she was not determined to meet the ICF/MR Level of Care criteria. . . .*

(Emphasis supplied.)

In August of 1992, Ms. Kistler was notified her benefits would be terminated because she: "Does not meet ICF/MR admission criteria." After the administrative hearing, Walter O'Neal, M.D., Medical Director of the Economic and Medical Services Division, was contacted by the Appeals and Hearings Office. Dr. O'Neal responded in a letter that both Ms. Kistler's WAIS-R Full Scale IQ and her Vineland Adaptive Behavior Score exceed the upper limits of eligibility for ICF/MR level of care. These scores were from the testing done prior to her admission to the Waiver Program in 1991. No new testing was done for the 1992 reevaluation. Dr. O'Neal stated the upper limits of eligibility were a score of 70 on both the WAIS and Vineland tests, and Ms. Kistler's "application is denied." Based upon Dr. O'Neal's response, the hearing officer affirmed the termination of benefits to Ms. Kistler.

This case is comparable to *Franklin* v. *Arkansas Dep't of Human Servs., supra*, where we reversed the agency's decision. In his concurring opinion, Justice Newbern wrote "[a] decision can be nothing but arbitrary when it is based upon no discernible standard." In the instant case, Ms. Kistler's benefits were terminated because, according to Dr. O'Neal, her WAIS-R Full Scale IQ and her Vineland Adaptive Behavior Score exceeded the upper

limits of eligibility for ICF/MR level of care. However, other than the letter from Dr. O'Neal, we are unable to ascertain the "limits of eligibility."

Medical Services Policy 2075.1 (#10) states that individuals, to be eligible, must be determined by the Long Term Care Utilization Review Committee to require an ICF/MR level of care. In her conclusions of law, the hearing officer states that the Level of Care Criteria issued by the Office of Long Term Care provide that a "client must have a diagnosis of developmental disability, due to a severe, chronic disability which: (1) is attributable to a *mental or physical* impairment or combination thereof. . . ." The record, however, is devoid of how that determination was made — other than Dr. O'Neal's statement of the applicable standard. On appeal, the appellant asserts Ms. Kistler did not fall within the definition of developmentally disabled, but the appellant has failed to express how the agency defines developmentally disabled.

The trial court applied federal social security guidelines and found the appellee met the mental retardation requirements. The trial court further found that the appellee has severe physical impairments which were also sufficient to justify an award of Alternative Medicaid Waiver Services. However, in its brief to the circuit court, the appellant contended the Waiver Program falls under the medicaid program which is administered by the appellant and, therefore, the social security regulations should not be applied.

We will not speculate, as the trial court did, that the federal criteria would be substantially identical to the state criteria if any criteria indeed existed. To be invalid as arbitrary or capricious, the agency's decision must lack a rational basis or rely on a finding of fact based on an erroneous view of the law. *See Enviroclean, Inc.* v. *Arkansas Pollution Control*, 314 Ark. 98, 856 S.W.2d 116 (1993). Since the appellant has not established that a discernible standard exists, we hold the termination of the appellee's benefits was arbitrary.

II. Attorney's Fees and Costs.

The trial court ordered the appellant to pay all court costs and an attorney's fee for the appellee's attorney in the

amount of $5,000.00. Our general rule relating to attorney's fees is that the recovery of attorney's fees is not allowed except when expressly provided for by statute. *State* v. *McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994); *Chrisco* v. *Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). On appeal, the appellee submits that "overriding public policy requires the finding of an implied authorization in the Administrative Procedures Act for the payment of court costs and attorney's fees to or on behalf of claimants who prevail against State Agencies in administrative reviews." However, we find no basis for the award of attorney's fees.

Ark. Code Ann. § 25-15-212 (Repl. 1992) provides the cost of the preparation of the record shall be borne by the agency, and the agency may only recover the cost of the record from the appealing party if the agency is the prevailing party. Thus, the statute provides only that the cost of the record shall be borne by the agency. The terms "costs" or "expenses" when used in a statute do not ordinarily include attorney's fees. *State* v. *McLeod, supra.* Consequently, an award of attorney's fees is not expressly provided for by § 25-15-212.

Further, § 25-15-212 establishes an entitlement to "judicial review of the action under this subchapter." Section 25-15-212 establishes the rules and procedures applicable to the process. In *Whitlock* v. *G.P.W. Nursing Home, Inc.*, 283 Ark. 158, 672 S.W.2d 48 (1984), this Court held the Rules of Civil Procedure do not apply to the judicial review procedure. In fact, we stated that when a party chooses to proceed pursuant to the Administrative Procedure Act he is bound by the procedures set out therein. *Id.* The procedures set out provide only that the cost of the preparation of the record may be borne by the agency.

Finally, Ark. Const. art. 5, § 20 prohibits awards of damages in lawsuits against the State of Arkansas and its institutions. *Smith* v. *Denton*, 320 Ark. 253, 895 S.W.2d 550 (1995). In *Smith*, we recognized that if officers and employees of the State act without malice and within the scope of their employment, they are immune from an award of damages, including attorney's fees, in litigation. The trial court did not find that any of the DHS employees acted with malice, nor is there any evidence that the employees acted with malice. Consequently, the circuit court had no basis for the award of an attorney's fee.

III. Statutory and Constitutional Violations.

The circuit court found DHS failed to inform Ms. Kistler of the existence of a substantial body of evidence considered by the hearing officer, and the failure to make her privy to all the evidence material to and considered in arriving at the administrative decision constituted a deprivation of her right to due process as guaranteed by the Arkansas and United States Constitutions, thereby rendering the administrative decision fatally defective. In addition, the court found the appellant "failed to file the entire administrative record of the administrative proceedings with this court within ninety (90) days after the filing of Plaintiff's petition as required by Ark. Code Ann. 25-15-212(d)(1) and therefore defaulted in its duties and obligations as specifically prescribed by the Act." Because we find the agency's decision was arbitrary, we need not address these points.

In sum, we affirm the circuit court's reversal of the agency's decision terminating Ms. Kistler's benefits and reverse the circuit court's award of an attorney's fee.

John Michael BRAY *v.* STATE of Arkansas

CR 95-436 898 S.W.2d 37

Supreme Court of Arkansas
Opinion delivered May 15, 1995

Robert W. Bush, for appellant.

No response.

PER CURIAM. The appellant, John Michael Bray, has

filed a motion for rule on the clerk. His attorney, Robert W. Bush, admits that the record was tendered late due to a mistake on his part. We find that such admission of fault by an attorney in a criminal case is good cause to grant the motion. *See Tarry* v. *State*, 288 Ark. 172, 702 S.W.2d 904 (1986).

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

Steve HUDNALL, Father of Stevie Hudnall, Female Minor
v. Carol BALMEZ of the
Arkansas Department of Human Services

95-295 898 S.W.2d 39

Supreme Court of Arkansas
Opinion delivered May 15, 1995

Lewis W. Littlepage, for appellant.

Breck G. Hopkins, Arkansas Dep't of Human Services, for appellee.

PER CURIAM. On November 9, 1994, appellant Steve Hudnall timely filed his appeal from the trial court's October 10, 1994 order terminating his parental rights. He also duly designated the entire record and requested he be permitted to continue

in forma pauperis. Hudnall further made a timely request for findings of fact and law and filed a motion for clarification which was denied on November 17, 1994. Hudnall then filed a second notice of appeal on December 2, 1994, and again requested a record be prepared. The trial judge questioned Hudnall's indigency status and strongly disagreed with Hudnall's designating the entire record.

After reviewing Hudnall's status once again, the trial judge, by order dated December 22, 1994, continued to allow Hudnall to proceed as an indigent, but also continued to disagree that Hudnall needed the entire record transcribed for his appeal. In the same order, the judge acknowledged Hudnall had a shortage of time to perfect an appeal but still directed the court reporter to transcribe only certain portions of the record, rather than the entire record as requested by Hudnall. The judge further directed that, if Hudnall desired further portions of the transcript, Hudnall (1) needed to specifically designate and itemize those portions, (2) correlate the legal issue and transcript portion requested, (3) prepare an estimate of costs and (4) file a newly sworn petition and affidavit of indigency.

On January 26, 1995, Hudnall attempted to comply with the judge's December 22, 1994 order by filing another designation, but by order dated February 2, 1995, the judge granted part of Hudnall's new designation of record, and denied other portions, stating that Hudnall could designate it at his own expense. The judge declined to direct his court reporter or Hudnall on how to resolve the financial arrangement between the two in preparing the record; he merely reminded them that a motion for extension may be necessary. The judge then gave the parties until February 17, 1995 to designate any additional portions of the record. The 90-day period to lodge a record from the trial court's first notice of appeal (November 9, 1994) ended on February 7, 1995. Thus, unless the trial judge by his order of February 2nd intended to extend Hudnall additional time past the February 7, 1995 deadline to file a record, Hudnall could never have complied with the judge's order allowing him until February 17, 1995 to designate the record.

In fact, appellee Department of Human Services entered its own designation on February 7, 1995, and on February 10, 1995, Hudnall designated a new designation of portions of the record

denied by the trial judge, and he agreed to pay the costs for the new designation.

In conclusion, the appeal record before us is fraught with confusion and pitfalls concerning if, when or how a record was to be designated in an appeal. Perhaps Hudnall should not have been declared an indigent — but he was. As an indigent, perhaps he was entitled to his designated record entirely without costs — but he was not. The trial judge was actively involved in raising and determining these matters and entered orders, establishing the directives and dates when the events must occur. The judge obviously by his order dated February 2, 1995, extended Hudnall time to perfect his appeal since he permitted Hudnall until February 17, 1995 — ten days after the 90-day period for filing a record had ended — to designate other portions of the record. Because the trial judge acted within the 90-day period in extending Hudnall's time to designate the record, he obviously intended to extend Hudnall's time within which to lodge his record on appeal. Therefore, we grant Hudnall's motion for rule on the clerk.

BROWN, J., would deny.

Charles PATTON *v.* STATE of ARKANSAS

CR 95-230 898 S.W.2d 446

Supreme Court of Arkansas
Opinion delivered May 15, 1995

John F. Gibson, Jr., for appellant.

No response.

PER CURIAM. John F. Gibson, Jr., has filed a second motion for rule on the clerk on behalf of his client, Charles Patton. We denied appellant's first motion for rule on the clerk without prejudice to file a proper motion. Once again, the appellant has confused two separate appeals and we deny the motion for rule on the clerk without prejudice to file a proper motion.

The appellant was convicted of three counts of delivery of a controlled substance on August 5, 1993. The record which contained the trial proceedings for those three counts was tendered to the Clerk on March 7, 1994. Subsequently, the Court of Appeals dismissed the appellant's appeal, case number CACR 94-570, for failure to file a brief.

The judgment and commitment order for a fourth count of delivery of a controlled substance was entered on January 5, 1994. That proceeding is the subject of this appeal, case number CR 95230. On March 9, 1995, the appellant tendered the record with the Clerk and filed his first motion for rule on the clerk.[1] The record was tendered more than seven months after the entry of the judgment. *See* Ark. R. App. P. 5(b). It is the attorney's duty to file the record on time. *Franklin* v. *State,* 318 Ark. 324, 885 S.W.2d 23 (1994). When a complete record is not available, a partial record will suffice. If the attorney will concede by affidavit within thirty days from the date of this *per curiam* that it was his fault that *the record was not timely filed*, or if other good cause is shown, then the motion will be granted.

In the instant case, the appellant is appealing from the judgment and commitment order entered January 5, 1994. Appellant's counsel admits fault for failing to file a brief; however, the brief was due in a separate appeal, case number CACR 94-570. The Court of Appeals dismissed the appeal from the August 5, 1993

[1]The record tendered March 7, 1994, case number CACR 94-570, contains only the trial proceedings for the three convictions entered on August 5, 1993. The record tendered March 9, 1995, case number CR 95-230, contains only the trial proceedings for the conviction entered January 5, 1994.

judgment and commitment order. However, the appeal from the January 5, 1994 judgment and commitment order has not been dismissed, nor has a briefing schedule been set. The record was simply tendered more than seven months after the entry of the judgment.

Motion denied.

Benny REED *v.* STATE of Arkansas

CR 95-392 899 S.W.2d 53

Supreme Court of Arkansas
Opinion delivered May 15, 1995

John D. Lightfoot, for appellant.

No response.

PER CURIAM. Appellant, Benny Reed, by his attorney, has filed for a rule on the clerk.

His attorney, John D. Lightfoot, 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.

Richard Thomas BUNN *v.* STATE of Arkansas

CR 94-1081 898 S.W.2d 450

Supreme Court of Arkansas
Opinion delivered May 22, 1995
[Rehearing denied June 12, 1995]

Kent McLemore, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, Richard Thomas Bunn, appeals his conviction of three counts of delivery of a controlled substance, cocaine, and asserts the following five points of error: (1) that the trial court erred in failing to grant his motion for severance of Count III from Counts I and II of the offenses charged; (2) that the trial court abused its discretion in admitting his "mug shot" into evidence; (3) that the trial court erred in admitting into evidence transcripts of recordings of two of the drug transactions; (4) that the trial court erred in admitting and allowing testimony about a letter purportedly written by him, in which he allegedly threatened a witness for the State; and (5) that the trial court erred in failing to declare Arkansas's bifurcated sentencing procedures unconstitutional. Finding merit in

the appellant's claim that the trial court erred by refusing to sever offenses prior to trial, we reverse and remand.

Facts

In October of 1993, Leslie Blackburn contacted the Fourth Judicial Drug Task Force about working as a confidential informant. Blackburn, who was serving a ten-day jail sentence, told officers that he could buy some cocaine from the appellant, Richard Thomas Bunn, as he "had been there before to buy it." On October 21, 1993, Blackburn had a meeting with officers at the Fayetteville Police Department to arrange for a drug buy from Bunn. Blackburn's person was searched for money and drugs, and, finding neither, officers wired him with a body microphone, and gave him $50.00 to purchase the cocaine. Officers drove Blackburn to the area of Bunn's trailer at 2605 Villa Boulevard, #1, where he entered to find Bunn, Andy Holm, Isaac Allen, "Amp," Sandra Williams, and Sabrina Williams inside. According to Officer McCarty, who, together with other officers, was conducting visual and audio surveillance, Blackburn exited the trailer six minutes later, turned a rock of cocaine over to officers, and told them he had purchased it from Bunn. Blackburn was returned to the police department, searched, then taken back to the area of Bunn's trailer approximately twenty-five minutes later, where he was again searched for drugs and money with negative results, given $50.00, and wired with a body microphone. Blackburn once again entered Bunn's trailer, where he stayed between fourteen and sixteen minutes, purchased a rock of cocaine from Bunn, and turned it over to officers.

Two days later, on October 23, 1993, Darryl Williams, who had been working as a confidential informant since July of 1993 in order to help pay his bills, met with officers to arrange for a drug buy from Bunn. Williams was searched for money and drugs with negative results, wired with a body microphone, and given $50.00 before he was dropped off near Bunn's trailer. Williams, who did not know Bunn, entered the trailer, recognized someone that he "knew from the streets" named Billy Joe, and returned a rock of crack cocaine to officers approximately four minutes later, describing the seller as a person who looked like the actor-dancer Gregory Hines. According to Officer McCarty, as he and other officers had been given this description before and "fig-

ured it was Bunn," they showed Williams a "mug shot" of Bunn upon their return to the police department, from which he identified Bunn as the person who had sold him the cocaine.

Bunn was charged by felony information with three counts of delivery of a controlled substance, cocaine. Counts I and II each alleged that Bunn had illegally delivered approximately 1/4 gram of crack cocaine to a confidential informant (i.e., Blackburn) in exchange for $50.00 on October 21, 1993. Count III alleged that Bunn had delivered approximately 1/4 gram of crack cocaine to a confidential informant (i.e., Williams) in exchange for $50.00 on October 23, 1993. Prior to trial, Bunn filed a motion to sever Count III from Counts I and II of the offenses charged, as well as a motion to declare Act 535 of 1993, Arkansas's bifurcated sentencing procedures, unconstitutional. The trial court denied both motions, and at trial, the State offered the testimony of both informants, Officer McCarty, and Norman Kemper, a forensic chemist with the State Crime Lab, who examined the three "rocks" and determined that each was cocaine base. It was through Officer McCarty's testimony that the State sought and obtained admission, over objection, of Bunn's "mug shot," as well as two transcripts of the taped transactions, in which Officer McCarty had identified Bunn as the seller of the cocaine "based upon what the informant had told him." Officer McCarty further stated that while he had been around Bunn before and knew what his voice sounded like, he could not positively identify the voice on the tape as being Bunn's. The State rested.

After renewing his motion to sever Count III, Bunn presented the testimony of Isaac Allen and Melvin "Big" Salley, both of whom, after listening to the tape of the Blackburn transaction, concluded that the voice of the seller was not Bunn's, but was Andy Holm's, and both of whom denied seeing Bunn sell cocaine to Blackburn. Bunn rested his defense and again renewed his motion to sever.

As rebuttal evidence, the State presented the testimony of Sabrina Williams, a sixteen-year-old convicted felon who testified that she knew Bunn, as he was her mother's former boyfriend, and that Bunn had "sold crack cocaine twenty times." According to Sabrina, he would get the cocaine from her, then bring her back the money. Sabrina's mother, Sandra Williams, corrobo-

rated her daughter's testimony. Admitting that she was presently facing drug and forgery charges, and that she was expecting to receive favorable treatment in return for her testimony, Sandra testified, over objection, that she had received a letter from Bunn in late December of 1993, or early January of 1994, in which Bunn threatened her, stating that, "If you let someone find this letter or you tell on me, I will hunt you down." Also over Bunn's objection, the State sought and obtained admission of the letter into evidence.

As further rebuttal evidence, Andy Holm testified on behalf of the State, and while admitting he had sold drugs while living with Bunn in Bunn's trailer, and that he had sold drugs to Blackburn one or two times, he denied having sold to him twice in the same day. He further testified that Bunn had also sold drugs, as Bunn "would knock on the doors, show me the amount of money he had and I would give him the dope," and he (Holm) "would hear people coming in" and "would put two and two together."

At the conclusion of the State's rebuttal testimony, Bunn did not renew his motion to sever. Thereafter, the case was submitted to the jury who found Bunn guilty of the counts as charged, and the trial court conducted sentencing procedures as required by Act 535 of 1993, after which, the jury assessed punishment. As a result, the trial court sentenced Bunn to a forty-two-year term of imprisonment, encompassing the counts charged, as well as a theft of property charge to which Bunn pleaded guilty, and a revocation of probation charge. It is from this sentence that Bunn appeals.

I. Motion to sever

For his first argument on appeal, Bunn asserts that the trial court erred in refusing to grant his motion to sever Count III of the information from Counts I and II. Prior to trial, Bunn filed a written motion to sever the offenses pursuant to Ark. R. Crim. P. 22.3, arguing that severance was necessary to achieve a fair determination of his guilt or innocence of each offense. At a pre-trial hearing, counsel for Bunn agreed that the charges were of the same or similar character, but argued that Count III should be severed from Counts I and II because it was "not part of the same single scheme or plan as the first two . . ." After hearing argument from the State, the trial court ruled on the motion as follows:

> Well, the State is alleging that these are all a part of a common scheme or plan and if, by chance, the proof is otherwise, then I think the Court is still permitted to sever out one or more of the counts. But those are all the allegations made by the State. It's sort of a matter of proof at this point. It seems to me, as I've just inquired, they're identical charges, although they did — apparently these alleged offenses occurred at some — two on one particular occasion; one at some later time but, nonetheless, still in fairly close proximity to the earlier conduct or alleged conduct so I'm going to deny the motion. You may want to raise it at some point during the trial.

Bunn renewed his motion to sever the offenses at the close of the State's case, and again after the presentation of his case, but before the State offered rebuttal testimony. The trial court denied the motion, concluding that the testimony of the witnesses showed a common scheme or plan, and that "all offenses were very similar, if not identical."

The trial court's rulings were in error. Arkansas Rules of Criminal Procedure 21 and 22 provide for joinder and severance of offenses, respectively. We have said that Rule 22.1(b) does not require that a motion to sever be renewed at the end of all the evidence but "before" or at the close of all the proof. *Rockett* v. *State*, 319 Ark. 335, 891 S.W.2d 366 (1995). Thus, as Bunn renewed his motion to sever at the close of the State's case-in-chief and at the end of his case, he did so "before or at the close of all the evidence" in conformance with the rule.

Rule 21.1 is a broad rule, allowing for joinder of offenses when they "(a) are of the same or similar character, even if not part of a single scheme or plan; or (b) are based on the same conduct or a series of acts connected together or constituting parts of a single scheme or plan." Rule 22.2, the severance rule, "recognizes the grave risk of prejudice from joint disposition of unrelated charges and, accordingly, provides a defendant with an absolute right to a severance of offenses joined solely on the ground that they are of same or similar character." *Clay* v. *State*, 318 Ark. 550, 886 S.W.2d 608 (1994); *See also Commentary to Article VI.* It provides in pertinent part that:

> (a) Whenever two (2) or more offenses have been joined

> for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have the right to a severance of the offenses.
>
> (b) The court, on application of the . . . defendant other than under subsection (a), shall grant a severance of offenses:
>
> (i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense . . .

A.R.Cr.P. Rule 37.2(a)-(b)(i).

In *Clay* v. *State, supra*, we made our position clear regarding what constitutes "a single scheme or plan," stating that:

> A single scheme or plan is discussed in the 1987 Unofficial Supplementary Commentary to Rule 21.1 as follows:
>
> > One who burglarizes an office on January 1 and a home on February 1 may be charged in the same information with both offenses, since they are "of similar character." He would be entitled to severance under Rule 22.2(a), however, unless the offenses were part of a single scheme or plan or criminal episode. Even though roughly the same type of conduct might be argued to be involved in both burglaries, justifying joinder under Rule 21.1(b), the term "same conduct" in Rule 21.1(b) was probably intended to be read literally to refer to contemporaneous events and to permit joinder in a situation where, for example, a defendant robs three persons simultaneously.
>
> In conformity with that commentary, in *Teas* v. *State*, 266 Ark. 572, 587 S.W.2d 28 (1979), we said that when an informer went to the home of the defendant and purchased some marijuana and a week later went back and purchased two morphine tablets from the same defendant, the evidence was insufficient to show that the sales were part of a single scheme or plan on the part of the defendant within the meaning of Rule 22.2. We reversed and remanded the case for a severance of the offenses. In a concurring opinion Justice George Rose Smith wrote:

> Criminal Procedure Rule 22.2 gives the defendant an absolute right to a severance when two or more offenses have been joined for trial solely on the ground that they are of similar character, but they are not part of a single scheme. Here the two offenses, sales of drugs, are unquestionably similar; so the controlling question is whether they were committed as part of a "single scheme or plan."
>
> I think it clear that they were not so committed. The purpose of Rule 22.2 is to give effect to the principle that the State cannot bolster its case against the accused by proving that he has committed other similar offenses in the past. *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954). There are exceptions to that principle, however, as when two or more crimes are part of the same transaction, *Harris* v. *State*, 239 Ark. 771, 394 S.W.2d 135 (1965), *cert. denied*, 386 U.S. 964 (1967), or when two or more offenses have been planned in advance, as part of a single scheme. *Ford* v. *State*, 34 Ark. 649 (1879). The intent of Rule 22.2 must have been to carry into effect the spirit of those exceptions, by permitting the charges to be tried together when they are parts of a single scheme.
>
> In drug cases the State cannot ordinarily prove that the accused sold drugs on one occasion by proving that he sold them on other occasions. *Rios* v. *State*, 262 Ark. 650, 473 S.W.2d 198 (1977); *Sweatt* v. *State*, 251 Ark. 650, 473 S.W.2d 913 (1971). Such proof of other sales, as we pointed out in *Sweatt*, would merely show that the accused had dealt in drugs before and hence was likely to do it again.

Teas v. *State*, 266 Ark. 572, 575, 587 S.W.2d 28, 30 (1979) (Smith, J., concurring).

318 Ark. 550 at 553-555, 886 S.W.2d 608 at 610-611.

The record is void of any evidence that the offense charged in Count III was planned in advance or as a part of the offenses charged in Counts I and II. In fact, the testimony of

Williams indicates the contrary, as he testified that, at the time he purchased cocaine from Bunn, he did not know him, nor had he ever seen him before. It was Williams's testimony that upon entering Bunn's trailer, he lied about having been there before, but "didn't have trouble buying the crack" once he recognized someone he "knew from the streets" named Billy Joe. Thus, it cannot be said that Bunn planned the delivery to Williams in advance. Moreover, the offense charged in Count III involves a different informant and occurred two days after the offenses alleged in Counts I and II. Under these circumstances, and pursuant to our holding in *Clay* v. *State, supra*, it was error for the trial court to deny Bunn's motion to sever, as the offenses did not involve a single scheme or plan.

II. Issues in the event of retrial

We discuss the other four points of appeal for the guidance of the trial court and counsel on remand, as it is likely that these issues will arise again at subsequent trials. *Diffee* v. *State*, 319 Ark. 669, 894 S.W.2d 564 (1995); *Spring Creek* v. *Sarrett*, 319 Ark. 259, 890 S.W.2d 598 (1995).

A. Admission of "mug shot"

Bunn alleges that the trial court abused its discretion in admitting his "mug shot" into evidence. During the State's case-in-chief, Detective Alan McCarty testified that upon Williams's return from Bunn's trailer, Williams told officers that the person who sold him the cocaine looked like Gregory Hines. It was Officer McCarty's testimony that, as he and other officers had been given this description before and "figured it was Bunn," they returned to the police department, where another officer showed a department photograph of Bunn to Williams. After Officer McCarty testified that Williams identified Bunn from the picture as the person who had sold him the cocaine, the State sought and obtained introduction of the picture into evidence.

We cannot consider the merits of Bunn's argument, as he failed to abstract the photograph as a part of his appeal. As we have stated many times, "[t]he 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.'" *Wynn* v. *State*, 316 Ark. 414, 871 S.W.2d 593 (1994); *See also*

Ark. Sup. Ct. R. 4-3(g). Moreover, Ark. Sup. Ct. R. 4-2(a)(6) provides that

> Whenever a map, plat, *photograph*, or other similar exhibit, which cannot be abstracted in words, must be examined for a clear understanding of the testimony, *the appellant shall reproduce* the exhibit by photography or other process and attach it to the copies of the abstract filed in the Court and served upon the opposing counsel, unless this requirement is shown to be impracticable and is waived by the Court upon motion.

(Emphasis added.)

Bunn did not present such a motion asking that we waive the requirements of Rule 4-2(a)(6); therefore, his failure to abstract the "mug shot" precludes our review of his argument on this point. As we have stated many times, the reason for this rule is basic — there is only one transcript, there are seven judges on this court, and it is impossible for each of the seven judges to examine the one transcript. *Franklin* v. *State*, 318 Ark. 99, 884 S.W.2d 246 (1994); *Dixon* v. *State*, 314 Ark. 378, 863 S.W.2d 282 (1993).

B. Admission of transcripts

Bunn next asserts that the trial court erroneously admitted transcripts of the recordings of the first and third transactions into evidence, asserting that the transcripts were not properly authenticated under Arkansas Rule of Evidence 901, and that they were unduly prejudicial under A.R.E. 403.

At trial, tapes of both the October 21, 1993, Blackburn transactions, and the October 23, 1993, Williams transaction were admitted without objection. Officer McCarty then testified that he had transcripts of the tapes prepared, identifying State's Exhibit 4 as a transcript of Blackburn's first cocaine purchase, and State's Exhibit 5 as a transcript of Williams's cocaine purchase. Bunn then made a "foundational objection," and the trial court asked that the tapes be played and that Bunn review the transcript.

Officer McCarty testified that he listened to the tapes twenty or thirty times for approximately three hours, took notes, wrote down what he heard, had his secretary type what he had written,

then compared what she had typed with his notes. Regarding State's Exhibit Four, Officer McCarty stated that he identified the persons on the transcript as "the confidential informant and who I believe to be Richard Bunn," as he "attributed Richard Bunn's name to the person selling the cocaine based on what the informant told me." He further testified that "[t]he voice appeared to be the person selling crack cocaine or negotiating the transaction." While he testified that he "kn[ew] what Richard Bunn's voice sounds like by having been around him and having heard him talk," he stated that he couldn't "positively identify" the voice on the tape as Bunn's.

The trial court overruled Bunn's "foundational objection," finding that Officer McCarty had clearly testified how the transcripts were prepared. We agree that the transcripts were properly authenticated under A.R.E. 901, as Officer McCarty's opinion that the voice on the tape was Bunn's was clearly "based upon [his] hearing the voice at any time under circumstances connecting it with the alleged speaker." *See* A.R.E. 901(b)(5).

After allowing Bunn to voir dire Officer McCarty, the trial court overruled Bunn's Rule 403 objection, concluding that the jury could give whatever weight that it desires to the tapes and the transcripts. The thrust of Bunn's argument is that State's Exhibit 4 erroneously attributes his name to one of the voices with the use of his initials, "RB." (State's Exhibit 5 attributes the voice on the tape to an unknown male, labeled "UM.") However, the State asserts, and we agree, that because Bunn failed to ask that the objectionable part of the transcript, or the "RB," be separated, the trial court was not required to sustain an objection to the entire transcript. *See Vasquez* v. *State*, 287 Ark. 468, 701 S.W.2d 357 (1985). Moreover, transcripts which are essentially accurate are admissible. *See Leavy* v. *State*, 314 Ark. 231, 862 S.W.2d 832 (1993). Under these circumstances, we cannot say that the trial court's ruling that the jury could give whatever weight that it desired to the tapes and the transcripts was in error.

C. Admission of letter

For his fourth assignment of error, Bunn maintains that the trial court abused its discretion in admitting a letter purportedly written by him to Sandra Williams into evidence,

and in allowing her to testify about the letter at trial. Sandra, who had previously lived with Bunn, testified that she had received a letter from Bunn in late December of 1993, or early January of 1994, in which Bunn threatened her, stating that, "If you let someone find this letter or you tell on me, I will hunt you down." The trial court admitted the letter over Bunn's objection. On appeal, he argues that the letter was more prejudicial than probative and was thus admitted in violation of A.R.E. 403. However, he failed to object to Sandra's earlier testimony concerning the letter as follows:

> PROSECUTOR: . . . Ms. Williams, have you ever been threatened by Mr. Bunn with reference to your testimony today?
>
> WITNESS: Uh, I've been threatened. I have a letter saying that when he was in jail if I told anything on him, he would hunt me down.
>
> PROSECUTOR: Do you have that letter with you?
>
> WITNESS: Yes I do.

Bunn did not object until the State actually sought and obtained admission of the letter. As stated in *Gonzalez* v. *State*, 306 Ark. 1, 811 S.W.2d 760 (1991), evidence that is merely cumulative or repetitious of other evidence admitted without objection cannot be claimed to be prejudicial. *See also Williams* v. *Southwestern Bell Tel. Co.*, 319 Ark. 626, 893 S.W.2d 770 (1995). As such, Bunn has not demonstrated prejudice on this point. We will not reverse in the absence of prejudice. *See Caldwell* v. *State*, 319 Ark. 243, 891 S.W.2d 42 (1995).

D. Act 535 of 1993

For his final point of error, Bunn asserts that the trial court erred in refusing to declare Act 535 of 1993, Arkansas's bifurcated sentencing procedures, unconstitutional. Due to his failure to abstract any part of the sentencing proceedings at trial, we will not consider his argument on this point. *Wynn* v. *State, supra, Franklin* v. *State, supra; Dixon* v. *State, supra.*

Reversed and remanded.

Terry SIMS *v.* STATE of Arkansas

CR 94-934 900 S.W.2d 508

Supreme Court of Arkansas
Opinion delivered May 22, 1995

[redacted]

Maxie G. Kizer, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, Terry Sims, was convicted of capital felony murder and sentenced to life imprisonment without parole. On appeal, he asserts the following three points of error: (1) that the State unconstitutionally used its peremptory strikes to exclude African-Americans from the petit jury; (2) that the trial court erroneously denied the motion to transfer his case to juvenile court; and (3) that his confession was illegally taken. After examining these points as well as all objections decided adversely to Sims pursuant to Ark. Sup. Ct. R. 4-3(h), we affirm.

Facts

On December 15, 1992, the body of Mary Lou Jones was discovered behind the counter at Cloud's Grocery Store in Casscoe, Arkansas. An employee of the store, Ms. Jones had been shot three times in the head. The owner, Julian Russell, had also been shot and was on the floor behind the store's meat counter. He died at a Little Rock hospital the following evening.

Police discovered the movie "52 Pickup" and a receipt for its rental on the store's counter bearing the name of the appellant, Terry Sims, then sixteen years old. When Arkansas State Police Investigator Lloyd Franklin phoned Sims on December 16, Sims told him that he had returned the movie to the store during his lunch break at school on December 15. Unaware that Investigator Franklin had spoken with Sims, Investigator Gary Allen interviewed him as a potential witness on December 29, at which time Sims stated that he had returned the tape to the store shortly after 7:00 p.m. on December 15.

Based upon the discrepancies in Sims's statements to these two officers, Sims was interviewed by Investigators John McCord and John Howell on January 5, 1993, and gave a voluntary statement without either of his parents being present to consent to waiver of his right to counsel. Discovering inconsistencies in

Sims's January 5 statement after speaking with another witness, the officers interviewed Sims at 4:00 p.m. on January 8. At that time, Sims gave another voluntary statement implicating others in the murders. Subsequently, at 9:38 p.m., after being advised of his *Miranda* rights, Sims, again without either of his parents being present, admitted to the murders.

According to the last statement Sims gave to the police, he and accomplice Albert Bell went to Cloud's Grocery Store on the night of the incident, and Sims returned the movie while Bell asked Mr. Russell if he had any fuses. While Mr. Russell was looking for fuses, Sims shot him approximately five times. Ms. Jones began screaming, and after she gave Bell approximately $200 from the register and picked up the telephone, Sims shot her twice. Sims and Bell then went to Sims's car and drove to a friend's house.

Sims was charged by felony information with two counts of capital felony murder. Prior to trial, Sims filed motions to transfer his case to juvenile court, to change venue, and to suppress his statements to police, all of which were denied following separate hearings. At trial, the jury, after hearing all the evidence, found Sims guilty as charged, and, although the State sought the death penalty, the jury recommended that Sims be sentenced to life imprisonment without parole. The trial court entered judgment against Sims, from which he now appeals.

I. Batson *objection*

For his first point of error, Sims claims that the State unconstitutionally used its peremptory strikes to exclude African-Americans from the petit jury. Ms. Tisinger, a minority venire member, was struck by the State. Sims objected, and the prosecutor offered the following explanation for striking Ms. Tisinger:

> First of all, Ms. Tisinger was acquainted with the defendant's sister and went to school with her for twelve years. Secondly, I got some mixed signals about what she would require of the state in proving this case against the defendant. Third, quite frankly I think she was much too anxious to say that she would impose the death penalty. I have some questions about her desire to try and get on this jury to do something. I am concerned about all three of these

> factors. I am not seeking to do anything because of her race. I would point out that there are prior African-American jurors that have been seated on this case.

Sims responded that Ms. Tisinger's responses were no different than those of any other jurors, and that she stated that she had not spoken to Sims's sister in a number of years. The trial court held that a *prima facie* case was not made, stating as follows:

> I have reviewed Mr. Hall's work on the subject and his digest of cases and read several of the cases cited therein as well as *Batson* itself. For the record I would note that the state has exercised four peremptory challenges, three of which were used to excuse whites and one of a black, a Ms. Ellis. She had a wide variety of matters or answers that could give a prosecutor pause. The other prospective black jurors that have been excused were Ms. Hancock, Ms. Lockett and Ms. Dabner for their inability to consider the death penalty. Ms. Briggs was a cousin of the defendant. Ms. Jones, my notes reflect, had already made up her mind.
>
> (After counsel for Sims commented that he had no objection to Ms. Jones being excused, the trial court continued.)
>
> Mr. Ferguson is so far the only black juror to be seated. Having said all that I cannot find a pattern here of discrimination or an attempt to exclude all of the blacks from the panel. I would note too that Ms. Tisinger's answers were technically correct in almost all aspects but I can find some justification for [the prosecutor's] gut reaction to Ms. Tisinger as a juror. She does have a basis of knowing or being acquainted with some members of the family. For that reason I will allow the peremptory.

The landmark case of *Batson* v. *Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), provides that the Equal Protection Clause forbids prosecutors from challenging potential jurors solely on the basis of race. See the recent application of the Batson doctrine in *Purkett* v. *Elem*, 115 S.Ct. 2635 (U.S. 1995).

In the recent case of *Rockett* v. *State*, 318 Ark. 831, 863 S.W.2d 235 (1994), we set out the procedures which are to be followed in Arkansas when a *Batson* objection is raised:

> First, the defendant must make a *prima facie* case that racial discrimination is the basis of a juror challenge. In the event the defendant makes a prima facie case, the state has the burden of showing that the challenge was not based on race. Only if the defendant makes a prima facie case and the state fails to give a facially neutral reason for the challenge is the court required to conduct a sensitive inquiry.

319 Ark. at 839, 863 S.W.2d at 239 (*quoting Franklin* v. *State*, 314 Ark. 329, 338, 863 S.W.2d 268, 273 (1993)). The standard of review for reversal of a trial court's *Batson* ruling is whether the court's findings are clearly against the preponderance of the evidence. *Bradley* v. *State*, 320 Ark. 100, 896 S.W.2d 425 (1995); *Rockett* v. *State, supra*; *Colbert* v. *State*, 304 Ark. 250, 801 S.W.2d 643 (1990).

In his brief, Sims contends that the issue of whether a *prima facie* case of discrimination was made is moot, relying on the United States Supreme Court decision in *Hernandez* v. *New York*, 500 U.S. 352 (1991). We agree with the State's assertion that Sims's reliance on the case is misplaced, as in that case, the trial court had no opportunity to rule on whether a *prima facie* case of discrimination had been shown; rather, the trial court only ruled on the question of intentional discrimination, and, as such, the Supreme Court concluded that the issue of whether a *prima facie* case had been made was moot. *Id.* at 1866. Conversely, in this case, the trial court ruled that a *prima facie* case had not been made, and alternatively, that intentional discrimination had not been shown.

Sims also asserts that the striking of Ms. Tisinger in and of itself established a *prima facie* case of racial discrimination. *See e.g. Franklin* v. *State*. Sims's reliance on *Franklin* is strained, as in that case, while we held that a *prima facie* case was shown when the State challenged the first African-American juror called, we recognized that that case was one "fraught with racial overtones," and concluded that a racially neutral explanation was required "under the totality of relevant facts." *Franklin* at 338-339, 863 S.W.2d at 273. Whereas the jury in *Franklin* was composed entirely of white persons by the time the trial court ruled on Franklin's *Batson* motion, in this case, Juror Ferguson,

an African-American, had been seated as a juror prior to the State's challenge of Ms. Tisinger.

Prior to the striking of Ms. Tisinger, the State had used its first peremptory challenge to excuse an African-American veniremember, Ms. Ellis, and three more peremptory challenges to excuse white veniremembers. While Sims made a *Batson* objection when the State excused Ms. Ellis, Sims does not abstract this portion of the record and from what little information we have before us, we see no pattern of discrimination. Furthermore, Sims does not furnish us with a comprehensive analysis of the jury's composition; rather, with the exception of Ms. Tisinger's examination, he only abstracts the voir dire examinations of the jurors who were seated. While the State maintained in its argument to the trial court that other African-American jurors had been seated as jurors, we have no evidence of the jury's composition other that the trial court's comment and Sims's concession in his brief that at least one African-American, Juror Ferguson, had been seated prior to the striking of Ms. Tisinger. Under these circumstances, certainly there has been no showing of a *prima facie* case of discrimination with reference to the excusal of Ms. Ellis or Ms. Tisinger.

Alternatively, the State did furnish racially-neutral reasons for striking Ms. Tisinger. The prosecutor based his first reason on the fact that she had gone to school with Sims's sister for twelve years. Sims challenges the State's reasoning, asserting that Ms. Tisinger's testimony regarding her knowledge of Sims's sister was "equivalent" to that of Juror Hammans, who had known the victims and was seated prior to the striking of Ms. Tisinger. Juror Hammans stated that while he did not know them well, he did know the victims, as he had stopped by Cloud's Grocery during turkey season to get a Coke. Also seated prior to the State's peremptory challenge of Ms. Tisinger was Juror Houten, who stated that, while she could have seen Sims when she worked at his high school, she did not remember his face. We cannot say that the testimony of either Jurors Hammans or Houten was "equivalent" to that of Ms. Tisinger. Even if we were to agree with Sims's comparision, the prosecutor offered additional racially neutral reasons for striking Ms. Tisinger, as he stated that he had gotten some mixed signals about what Ms. Tisinger would require in terms of the State's proof against Sims. We note that this concern

was in fact reflected in a question posed to Ms. Tisinger during voir dire examination, as the prosecutor specifically inquired as to her hesitation in answering a question. Finally, the prosecutor explained that he thought that Ms. Tisinger seemed much too anxious to say that she would impose the death penalty. Under these circumstances, the trial court's overruling of Sims's *Batson* objection was not clearly against the preponderance of the evidence.

II. Denial of transfer

For his second point of error, Sims asserts that the trial court erroneously denied his motion to transfer his case to juvenile court. At a hearing on the motion, both parties stipulated that Sims was on juvenile probation at the time of the murders for theft of property, as he had unlawfully taken cattle and a cattle trailer. The trial court then heard testimony from Sims's mother, Thelma Sims, who related that her son was in the tenth grade at the time of his arrest for the Cloud's Grocery killings. While he had a few disciplinary problems where he would have to stay in detention, Mrs. Sims stated that Terry had never been expelled from school. According to Mrs. Sims, with the exception of the charge for which he was placed on juvenile probation, her son had never been charged with any other criminal offenses, nor did he have any alcohol, drug or health problems. Mrs. Sims concluded that she had taught Terry to do his chores, and that, after school, he would help his father on their farm.

The State offered the testimony of Arkansas County Sheriff Wayne Simpson, who testified that, on the date of the incident in question, he arrived at Cloud's Grocery to find Ms. Jones dead, as she had been shot, and was "lying on the floor with blood all beneath her head." According to Sheriff Simpson, there was no evidence that either victim had a weapon, and "[t]here was no way that either of the victims could have left the area without coming past their assailants." He further remarked that Sims had confessed and admitted being the person who fired the weapon used in the shooting.

Following this testimony, Sims offered his psychological evaluation completed by an independent psychiatrist, Dr. Brad Fisher, who stated in his report that Sims functioned "like a thirteen-year-old," and that his "immaturity" was coupled with "a strongly dependent character whose borderline intelligence and developmental lags look to outsiders for guidance in complex

situations." After hearing all the evidence, the trial court denied Sims's motion to transfer based upon the fact that Sims had been charged with capital murder involving the "violent death" of two victims, that Sims had a prior juvenile record at the time of the alleged offense consisting of a felony conviction for which he received probation, and "on all other matters of fact and law properly before the court."

[redacted] We have recently decided the issue of the appealability of denials of transfer to juvenile court following a conviction in circuit court in *Hamilton* v. *State*, 320 Ark. 346, 896 S.W.2d 877 (1995). In that case, we announced a prospective rule, holding that an appeal from an order granting or denying transfer of a case from one court to another having jurisdiction over juvenile matters must be considered by way of interlocutory appeal, and an appeal from such an order after a judgment of conviction in circuit court is untimely and will not be considered. Because the case against Sims was commenced prior to our decision in *Hamilton*, we will address the merits of his argument.

[redacted] As we stated in *Hamilton*, the standard of review in juvenile-transfer cases is whether the circuit court's denial of the motion was clearly erroneous. *See also Davis* v. *State,* 319 Ark. 613, 893 S.W.2d 678 (1995); *Beck* v. *State*, 317 Ark. 154, 876 S.W.2d 561 (1994); *Vickers* v. *State*, 307 Ark. 298, 819 S.W.2d 13 (1991). We have often stated that the serious and violent nature of an offense is a sufficient basis for denying a motion to transfer and trying a juvenile as an adult. *Id.; See also Walker* v. *State*, 304 Ark. 393, 803 S.W.2d 502, *Supplemental Opinion on denial of rehearing*, 304 Ark. 402-A, 805 S.W.2d 80 (1991); Here, the information alleged that Sims committed two counts of capital felony murder by "acting alone or with one or more persons, he caused the death[s] of Julian Russell [and Mary Lou Jones] in the course of and in furtherance of a felony under circumstances manifesting extreme indifference to the value of human life." At the hearing on the motion to transfer, Sheriff Simpson testified that he found Ms. Jones's body "lying on the floor with blood all beneath her head," and that Sims had confessed to shooting both victims. There was also evidence presented at the hearing that Sims was on juvenile probation at the time of the incident. Undoubtedly, there was clear and convincing evidence which supported the circuit court's denial of the motion to transfer; accordingly, it cannot be said that

its ruling was clearly erroneous. Moreover, Sims's date of birth was September 23, 1976, and because he had reached the age of eighteen, Sims could not then have been committed to a youth services center on conviction, and therefore a transfer of his case to juvenile court was unwarranted. *See Myers* v. *State*, 317 Ark. 70, 876 S.W.2d 246 (1994); *Bright* v. *State*, 307 Ark. 250, 819 S.W.2d 7 (1991). *See also* Ark. Code Ann. §§ 9-27-331(1) & 9-28-209(a)(1) (Repl. 1993).

III. Admissibility of confession

For his final point of error, Sims maintains that his confession was illegally taken on the grounds that its admission violated a provision of the Arkansas Juvenile Code, particularly, Ark. Code Ann. § 9-27-317 (Repl. 1993), which provides that, when obtaining a juvenile's waiver of the right to counsel, the waiver must include a written and signed agreement by the juvenile and his parent, guardian, or custodian. At a hearing on his motion to suppress, Sims challenged the admission of the statements given to police on January 5 and January 8, 1993, without his parents being present to consent to the waiver of counsel. In response, the State specifically relied on the case of *Boyd* v. *State*, 313 Ark. 171, 853 S.W.2d 263 (1993), in arguing that the Arkansas Juvenile Code did not apply to Sims, as he was being charged as an adult in circuit court. Thereafter, the State stipulated to the fact that neither Mr. Sims or Mrs. Sims was present, nor was a juvenile intake or probation officer present during the taking of the statements. After hearing testimony from Sims, both his parents, and Investigators Howell and McCord of the Arkansas State Police, the trial court denied Sims's motion to suppress.

Sims argues that the cases of *Rhoades* v. *State*, 315 Ark. 658, 869 S.W.2d 698 (1994), in which we held that, when the State chooses to file its petition in juvenile court, the Juvenile Code provisions control, and *Boyd* v. *State, supra*, in which we held that the Arkansas Juvenile Code does not refer to proceedings to circuit court, rather, only to proceedings in juvenile court, are inconsistent, and urges us to overrule our decision in *Boyd*. We reconciled these two cases in *Ring* v. *State*, 320 Ark. 128, 894 S.W.2d 994 (1995), in which Ring brought an interlocutory appeal of an order denying his motion to transfer his case to juvenile court on the grounds that the trial court erred in admitting his confession

at his transfer hearing, as neither of his parents signed a written waiver of his right to counsel under § 9-27-317. At the time of Ring's confession to police, he had not yet been charged in circuit court. We rejected his argument, reasoning as follows:

> Appellant's reliance on *Rhoades* is misplaced. True, similar to appellant, Rhoades had not yet been charged in any court when he made his statement. Also similar to appellant, Rhoades was charged in circuit court. However, unlike appellant, Rhoades's case was transferred to juvenile court where he was ultimately adjudicated a delinquent. Thus, even though Rhoades had not yet been charged in circuit court when he gave his confession, because his offense was ultimately adjudicated in juvenile court, this court held that the Arkansas Juvenile Code applied to Rhoades at the time he gave his confession, such that the law enforcement officers' failure to comply with section 9-27-317 barred admission of Rhoades's confession at the adjudicatory hearing.
>
> The state responds that *Boyd* v. *State*, rather than *Rhoades*, controls the present case. In *Boyd*, this court stated that when a prosecutor chooses to prosecute a juvenile in circuit court as an adult, the juvenile becomes subject to the procedures and penalties prescribed for adults. Thus, the state argues that when a juvenile is charged in circuit court, the requirement in section 9-27-317 that the juvenile's parent consent to the juvenile's waiver of right to counsel is not applicable.
>
> The state's argument is correct. In *Boyd*, this court held that the Arkansas Juvenile Code does not refer to proceedings in circuit court, rather, only to proceedings in juvenile court. When *Rhoades* and *Boyd* are considered together and applied to the facts in this case, they imply but one conclusion: *since appellant was ultimately charged in circuit court and, upon this court's affirmance of the denial of his motion to transfer, will ultimately be tried there, the failure of the law enforcement officers to obtain the consent of appellant's parents to his waiver of right to counsel, as required by section 9-27-317, does not bar admission of appellant's confession. . .*

(Citations and footnote omitted.) (Emphasis added.)

In short, in light of our holdings in *Ring* v. *State, supra*, and *Boyd* v. *State, supra*, Sims's argument on this point is without merit.

IV. Compliance with Ark. Sup. Ct. R. 4-3(h)

As Sims received a sentence of life imprisonment without parole, we must examine all objections decided adversely to him in accordance with Ark. Sup. Ct. R. 4-3(h). In a motion for change of venue, Sims submitted the affidavits of nine Arkansas County residents, each of whom opined that Sims could not receive a fair and impartial trial in the county. Sims also referred to a county newspaper article which quoted the prosecutor as stating that he expected "to have a problem" with finding a jury in the case against Sims, as there were "some awful strong feelings in Arkansas County about Cloud's Grocery," referencing an earlier murder trial involving the same store in 1975. Following a hearing, the trial court denied Sims's motion for change of venue. Article 2, section 10 of the Arkansas Constitution provides that a criminal defendant has the "right to a speedy and public trial by impartial jury of the county in which the crime shall have been committed," while venue "may be changed to any other county of the judicial district in which the indictment is found upon the application of the accused." *Sanders* v. *State*, 317 Ark. 328, 878 S.W.2d 391 (1994). However, "there can be no error in the denial of a change of venue in cases . . . where an examination of the jury shows that an impartial jury was selected and that each juror stated he or she could give the defendant a fair trial and follow the instructions of the court." *McArthur* v. *State*, 309 Ark. 196, 830 S.W.2d 842 (1992). Sims has in fact abstracted the voir dire examinations of each of the seated jurors, and upon review of these individual examinations, it appears that an impartial jury was selected and that each juror in fact indicated that he or she had not formed an opinion about Sims's guilt or innocence based upon what had been printed in the area newspapers. As such, there was no error.

Affirmed.

NEWBERN and ROAF, JJ., dissent for the reasons stated in the dissenting opinions in *Ring* v. *State, supra*, and *Boyd* v. *State, supra*.

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

94-786 899 S.W.2d 57

Supreme Court of Arkansas
Opinion delivered May 22, 1995

Ginger P. Crisp, Assoc. Gen. Counsel for the University of Arkansas, for appellant.

Jerry E. Rose, Fayetteville City Attorney, for appellant.

Winston Bryant, Att'y Gen., by: *Ann C. Purvis*, Asst. Att'y Gen., for appellant.

Fred H. Harrison, Gen. Counsel for the University of Arkansas, for appellant.

George E. Butler, for appellee.

ROBERT H. DUDLEY, Justice. The Walton Arts Center is jointly owned by the City of Fayetteville and the Board of Trustees of the University of Arkansas. The issue on appeal is whether the Center is exempt from ad valorem taxation as "public property used exclusively for public purposes." Ark. Const. art. 16, § 5(b). It is undisputed that the Center is public property: The question is whether it is used *exclusively* for public purposes.

In 1988, during construction of the Center, appellants applied to Washington County for an exemption from ad valorem taxation. The exemption was denied, and the issue ultimately reached this court. In 1991, we affirmed the denial of the exemption for the tax year 1988. *City of Fayetteville* v. *Phillips*, 306 Ark. 87,

811 S.W.2d 308 (1991). Appellants subsequently applied for an exemption for the tax year beginning January 1, 1992. The County Equalization Board denied the exemption. Appellants appealed to the county court, and that court reversed the Board's ruling. The Tax Assessor appealed to circuit court, and the circuit court ruled that the property was not used exclusively for public purposes. Appellants appeal to this court. We affirm the ruling of the circuit court because the Center is not used exclusively for public purposes.

It is settled that a taxpayer must establish an entitlement to an exemption beyond a reasonable doubt. *City of Little Rock* v. *McIntosh*, 319 Ark. 423, 426, 892 S.W.2d 462 (1995). A strong presumption operates in favor of the taxing power. *Id.* Tax exemptions must always be strictly construed against the exemption. *City of Fayetteville* v. *Phillips*, 306 Ark. 87, 91, 811 S.W.2d 308, 311 (1991). In *Hilger* v. *Harding College*, 231 Ark. 686, 331 S.W.2d 851 (1960), we wrote:

> Taxation is an act of sovereignty to be performed, so far as conveniently can be, with justice and equality to all, and exemptions, no matter how meritorious, are acts of grace, and must be strictly construed, and every reasonable intendment must be made that it was not the design to surrender the power of taxation or to exempt any property from its due proportion of the burden of taxation.

Id. at 693, 331 S.W.2d at 855 (quoting *Brodie* v. *Fitzgerald*, 57 Ark. 445, 22 S.W. 29 (1893)).

Appellants first assignment of error is that the trial court erred in ruling that because the Center rents space to individuals and private entities for private events it is not being used exclusively for public purposes. In this argument, appellants urge this court to interpret the term "public purpose" to include the concept of private use when any member of the general public can rent space for private use. We have previously rejected the argument.

The facts in the first appeal involving the Center, *Phillips*, 306 Ark. 87, 811 S.W.2d 308, showed that the facility, when completed, might be rented by private individuals and that, in some instances, events at the Center might be closed to the pub-

lic-at-large. As a result, we wrote: "The stipulated facts indicate the Center may be used for non-public purposes. Such anticipated private use, regardless of any fee arrangements, could prevent property from being used exclusively for public purposes, which is the constitutional standard." *Id.* at 94, 811 S.W.2d at 312. As authority for this statement, the opinion appropriately cites *Holiday Island Suburban Improvement District No. 1* v. *Williams*, 295 Ark. 442, 749 S.W.2d 314 (1988).

Holiday Island involved recreational facilities that were open only to members of an improvement district. The district argued that the facilities were for a public use because any member of the public could use the facilities by purchasing property in the district. In rejecting the argument, we wrote:

> While we find authority for the view that reasonable fees may be charged for use by the public, and that reasonable classifications of persons can be established, the law almost uniformly is to the effect that a "public purpose" contemplates that the use must be common to all and not to a particular group.

Id. at 445, 749 S.W.2d at 316 (citations omitted).

Similarly, in *Off-Street Parking Development District No. 1* v. *City of Fayetteville*, 284 Ark. 453, 683 S.W.2d 229 (1985), we wrote:

> There is a material difference between the use of property exclusively for public purposes and renting it out an then applying the proceeds arising therefrom to the public use. The property under our Constitution must be actually occupied or made use of for a public purpose and our court has recognized the difference between the *actual use* of the property and the *use of the income.*

Id. at 456, 683 S.W.2d at 231 (quoting *Hilger* v. *Harding College*, 231 Ark. 686, 331 S.W.2d 851 (1960) (emphasis in the original)).

Appellants ask us to follow the case of *City of Cleveland* v. *Carney*, 174 N.E.2d 254 (Ohio 1961). That case is contrary to our precedent, and, in addition, involves a statute with language that is different from our constitutional provision. We

choose to follow our cases, and, under those cases, which represent a strict construction of the public purpose exemption, the use of space by private entities for private events is not a use for a public purpose.

Appellants next contend that the trial court erred because the private use of the facility was only incidental to the public use, and, consequently, the private use should not deny the Center a tax-exempt status. We most recently discussed the incidental use exception in *City of Little Rock* v. *McIntosh*, 319 Ark. 423, 892 S.W.2d 462 (1995), a case involving private businesses located on real estate owned by a municipal airport. We stated:

> When the exemption from ad valorem taxation depends upon the use of the property "then the general rule is that the exception does not apply to property rented out to others by the exempt association or to other property held or used by it merely as a source of revenue, except that a mere occasional renting out, not interfering the primary use of the property by the lessor, does not affect the exemption."

Id. at 429, 892 S.W.2d at 466 (quoting 2 Thomas M. Cooley, *The Law of Taxation* § 686, at 1435-37 (4th ed. 1924)).

In *Hilger*, the issue involved the tax-exempt status of a print shop owned by a college. In discussing incidental use, we wrote:

> We recognize that a casual or incidental outside usage might not always be inconsistent with the constitutional requirement of exclusiveness but we are unwilling to say that the outside work in this instance was casual or incidental. If we arbitrarily hold that 10% is incidental and inconsequential and that it does not violate the constitutional injunction of exclusiveness, then we would open a Pandora['s] box of borderline questions to plague the courts in the future. We are not inclined to endorse a procedure that could result in whittling away at the intent of the Constitution.

231 Ark. at 696, 331 S.W.2d at 857.

In the case at bar, appellants argue that the private use is

incidental because only 26 of 300, or only 9%, of the performances and activities at the Center were closed to the general public in 1992; that only 4% of the rental income came from private rentals; and that only .4% of the total income came from private rentals. While those limited facts are not in dispute, they do not provide an accurate measure of incidental use and do not establish entitlement to an exemption beyond a reasonable doubt.

The statistic that only 9% of the activities were closed to the general public is somewhat deluding because it does not take into account the fact that the Center sells memberships based upon contributions, which begin at $50, and continue in increments to $100, $250, $500, and $5,000, and that those who contribute $250 or more are entitled to purchase tickets in advance of the general public. The result of this "priority seating" is that the general public is excluded to an unknown extent from events. An illustration occurred when the touring production of the Broadway show "Cats" visited the Center, and only 32% of the seats were made available to the general public. The rest of the tickets had already been purchased by contributors who held priority seating. Yet, this event is included in the statistic as one being open to the general public.

Likewise, appellants proved that the total revenue of the Center in 1992 was $1,070,900, and, of that amount, rental fees amounted to only 10.4%, with private rentals constituting .4%. Again, these statistics do not present an accurate measure of the incidental use of the facilities. A significant amount of the gross income comes from corporate and individual gifts and from the earnings from a $4,500,000 endowment contributed by the Sam Walton family.

Further, even if 9% were an accurate representation of the rentals made to private persons or entities, it would not necessarily be determinative of incidental use. In *Hilger*, we explained that we would not set some arbitrary percentage of use, such as 10%, that would qualify as incidental use because to do so would violate the constitutional mandate of exclusiveness, and we would be opening borderline questions that would plague courts in the future. *Hilger*, 231 Ark. at 696, 331 S.W.2d at 857.

Another reason for denying the exemption is the fact that the facility is in competition with other tax-paying facilities

located in the area such as the Arts Center of the Ozarks located in Springdale. *See McIntosh*, 319 Ark. at 429, 892 S.W.2d at 466. We have stated the exemption should not be construed to give one business an advantage over another. *Id.*

Appellants' last argument is that the ticket policy utilized by the Center does not limit public access to the facility. We summarily dispense with the argument. It is manifest that the ticket priority policy substantially curtails the general public's access to some of the events.

In summary, we hold that the trial court correctly ruled that there is substantial doubt that the Center is being used exclusively for public purposes.

HOLT, C.J., and NEWBERN and BROWN, JJ., not participating.

Special Chief Justice TOM D. WOMACK, Special Justice JANET PULLIAM, and Special Justice DAVID G. HENRY, join in this opinion.

Bud SAUNDERS, for Himself and Similarly Situated Taxpayers of Washington County, Arkansas, *Appellants* and *Cross-Appellees* and Tom Brown, for Himself, *Cross-Appellee* *v.* Steven NEUSE, Jerome J. Paddock, Jr., and Job Serebrov [both individually and jointly as comprising the Washington County Board of Election Commissioners]; Washington County Judge Charles Johnson, Washington County Treasurer Joan Perry, *Appellees* and *Cross-Appellants*

and

Washington County, the State Board of Election Commissioners, and Washington County Prosecuting Attorney Terry Jones, *Appellees*

94-1434 898 S.W.2d 43

Supreme Court of Arkansas
Opinion delivered May 22, 1995

Donald C. Donner, for appellants and cross-appellees.

George E. Butler, Washington County City Att'y, for appellees and cross-appellants.

Winston Bryant, Att'y Gen., by: *Patricia Van Ausdall*, Asst. Att'y Gen., for appellees.

ROBERT H. DUDLEY, Justice. Budd Saunders filed this suit seeking a declaratory judgment that defendants Steven Neuse and Jerome J. Paddock, Jr. were ineligible to serve on the Washington County Board of Election Commissioners. The gravamen of count one of the complaint was that article 3, section 10 of the Constitution of Arkansas provides that no election officer shall hold any office or employment in state or city government and that Neuse was a professor at the University of Arkansas and Paddock was the City Attorney for the City of West Fork.

In the second count of his complaint Saunders asked that, after Neuse and Paddock were declared ineligible to serve on the Board, the circuit court remove them from office, rule that any compensation paid to them constituted an illegal exaction, and issue a writ of mandamus compelling the Washington County Judge, Charles Johnson, and the Prosecuting Attorney, Terry Jones, to institute an action for the recovery of all compensation paid to Neuse and Paddock for their service on the Board.

Both Neuse and Paddock resigned from the Board before judgment was rendered. The circuit judge entered judgment declaring that Neuse and Paddock were prohibited by article 3, section 10 from serving on the Board. The circuit judge did not address the moot issue of removal, but ruled that the compensation paid to Neuse and Paddock constituted an illegal exaction and that there were no affirmative defenses to an illegal exaction. The trial court refused to issue the writs of mandamus commanding the county judge and prosecuting attorney to file suit to collect the compensation paid.

Saunders appeals from that part of the order refusing to issue the writs of mandamus. Neuse, the county judge, the county treasurer, and Paddock, the third member of the Board, cross-appeal from that part of the ruling providing there are no affirmative defenses to an action for an illegal exaction. We affirm on direct appeal, and dismiss the cross-appeal.

The proceedings in this case are enigmatic. In the first proceeding the circuit court dismissed a taxpayer's petition for a writ of mandamus. The taxpayer appealed. We affirmed because of a flagrantly deficient abstract. *Edwards* v. *Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993). A second suit was filed, but the taxpayer failed to name the appropriate parties, failed to fully develop the issues, and obtained a ruling on only one of the multiple issues. We affirmed. *Morgan* v. *Neuse*, 314 Ark. 4, 857 S.W.2d 826 (1993). This was the third time a taxpayer's suit involving this same issue was filed. In this suit the taxpayer did not ask that Neuse and Paddock be required to reimburse Washington County for an illegal exaction. Rather, the taxpayer sought writs of mandamus that would compel the county judge and the prosecuting attorney to file the illegal exaction suits against Neuse and Paddock. It is from the denial of those writs that the taxpayer files his direct appeal.

In order to prevent any confusion, we note that the taxpayer could have filed the illegal exaction suit directly against Neuse and Paddock. *See* Ark. Const. art. 16, § 13. It was not necessary to seek the writs of mandamus commanding the county judge and prosecuting attorney to file the suit. In *Samples* v. *Grady*, 207 Ark. 724, 182 S.W.2d 875 (1944), we held that the refusal of the prosecuting attorney to bring a suit on behalf of the tax-

payers was not a condition precedent to the exercise of that right by a citizen. We wrote that Ark. Const. art. 16, § 13 is self-executing and imposes no terms or conditions upon the right of the citizen to file suit to prevent an illegal exaction.

I.

The Direct Appeal

In his points of appeal, the taxpayer argues that the trial court erred in refusing to issue the writs of mandamus commanding the county judge and prosecuting attorney to file suit against Neuse and Paddock. Mandamus is an appropriate remedy when a public officer is called upon to do a plain and specific duty, which is required by law, and which requires no exercise of discretion or official judgment. *State* v. *Grimmett*, 292 Ark. 523, 525, 731 S.W.2d 207, 208 (1987). However, a writ of mandamus is a discretionary remedy which will be issued only when the petitioner has shown a clear and certain legal right to the relief sought and there is no other adequate remedy. *Id.* at 525, 731 S.W.2d at 208. The writ of mandamus will not lie to control or review matters of discretion; it will lie only to compel the exercise of that discretion. *Thompson* v. *Erwin*, 310 Ark. 522, 838 S.W.2d 353 (1992) (citing *Eason* v. *Erwin*, 300 Ark. 384, 781 S.W.2d 21 (1989)).

In the case at bar the trial court ruled that mandamus would not lie. We affirm the ruling because both the county judge and the prosecuting attorney have discretion in the filing of a lawsuit such as the one at issue. They must exercise discretion in deciding whether an attempt to recover the funds would be prudent—whether the cost of such a suit might exceed the amount of the recovery. The county judge and prosecuting attorney are required to weigh cases such as *Martindale* v. *Honey*, 261 Ark. 708, 551 S.W.2d 202 (1977), where we held that a county was not entitled to a windfall and that a dual office holder was not required to account for compensation, when the dual officeholder performed the duties of the other office in good faith. Similarly, they must weigh the application of a case where we held that amounts unlawfully appropriated, but well spent, were not recoverable in a taxpayer's suit for the return of compensation unlawfully paid to a road commissioner. *Ward* v. *Farrell*, 221 Ark. 363, 253 S.W.2d 353 (1952). They would also be required to weigh

the application of a statute of limitations, for we have applied a statute of limitations to claims of illegal exaction. *Baker* v. *Allen*, 204 Ark. 818, 164 S.W.2d 1004 (1942). In summary, the county judge and the prosecuting attorney have discretion to determine whether it is prudent to file the suit, and, accordingly, we affirm the denial of the writs of mandamus.

II.

The Cross-Appeal

The trial judge additionally ruled that affirmative defenses are not available in illegal exaction suits, and this ruling is assigned as error on cross-appeal. We do not reach the assignment because, even though this is the third appeal of this case, no one has yet sought to recover the compensation illegally paid to Neuse or Paddock, and, consequently, they have not pleaded any affirmative defenses to such a claim. Therefore, any ruling about affirmative defenses would be advisory. It is well settled that we do not issue advisory opinions. *Walker* v. *McCuen*, 318 Ark. 508, 886 S.W.2d 577 (1994). However, because of the unconventional proceedings to date, because Neuse and Paddock were made parties to this proceeding but no relief was asked from them, and because the trial judge ruled that no affirmative defenses are available, we understand cross-appellants' dilemma. They may wish to plead an affirmative defense if this action is pursued in the future, and they do not want to be bound by law of the case. To prevent a possible injustice, we hold that the trial judge's ruling on affirmative defenses by Neuse and Paddock was advisory only, and because we do not reach the issue, is not binding upon the parties if this action is pursued further. Accordingly, we dismiss the cross-appeal.

Mark Thomas STOUT *v.* STATE of Arkansas

CR 94-1276 898 S.W.2d 457

Supreme Court of Arkansas
Opinion delivered May 22, 1995

A. Wayne Davis and *Steven E. Cauley*, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant Mark Stout was driving his sister's hatchback station wagon on Interstate 30 near Arkadelphia when Deputy Sheriff Terry Palmer stopped him for crossing the center line of the highway. Stout rolled down the window by the driver's seat and handed Palmer his driver's license. Palmer smelled alcohol and asked Stout how much he had to drink. Stout replied "a beer or two since [he] had been in Texas." Stout explained that he had been in Texas visiting for a week or

two and was on his way back to Wisconsin. Palmer asked Stout to get out of the station wagon and take some field sobriety tests. Stout got out and took three tests. Palmer determined that Stout was not under the influence of intoxicants and issued a warning ticket for crossing the center line. At this time Stout, who was standing near the rear of the hatchback, was free to leave.

Palmer noticed that there was no baggage or clothing inside the station wagon and wondered about the truth of Stout's statement that he had been visiting in Texas for a week or two. As a result, he asked Stout if he had any contraband in the vehicle. Stout replied that he did not. Palmer asked if he and another deputy sheriff could search the vehicle. Stout said that they could. Although the record does not show the length of this conversation, it appears from all of the testimony that it occurred almost immediately after Palmer handed Stout the warning ticket, and Stout makes no argument that Palmer "detained" him unduly after a legitimate stop for an unauthorized warrantless search. *See United States* v. *Ramos*, 20 F.3d 348 (8th Cir. 1994). Palmer filled out a consent to search form, but Stout refused to sign it. Stout told Palmer that he could look in the vehicle from the outside. Palmer looked through the driver's window and saw a package of cigarettes on the front seat. He noticed that inside the cellophane on the pack was "what looked to me as a marijuana cigarette, what we call a roach." Palmer opened the door, took the cigarette butt, smelled it, and determined that it was a marijuana cigarette. At that time he arrested Stout, handcuffed him, and had him stand on the side of the highway. Palmer and the other deputy then conducted a search of the hatchback station wagon. In the hatchback area, there is a flap on the floor that covers the spare tire. Under the flap, and inside the spare tire compartment, Palmer found a square blue metal container. Inside it were packages wrapped in gray duct tape which that contained 10.6 pounds of marijuana.

Stout was subsequently charged with possession of a controlled substance with intent to deliver. He filed a motion to suppress the evidence seized, both the cigarette roach and the 10.6 pounds of marijuana, on the grounds that it was illegally seized under article 2, section 15 of the Constitution of Arkansas and Rule 12.4 of the Arkansas Rules of Criminal Procedure. He additionally made a Fourth Amendment argument. The trial court

denied the motion to suppress because the deputy sheriff had probable cause to make the initial stop for crossing the center line and the marijuana roach was in plain view; consequently, that seizure was valid. The trial court further reasoned that after Stout was lawfully arrested for possession of the marijuana cigarette, the subsequent search of the inside of the hatchback was valid as incident to the arrest for possession of the marijuana roach. We affirm.

Stout argues that the trial court erred in construing article 2, section 15 of the Constitution of Arkansas and the Fourth and Fourteenth Amendments to the Constitution of the United States in refusing to suppress the evidence of the 10.6 pounds of marijuana found in the hatchback area of the vehicle. His arguments are based on the fact the officer had no probable cause to believe the marijuana was in the hatchback area of the car. The arguments are without merit. Once Stout was lawfully arrested, the officers were justified in making a contemporaneous search of the interior of the vehicle.

[redacted] In *New York* v. *Belton*, 453 U.S. 454 (1981), the Supreme Court provided a bright line rule for automobile searches incident to lawful arrest. The Court acknowledged "that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area." *Id.* at 457. Such searches are justified because of the need to remove any weapons that the arrestee might use to resist or escape, and to prevent the concealment or destruction of evidence. *Id.; see also Chimel* v. *California*, 395 U.S. 752 (1969). The scope of the search must be strictly tied to and justified by the circumstances. *Id.; see also Chimel*, 395 U.S. at 762; *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968).

[redacted] The Court in *Belton* stated that it recognized that *Chimel* and other cases had not provided a workable definition of "the area within the immediate control of the arrestee" when the area arguably includes the interior of the automobile that the arrestee occupied just prior to arrest. *Belton*, 453 U.S. at 460. The Court held that when police have made a lawful custodial arrest of the occupant of an automobile, they may, as a contemporaneous incident of that arrest, search the *passenger compartment* of the automobile. *Id.* Containers *found within the pas-*

senger compartment of the car may be searched whether they are open or closed, *id.* at 461, but the Court specifically stated that its holding encompassed "only the interior of the passenger compartment of an automobile and [not] the trunk." *Id.* at 460-61 n.4.

In this case Stout was arrested for possession of marijuana after police found a marijuana roach in plain view in the front seat of the station wagon. After arresting Stout, Palmer opened the hatchback, raised the flap that covered the spare tire compartment, smelled a strong odor of marijuana, and discovered the metal container that held 10.6 pounds of marijuana. In *Baxter* v. *State*, 274 Ark. 539, 626 S.W.2d 935, *cert. denied*, 457 U.S. 1118 (1982), we held, without discussion, that the hatchback area of an automobile qualifies as part of the "passenger compartment" under *Belton.* That holding appears to be the general construction of "passenger compartment" under *Belton. See United States* v. *Russell*, 670 F.2d 323 (D.C. Cir. 1982); *Stevens* v. *State*, 38 Ark. App. 209, 832 S.W.2d 275 (1992); *State* v. *Delossantos*, 559 A.2d 164 (Conn. 1989). Professor Wayne LaFave in his treatise on search and seizure suggests that the passenger compartment is to be read as all space reachable without getting out of the vehicle and without regard to the likelihood in the particular case that it was possible to reach the object. 3 Wayne LaFave, *Search and Seizure* §7.1(c), at 16-17 (2d ed. 1987 & Supp. 1994). In summary, the trial court correctly ruled that under the Fourth Amendment the search was justified as being incident to a lawful arrest under *Belton.*

Next, appellant asks this court to hold that, even if the search and seizure were valid under the Fourth Amendment, they were unconstitutional under article 2, section 15 of the Constitution of Arkansas. Of course, we could hold that the Arkansas Constitution provides greater protection against unreasonable searches than does the Constitution of the United States, but we see no reason to do so. The wording of each document is comparable, and through the years, in construing this part of the Arkansas Constitution, we have followed the Supreme Court cases. It seems especially appropriate to do so in this case because courts in the past had great difficulty in balancing the competing interests and, at the same time, setting out workable rules for search and seizure cases involving automobiles. *See* 1987

Unofficial Supplementary Commentary to A.R.Cr.P. Rule 12.4. *Belton* has provided a practical and workable rule for fourteen years, and we have followed it on many occasions. Consequently, we choose to continue to interpret "unreasonable search" in Article 2, section 15 of the Constitution of Arkansas in the same manner the Supreme Court interprets the Fourth Amendment to the Constitution of the United States.

[redacted] Appellant next argues that the Arkansas Rules of Criminal Procedure provide greater protection against unreasonable searches than does the Fourth Amendment, *see Cook* v. *State*, 293 Ark. 103, 106, 732 S.W.2d 462, 464 (1987), and that under A.R.Cr.P. Rule 12.4, deputy sheriff Palmer could not have lawfully searched the area under the hatchback without probable cause. Appellant asserts that Palmer improperly searched the hatchback area because he only saw a marijuana roach, which, without more, is insufficient to establish probable cause. *See State* v. *Villines*, 304 Ark. 128, 801 S.W.2d 29 (1990). Standing alone, Rule 12.4 does provide a more narrow definition of a reasonable search than does *Belton* because it requires the officer who stops a vehicle to have a reasonable belief that the vehicle contains things which are connected with the offense. The State responds that Palmer had more cause than just the cigarette; he had the cigarette and the unbelievable statement that appellant had been in Texas for a week or two. Taken together, these two elements would give a reasonable suspicion that Stout was a "mule" carrying drugs. However, we need not decide the issue on that basis. Rule 12.1 provides the *permissible purposes* of search and seizure incidental to arrest and, although written in 1976, embraces the *Belton* rationale. It provides that an officer may, incident to a lawful arrest, conduct a warrantless search of the person or his (immediate) property in order to protect the officer; or to obtain evidence of the commission of the offense for which the accused has been arrested; or to seize contraband, the fruits of the crime, or other things criminally possessed or used in conjunction with the offense. A.R.Cr.P. Rule 12.1. The purpose for this rule is to allow the search of the passenger compartment of a car incident to a lawful custodial arrest for the officer's protection.

Appellant parenthetically argues that our case of *Burkett* v. *State*, 271 Ark. 150, 607 S.W.2d 399 (1980), a pre-*Belton* case, held that under Rule 12.4 an officer cannot lawfully conduct a

warrantless search of a vehicle after arresting the defendant for possessing a marijuana roach. We are not persuaded by the argument because of a significant difference in the two cases. The illegal search in the cited case was in the trunk of the car, and we held that it was conducted in violation of the Fourth Amendment. Our holding today would be consistent on those same facts. The case at bar involved the search of the passenger compartment of the car.

Appellant Stout next argues that the trial court erred in ruling that the seizure of the marijuana roach was admissible under the plain view exception to the general requirement of a search warrant. The requirements of the plain view exception are: (1) The initial intrusion must be lawful; (2) the discovery of the evidence must be inadvertent; and (3) the incriminating nature of the evidence must be immediately apparent. *Johnson* v. *State*, 291 Ark. 260, 263, 724 S.W.2d 160, 162 (1987). Here, there was substantial evidence for the trial court to find that the plain view exception applied. The officer testified at the suppression hearing that appellant consented to the search. It is well established that validly-obtained consent justifies an officer in conducting a warrantless search, with or without probable cause. *See* Joshua Dressler, *Understanding Criminal Procedure* § 88, at 177 (1991). If an officer discovers evidence during a warrantless "consent search" he may seize it without a warrant pursuant to the plain view doctrine. *Id.*

Appellant Stout next argues the discovery of the roach was not inadvertent. The inadvertence requirement of the plain view doctrine has generally been interpreted to mean that "immediately prior to the discovery the police lacked sufficient information to establish probable cause to obtain a warrant to search for the object." *Johnson*, 291 Ark. at 263, 724 S.W.2d at 162. Inadvertence does not encompass total surprise or mean "unexpected." *Id.* Here, the marijuana roach was discovered as the deputy sheriff looked into the car. The fact that the deputy was suspicious of marijuana use before finding the roach does not make the discovery inadvertent. *See id.* at 263, 724 S.W.2d at 162. In sum, the evidence of the marijuana roach was admissible under the plain view doctrine.

In his final argument appellant Stout contends that the trial

court erred by refusing to rule that one of his witnesses was qualified to testify as an expert witness. The witness, a former marijuana grower who has special skills in the cultivation of marijuana and served as a drug education specialist in the United States Navy, is a member of the National Organization for Reform of Marijuana Laws, and was proffered as an expert to show that appellant possessed less than ten pounds of marijuana. The trial court refused to rule that he was an expert in weighing marijuana.

[redacted] The qualification of an expert witness is within the sound discretion of the trial court and will not be reversed absent abuse. *Dillon* v. *State*, 317 Ark. 384, 877 S.W.2d 915 (1994). If there is some reasonable basis to find that the witness has knowledge of a subject beyond that of ordinary knowledge then witness may be qualified as an expert. *Poyner* v. *State*, 288 Ark. 402, 705 S.W.2d 882 (1986).

An element of the crime with which appellant was charged was that he possessed ten pounds or more of marijuana. *See* Ark. Code Ann. § 5-64-401 (Repl. 1993). When marijuana is weighed the stalks are excluded, but the stems and seeds are included. Appellant's witness stated that he could identify marijuana by sight, knew the difference between a leaf and a seed, and knew how to grow it. However, he admitted that he is not a chemist, had no comparable education in chemistry, and was a drug counselor in the Navy over twenty years ago. He stated that he just had a general knowledge of the legal definition of marijuana. He admitted that any definition he would give would be paraphrasing what he had read in the Arkansas statutes. He could not say how his background related to weighing and distinguishing stalks and stems.

[redacted] In *Dillon*, the trial court found that while a proffered expert's experience might have been beyond that of persons who had no experience at all in the general area to which he would testify, it was not error to refuse to qualify him as an expert when his knowledge was below the standards of most recognized experts in the field. *Dillon*, 317 Ark. at 394, 877 S.W.2d at 920. Similarly, while appellant's proposed expert witness might have more knowledge than the average citizen about marijuana cultivation, he admitted that he was not a chemist, was not intimately famil-

iar with the legal definition of marijuana, and could not say how his experience related to the weighing of marijuana. The general test of admissibility of expert testimony is whether it will assist the trier of fact in understanding the evidence or determining a fact in issue. *Utley* v. *State*, 308 Ark. 622, 826 S.W.2d 268 (1992). As appellant did not show how the witness's testimony would aid the jury in determining whether the marijuana weighed more than ten pounds, the trial court did not abuse its discretion in refusing to qualify him as an expert.

Affirmed.

Charles R. BADER, as Father and Next Friend of
Jennifer Nicole Bader, a Minor
v. Gene LAWSON and Sharon Lawson, His Wife

94-1440 898 S.W.2d 40

Supreme Court of Arkansas
Opinion delivered May 22, 1995

Annie Powell and *Eddie N. Christian*, for appellant.

Jones, Gilbreath, Jackson & Moll, by: *Robert L. Jones, III,* and *Charles R. Garner, Jr.,* for appellees.

DAVID NEWBERN, Justice. Jennifer Bader, the eight-year-old daughter of the appellant, Charles Bader, was injured as the result of jumping off a trampoline belonging to Gene and Sharon Lawson, the appellees. Mr. Bader sued the Lawsons for negligence. The Lawsons contended Jennifer was a mere licensee to whom

they owed only a duty not to engage in willful or wanton conduct. Mr. Bader contended Jennifer was an invitee to whom the Lawsons owed a duty of ordinary care. The Lawsons' motion for summary judgment was granted. Mr. Bader contends summary judgment was improper due to remaining genuine issues of material fact. Ark. R. Civ. P. 56(c). We affirm the summary judgment.

The Baders and the Lawsons are neighbors. Mr. Bader and Mr. Lawson were in their front yards when Jennifer's accident occurred in the Lawsons' backyard. Mr. Bader was aware that Jennifer was using the trampoline. She was jumping on the trampoline with her two brothers, the Lawsons' three children, and Mike Emmert, a friend of the Lawson family. Some of the children began jumping from the trampoline to the ground. When Jennifer attempted the same feat she fractured her left arm and dislocated her elbow.

Mr. Bader alleged the Lawsons were negligent in several respects including failing to supervise Jennifer while she was jumping on the trampoline, failing to warn Jennifer of the danger, providing a condition or activity which they knew or should have known involved a risk of harm to children, and providing a condition or activity which they reasonably should have known would attract children. In their answer denying liability the Lawsons admitted there was a warning sticker on the trampoline which stated "WARNING — USE UNDER PARENTAL SUPERVISION AT ALL TIMES."

Attached to the summary judgment motion were excerpts of deposition testimony of Jennifer and of Charles Bader and Mr. Lawson. The Lawsons contended in their motion that there were no material issues of fact in dispute and no evidence supporting the allegations of negligence proximately causing the accident. Mr. Bader responded with an excerpt from Mr. Lawson's deposition in which he admitted that Jennifer had permission to jump on the trampoline and that if he, Mr. Lawson, had been in the backyard he would have told the children to stop jumping from the trampoline onto the ground.

1. Jennifer's status

Mr. Bader contends factual issues remain which are relevant to determining whether Jennifer was a licensee or an invi-

tee. He bases the contention on deposition testimony that the children of the two families often entertained each other and that each family from time to time looked after the children of the other, thus conferring economic benefits on one another.

We have defined "invitee" as "one induced to come onto property for the business benefit of the possessor." *Lively* v. *Libbey Mem. Physical Med. Ctr.*, 311 Ark. 41, 841 S.W.2d 609 (1992); *Kay* v. *Kay*, 306 Ark. 322, 812 S.W.2d 685 (1991); *Coleman* v. *United Fence Co.*, 282 Ark. 344, 668 S.W.2d 536 (1984). A "licensee" is one who goes upon the premises of another with the consent of the owner for one's own purposes and not for the mutual benefit of oneself and the owner. *Lively* v. *Libbey Mem. Physical Med. Ctr., supra*; *Tucker* v. *Sullivan*, 307 Ark. 440, 821 S.W.2d 470 (1991).

In the *Tucker* case, a young woman brought a negligence action against the man with whom she was living, claiming she was an invitee owed the duty of ordinary care. She contended the defendant benefitted from her presence as she made house payments and paid utility bills and other living expenses. We held summary judgment in favor of the defendant was proper because the plaintiff presented no evidence to show her presence at the defendant's property was other than "primarily social." Her claim of having conferred an economic benefit was certainly stronger than that asserted in this case by Mr. Bader.

We again decline to expand the "invitee" category beyond that of public or business invitee to one whose presence is primarily social. There is no factual dispute the resolution of which might result in a holding that Jennifer Bader was an "invitee" as we have defined the term.

2. Duty

Mr. Bader also claims that, even if Jennifer's status was that of a licensee, a material question of fact exists as to whether the Lawsons breached the duty of care which was owed to Jennifer. The question of the duty, if any, owed by one person to another is always a question of law and never one for the jury. *Lovell* v. *St. Paul Fire and Marine Ins.*, 310 Ark. 791, 839 S.W.2d 222 (1992).

A landowner owes a licensee the duty to refrain from

injuring him or her through willful or wanton conduct. *Lively* v. *Libbey Mem. Physical Med. Ctr., Inc. supra; King* v. *Jackson*, 302 Ark. 540, 790 S.W.2d 904 (1990); *Baldwin* v. *Moseley*, 295 Ark. 285, 748 S.W.2d 146 (1988). To constitute willful or wanton conduct, there must be a course of action which shows a deliberate intention to harm or utter indifference to, or conscious disregard of, the safety of others. If, however, a landowner discovers a licensee is in peril, he or she has a duty of ordinary care to avoid injury to the licensee. The duty takes the form of warning a licensee of hidden dangers if the licensee does not know or have reason to know of the conditions or risks involved. *Lively* v. *Libbey Mem. Physical Med. Ctr., Inc., supra; King* v. *Jackson, supra*. None of these descriptions of conduct applies to the Lawsons, given the evidence before the Trial Court.

3. Attractive nuisance

One who maintains upon one's premises a condition, instrumentality, machine, or other agency which is dangerous to children of tender years by reason of their inability to appreciate the peril, and which may reasonably be expected to attract children of tender years to the premises, is under a duty to exercise reasonable care to protect them against the dangers of the attraction. *See Cooper, Adm'r* v. *Diesel Service Et. Al.*, 254 Ark. 743, 496 S.W.2d 383 (1973). That is the "attractive nuisance doctrine" which was effectively pleaded in Mr. Bader's complaint but not addressed in the summary judgment motion or the Trial Court's ruling. Mr. Bader asks that we remand the case for consideration of that point. We decline to do so.

In his response to the Lawsons' summary judgment motion, Mr. Bader addressed only the matter of Jennifer's status as a licensee or invitee and his allegation that the Lawsons were negligent in failure to supervise the children using the trampoline. No reference to the attractive nuisance doctrine appears.

In *Oglesby* v. *Baptist Medical Sys.*, 319 Ark. 280, 891 S.W.2d 48 (1995), Ms. Oglesby alleged medical malpractice and battery resulting from an injection she was given, but which had not been prescribed for her, while she was a patient in the defendant hospital. Motions for partial summary judgment addressing the malpractice claim were granted and the case "dismissed" without consideration of the battery claim. Refusing Ms.

Oglesby's request that the case be remanded for consideration of the battery claim we said:

> Common sense but also judicial economy dictate such a result in light of the fact that this issue could have been readily resolved by timely motion to the trial court.
>
> Because no effort was made by Oglesby to move to obtain a ruling from the trial court based on its seeming failure to hear and determine the battery claim, we consider the issue waived. *Parmley* v. *Moose*, 317 Ark. 52, 876 S.W.2d 243 (1994).

By failing to raise the attractive nuisance claim in the context of the summary judgment motion and response, Mr. Bader waived it.

Affirmed.

John RICHMOND *v.* STATE of Arkansas

CR 95-38 899 S.W.2d 64

Supreme Court of Arkansas
Opinion delivered May 22, 1995

[redacted]

Tom Garner, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. John Richmond was convicted as an habitual offender on charges of escape in the second degree, aggravated robbery, burglary, theft of property, and possession of firearm by a felon. He was sentenced to sixty-five years in prison in addition to the term he was serving. Mr. Richmond seeks a reversal on the ground that the prosecutor improperly referred in closing argument to the fact that Mr. Richmond did not testify at the trial. He also argues he did not receive a proper examination in response to his request for psychological evaluation. Additional arguments are lack of a *contra pacem* clause in the information and a tainted in-court identification of him by the victim. We hold the prosecutor's remark was not improper, the argument made here with respect to the mental examination is not to be considered as it was not made to the Trial Court, the *contra pacem* clause objection was abandoned, and the in-court identification was reliable. We affirm the conviction.

Mr. Richmond and another inmate escaped from the Arkansas Prison Unit located at Calico Rock. Shortly thereafter, two men posing as construction workers entered the home of Gordon Nichols, who lived within a short distance from the prison. The two men, using a knife and Mr. Nichols' gun, robbed him of $46, his coat, and his car.

On the following morning, in Ozark County, Missouri, officers located Mr. Nichols' abandoned automobile while investigating the theft of a Lincoln automobile. Later in the morning, Richmond and his companion were stopped while driving a Lincoln in Oklahoma. The Oklahoma State Trooper who made the

stop determined that the car was stolen and the two men in the car matched the descriptions of escapees from Arkansas. Mr. Richmond and his companion were arrested, returned to Arkansas, and charged.

1. Identification

Shortly after he was robbed, Mr. Nichols was shown a photograph of one of the escapees by Assistant Warden Jack Yancey. Mr. Nichols identified that person as one of the men who had robbed him. Warden Yancey could not recall whether the photograph he showed to Mr. Nichols was of Mr. Richmond or the other escapee.

Two days after he was interviewed by Warden Yancey, Mr. Nichols was asked to view a photographic lineup. Officer Tommy Cleveland, who prepared the lineup, testified that Mr. Nichols made an immediate identification of Mr. Richmond and the other escapee.

Mr. Richmond moved to suppress both the photographic lineup and the in-court identification. He contended the showing of the single photo to Mr. Nichols, followed by the photographic lineup, violated his right to due process of law as it constituted a suggestive procedure that tainted any later identification of Mr. Richmond and his companion as the perpetrators of the crime. The Trial Court denied the motions. No argument is made to the effect that the identifications were unreliable.

A pre-trial identification does not comply with due process of law when there are suggestive elements in the identification procedure that make it all but inevitable that the victim will identify one person as the criminal. Even if the identification technique used was impermissibly suggestive, however, testimony concerning it is admissible if the identification was reliable. *Bishop* v. *State*, 310 Ark. 479, 839 S.W.2d 6 (1992); *Manson* v. *Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1977).

The factors to be considered in determining reliability are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the prior description; (4) the level of certainty; and (5) the time lapse between the crime and the confrontation. *Bishop* v. *State, supra.* We do not reverse a ruling on the admissibility

of an identification unless it is clearly erroneous, and we do not participate in the process of determining reliability unless there is a very substantial likelihood of irreparable misidentification.

Warden Yancey did not recall which inmate's photograph he showed Mr. Nichols; nor is there any additional indication that the photo was of Mr. Richmond. It is thus difficult to conclude with certainty that the lineup procedure was unduly suggestive.

[redacted] Even if it can be said that the procedure was suggestive, Mr. Nichols made a reliable identification. He testified he could see the faces of the two people who came into his home and there was adequate lighting and nothing to obstruct his vision. Mr. Nichols had sufficient opportunity to view the faces of the robbers. He testified that while he was under the impression that they were construction workers he conversed with them concerning work being done down the road from his home. The decision to admit the in-court identification was not clearly erroneous.

2. Mental evaluation

Dr. Henderson examined Mr. Richmond at the Arkansas State Hospital. The examination was brief, consisting of some elementary questions. Mr. Richmond objected to the report finding him competent and able to assist effectively in his own defense. He moved for appointment of an independent psychologist to conduct an examination. The motion was denied.

Mr. Richmond argues his psychological evaluation was inadequate because no inquiry was made as to whether he was suffering from any mental disease or defect that would have mitigated his sentence.

Arkansas Code Ann. § 5-2-305 outlines the procedures to be followed when the defense of mental disease or defect is raised. Normally, an evaluation performed under this section does not require a second opinion. *King* v. *State*, 317 Ark. 293, 877 S.W.2d 583 (1994). Mr. Richmond's primary citation on this point is *Starr* v. *Lockhart,* 23 F.3d 1280 (8th Cir. 1994), in which it was held that an additional opinion may be justified when it has been shown that further examination could aid in the defense.

We decline to consider this argument because Mr. Richmond's abstract of the record does not show that it was presented to the Trial Court. *Whitson* v. *State,* 314 Ark. 458, 863 S.W.2d 794, 798 (1993). Even if we were to consider it, we could not reverse on the basis of the *Starr* decision in which the defendant presented a history of mental illness not even hinted in the record now before us.

3. Contra pacem clause

Article 7, § 49, of the Arkansas Constitution declares that indictments "shall include 'Against the peace and dignity of the State of Arkansas.'" We have held each count in an indictment must stand on its own, and therefore each must contain the *contra pacem* clause. *Caldwell* v. *State,* 295 Ark. 149, 747 S.W.2d 99 (1988). On the day of the trial, Mr. Richmond's attorney informed the Trial Court that the information was defective for failure to contain a *contra pacem* clause at the end of each charge and the amended information had no such clause at all. The prosecuting attorney sought to amend the information to include the *contra pacem* clause at the end of each charge by reading each charge into the record and adding to each, "against the peace and dignity of the State of Arkansas." The following colloquy then occurred:

> TRIAL COURT: Any Response?
>
> DEFENSE: No. Judge, I just made my objection, and if that cured it, well, then —
>
> TRIAL COURT: Well, the court will grant the amendment. I believe the defendant is aware of all the charges that were initially filed and that they were covered by the amendment anyway. And now this does not change it other than just adding the contra pacem clause after each alleged offense.
>
> DEFENSE: Well, I think from reading Caldwell [v. *State*, 295 Ark. 149, 747 S.W.2d 99 (1988)] that probably if the prosecutor does amend after it is brought to the Court's attention, that probably satisfies that.

It appears the objection was relinquished as the relief requested was granted; thus we need not pursue the question whether any

prejudice resulted. *Sweat* v. *State*, 307 Ark. 406, 820 S.W.2d 459 (1991).

4. Prosecutor's remark

During his rebuttal closing argument, the prosecuting attorney stated:

> And I am asking you again, as I have previously done, to return a guilty verdict on each and every one of those charges, and come back in here and let me talk to you about the appropriate sentences to assess on each one of those charges, that the State has met the burden of proof on each and every element, and I have outlined those to you, and the testimony and evidence that has been submitted in here is uncontroverted, uncontroverted.

The defense moved for a mistrial on the basis that the prosecutor had made a comment on Mr. Richmond's failure to testify.

Mr. Richmond attempts to distinguish cases in which we held that similar comments, such as "the evidence is undisputed," or "there has been absolutely no testimony to contradict that. . ." did not constitute prejudicial comments on the defendant's failure to testify.

[redacted] A prosecutor may mention the fact that the State's evidence has remained undisputed. For example, in *Beebe* v. *State,* 301 Ark. 430, 784 S.W.2d 765 (1990), the prosecutor stated, "I submit to you that the evidence has not been disputed." In holding that was not an improper comment on the defendant's failure to testify, the court noted that the remark was not necessarily improper because the state's evidence could have been disputed by evidence other than by the testimony of the accused. Similarly, *Davis* v. *State*, 174 Ark. 891, 298 S.W. 359 (1927), held that the prosecutor's argument that the State's evidence was undenied and uncontradicted was merely a comment that the testimony of the witnesses should be believed because it went undisputed. Mr. Richmond argues those comments were held proper because the defense had failed to create a dispute in the evidence through cross-examination. He contends he thoroughly cross-examined the State's witnesses, thereby creating an evidentiary dispute. He contends, therefore, that the prosecutor's argument

that the evidence went uncontroverted could only be interpreted as a comment on his failure to testify.

We cannot agree that the remark somehow eliminated the cross-examination of the State's witnesses from the memory of the jurors and thus caused them to focus on the accused's failure to testify. It is far more likely, as we suggested in the *Beebe* and *Davis* cases, that the attention was directed to the fact that no witnesses were presented by the defense to controvert the State's evidence.

A mistrial is an extreme remedy that should only be granted when justice cannot be served by continuing the trial. We do not reverse a decision declining to grant a mistrial absent an abuse of the Trial Court's broad discretion in considering the motion. *Cook* v. *State,* 316 Ark. 384, 872 S.W.2d 72 (1994). There was no such abuse in this case.

Affirmed.

Albert BESHEARS *v.* STATE of Arkansas

CR 94-1109 898 S.W.2d 49

Supreme Court of Arkansas
Opinion delivered May 22, 1995
[Rehearing denied June 26, 1995.]

D. Paul Petty, for appellant.

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

TOM GLAZE, Justice. Albert Beshears entered a conditional plea of guilty to one count of possession of crystal methamphetamine with intent to deliver, and under A.R.Cr.P. Rule 24.3(b), he appeals his denial of his motion to suppress. The search in question was of Beshears's business property in Algoa, Arkansas, where officers recovered 424 grams of crystal methamphetamine in an office building and twenty-two grams in a cellular phone located in a pickup truck.

Beshears first argues that there was no probable cause for issuance of the officers' search warrant. He claims the officers' affidavit used to obtain the warrant was based upon one or more confidential informants whose veracity was not verified. He also asserts conclusory statements were contained in the affidavit, giving no factual basis for authorizing a search. We disagree.

In reviewing a trial judge's ruling on a motion to suppress, this court makes an independent determination based upon the totality of the circumstances, and in reviewing the evidence in the light most favorable to the appellee, we reverse only if the ruling is clearly against the preponderance of the evidence. *State* v. *Mosely*, 313 Ark. 616, 856 S.W.2d 623 (1993). In *Rainwater* v. *State*, 302 Ark. 492, 494, 791 S.W.2d 688, 689 (1990), the court made the following analysis:

> [T]he 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 the "basis of knowledge" of persons supplying hearsay information, there is a fair proba-

> bility that contraband or evidence of a crime will be found in 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.

On this subject of search and seizure, our Arkansas Rules of Criminal Procedure 13.1(b) provides the following specific requirements for issuing a search warrant:

> The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

Here, investigator Marvin Poe provided an affidavit which the magistrate relied upon in issuing the warrant. In that affidavit, Poe stated that a confidential informant told him that Albert Beshears was selling crystal methamphetamine. He stated that this information matched information he received from other informants in the past. Poe also stated that he received a call from a "concerned citizen" who stated it was common knowledge on the streets that Beshears was dealing drugs from his grain bins in Algoa. Another informant told Poe that Beshears was supplying drugs to several dealers in the county, including

Beshears's brother, Eddie. Officer Poe further stated in the affidavit that he had an informant wear a body mike on two occasions when the informant purchased crystal methamphetamine from Eddie Beshears. Poe heard the conversations of Eddie and the informant when Eddie stated that he had purchased his drugs from Albert; Eddie further said that Albert had gotten in a pound of crystal methamphetamine. The affidavit further related that Poe later received a call from a concerned citizen who stated that he had seen drugs at Albert Beshears's grain bins and in his main office. Another police officer contacted Poe and stated that he had received information from a confidential source that Albert had approximately two pounds of crystal methamphetamine at a grain dryer in Algoa. During this period and on four separate occasions, Officer Poe conducted a surveillance of Albert Beshears's property. Poe's affidavit reflected that Poe had observed a heavy amount of traffic going in and out of the grain bins and shop building located on Beshears's property. Poe averred that the traffic involved known drug dealers and individuals who had been convicted for drug offenses. Officer Poe also stated that the informant who wore the body mike had given him information that had led to the issuance of three felony warrants for delivery of a controlled substance.

We conclude Poe's affidavit set forth particular facts bearing on the informants' reliability, and related the means by which the information was obtained. In addition, the affidavit further provided a substantial basis for a finding of reasonable cause to believe that contraband subject to seizure would be found on Albert Beshears's property. In sum, Poe's affidavit showed that Albert Beshears was in the business of selling drugs and was in possession of crystal methamphetamine at his property, specifically his grain bins in Algoa. One, confidential informants reported that Eddie Beshears had stated that Albert was currently selling drugs and was in possession of crystal methamphetamine. Two, the truthfulness of the informants' information was given strength by Poe's own hearing of Eddie making the same statement to the informant(s) when the informant(s) were wired for sound. Three, an anonymous caller stated where the grain bins were located, that he had seen approximately two pounds of crystal methamphetamine along with scales and plastic bags, and stated where the drugs were hidden. Four, information from

another officer, whose information came from another confidential informant, corroborated that Albert Beshears had about two pounds of crystal methamphetamine in a grain dryer in Algoa. Five, the investigator's surveillance revealed activity at the grain bins not consistent with a farming operation and included the presence of people coming and going from the grain bins and office area who the investigator knew to have criminal records for possession of drugs or for selling illegal drugs. Examining investigator Poe's affidavit in the light of the "totality of the circumstances" made known to the magistrate, we conclude that it reveals there was sufficient evidence to provide a substantial basis for the issuance of the warrant, and the lower court should be affirmed. *See Massachusetts* v. *Upton*, 466 U.S. 727 (1984); *Illinois* v. *Gates*, 462 U.S. 213 (1983).

Beshears's second point for reversal is that the search warrant obtained by the officers was limited only to the search of his residence, and therefore, the officers' search of his business property was unlawful. The record reflects that the search warrant issued was based upon Officer Poe's affidavit which set out detailed directions to the property to be searched. Those directions are as follows:

> The undersigned being duly sworn deposes and says that he has reason to believe that on the premises known as that of Albert Beshears, to get to the property you would travel east out of Newport on Highway 14 east until you get to Amagon, Arkansas. At Amagon, Arkansas, you turn right on Highway 37 and travel 3 and 7 tenths miles. You will come to a sign that reads Algoa, Arkansas. Just past this sign is a driveway. Turn right into this driveway and it will go to the rear of a red brick house. Behind the house is a set of grain bins and two shop buildings. One shop is yellow in color and the other is green in color. The grain bins have a beige building in the middle of them that is used as a scale house for the grain bins. There is (sic) two grain bins silver in color on each side of the beige building.
>
> According to the assessment sheets provided by the Jackson County Assessor's office the lots are 7 and 8 of Algoa's original town.

> This warrant is to include all offices, shop buildings, storage buildings, grain bins, control rooms, tractors, combines, trucks, trailers, cars, and any other equipment on the property known as the Albert Beshears.

In issuing the warrant to search Beshears's property, the magistrate relied upon Poe's affidavit and the directions above, but the warrant, itself, provided, "You are Hereby Commanded to search forthwith the *residence* in Exhibit 'A' for the property herein described . . . ." (Emphasis added.) Exhibit A contained the same directions set out in Poe's affidavit above but it omitted the paragraphs that mentioned "all offices, shop buildings, grain bins, control rooms" and "other equipment on property known as the Beshears's property." Because of this omission and the fact that Beshears's actual residence was located a distance from his business property, Beshears claims that the officers' search exceeded the authority granted by the warrant. We find no merit in this contention.

In *Baxter* v. *State*, 262 Ark. 303, 556 S.W.2d 428 (1977), Baxter attacked the description of the property in the warrant as "the house occupied by Faron Baxter" as being too vague. This court upheld the warrant, stating that while it was true that the warrant itself was vague, the affidavit attached to the warrant described the location of Baxter's property with great particularity. In the present case, Poe's affidavit supporting and attached to the issued warrant clearly described the location of Beshears's business property and the places thereon containing the contraband. Consistent with the court's decision in *Baxter*, other courts have held that a warrant that fails to describe the area to be searched with sufficient particularity can be cured by an accompanying affidavit if the affidavit is attached to the warrant and the warrant incorporates the affidavit by reference. *See U.S.* v. *Gahagan*, 865 F.2d 1490 (6th Cir. 1989), *cert. denied*, 492 U.S. 918 (1989). Here, the warrant Beshears challenges specifically referred to Poe's affidavit being attached.

We point out that the requirement of particularity of describing the location and place to be searched is to avoid the risk of the wrong property being searched or seized. *Watson* v. *State*, 291 Ark. 358, 724 S.W.2d 478 (1987). This court stated that the test for determining the adequacy of the description of

the place to be searched under a warrant is whether it enables the executing officer to locate and identify the premises with reasonable effort and whether there is any likelihood that another place might be mistakenly searched. *Costner* v. *State*, 318 Ark. 806, 887 S.W.2d 533 (1994). The risk of misidentification is minimized when the same law enforcement officer who applies for the warrant executes it. *Id.* And in determining whether a particular description is sufficient under this test, courts must use common sense and not subject the description to hypercritical review. *Watson*, 291 Ark. 358, 724 S.W.2d 478.

[redacted] Here, Officer Poe not only conducted a four-day surveillance of Beshears's business property where the contraband was alleged to be, he also prepared the affidavit, acquired the search warrant and executed it, along with other officers. There was virtually no likelihood that a misidentification of the place to be searched could have occurred. Accord, *U.S.* v. *Gahagan*, 865 F.2d 1490 (6th Cir. 1989), *cert. denied*, 492 U.S. 918 (1989), (when officer executing search warrant is affiant who describes property to judge, and judge finds probable cause to search property as described by affiant, and search is confined to areas which affiant described, then search is in compliance with the Fourth Amendment.) The only reference to a residence in Poe's affidavit or Exhibit A attached to the warrant issued was Poe's reference to "a red brick house" (not Beshears's residence) which was used merely as a landmark by Poe when describing how to get to Beshears's grain bins and shop buildings. The search warrant itself was captioned "Albert Beshears Grain Bins, Algoa, Arkansas." As previously mentioned, Poe's affidavit described how to locate Beshears's grain bins and other buildings and equipment where the contraband was located and the officers limited their search to that area.

For the reasons above, we affirm.

John L. KEARNEY
v. COMMITTEE ON PROFESSIONAL CONDUCT

94-1399 897 S.W.2d 573

Supreme Court of Arkansas
Opinion delivered May 22, 1995

Appellant, pro se.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *John S. Cherry, Jr.*, and *Derek J. Edwards*, for appellee.

TOM GLAZE, Justice. Several complaints were filed against appellant John Kearney. First, James M. Guffy claimed Kearney mishandled a quiet title action, and in doing so, violated Model Rules of Professional Conduct 1.1, 1.3, 1.4(a), 3.4(c) and 8.4(d). The second and third complaints were referrals by per curiam to the Professional Conduct Committee from this court in cases where Kearney petitioned for rule on the clerk for belated appeals. *Britton* v. *State*, 314 Ark. 469, 861 S.W.2d 551 (1993); *Garrett* v. *State*, 314 Ark. 470, 861 S.W.2d 550 (1993). All three complaints were consolidated for hearing before the Committee. Mr.

Kearney brings this appeal from the Committee's May 26, 1994 decision wherein it suspended his license for six months.

Kearney lists six points for reversal which we are unable to address because of his flagrantly deficient abstract. Ark. Sup. Ct. R. 4-2(b)(2). The transcript itself contains only 62 pages, and Kearney fails to abstract thirteen pages of it, including the Committee's findings, the Committee's May 26, 1994 letter decision and the notice of appeal. In addition, significant and relevant information contained in exhibits introduced below have not been abstracted.

Specifically, we point out that, in his argument on appeal, Kearney challenges the Committee's findings that he had violated certain Model Rules when representing Garrett and Britton in their belated appeals. However, he fails to abstract those findings or what sanctions were imposed for those violations. In addition, Kearney's abstract only reflects he has appealed the Committee's May 26, 1994 decision which suspended his license. Whether the Garrett and Britton claims were considered in the Committee's suspension of Kearney's license is not clear, since we do not have the Committee's findings and decision before us.

Next, Kearney also argues the Committee erred in admitting into evidence an informal list of nine prior sanctions, but he fails to abstract that list. Aside from Kearney's failure to abstract these prior sanctions, he also does not abstract that part of the transcript where his counsel forewent any objection to the admission of those prior violations.

Another example of Kearney's abstract concerns his contest of Guffy's affidavit and the Committee's consideration of it. Below, Kearney objected to Guffy's affidavit because it was not notarized, but on appeal, he claims that, because Guffy failed to appear at the hearing, Kearney was denied the due process right to cross-examine him. Again, Kearney fails to abstract Guffy's affidavit and attached pleadings and exhibits even though these items are the focus of his point for reversal on appeal. We should also note that, at the Committee's hearing, Kearney lodged no objection or obtained no ruling concerning his due process (inability to cross-examine) argument.

And finally, we mention Kearney's argument that the

penalties imposed were greater than warranted by the circumstances. As previously mentioned, the transcript itself reflects prior sanctions against Kearney were considered at the penalty stage of this proceeding, but, again that portion of the transcript was not abstracted. As this court has written numerous times, we will not go to the single transcript. Our review of the case on appeal is limited to the record as abstracted in the briefs, not upon one transcript, since there are seven judges involved in the appellate decision-making process. *Stroud Crop, Inc.* v. *Hagler*, 317 Ark. 139, 875 S.W.2d 851 (1994).

Concerning the severity-of-sanction issue, we also reiterate Kearney's failure to abstract the Committee's May 26, 1994 letter decision that related contested factual questions. The Committee noted Kearney never answered interrogatories in the proceeding in which he represented Guffy even though a court had ordered Kearney to do so. The Committee's letter further related Guffy said that he had incurred a $1,500 judgment due to Kearney's actions or inactions, and while Kearney agreed to pay the judgment, he did not do so. Kearney's failure to abstract that part of the record bearing on his decision not to comply with a court order is clearly relevant to the severity of the sanctions the Committee may have considered and imposed against him. Also, while Kearney testified he rectified Guffy's problem by paying the $1,500 judgment, it is relevant to know the Committee considered Guffy's statement that Kearney never paid the judgment.[1]

Where the appellant fails to abstract the pleadings, exhibits, orders and final judgment necessary to an understanding of all questions on appeal, the appellate court cannot reach the issues it is asked to decide. *Jolly* v. *Hartje*, 294 Ark. 16, 740 S.W.2d 143 (1987). Because Kearney's abstract is so deficient in omitting relevant parts of the transcript needed in order to consider the arguments raised on appeal, we affirm for failure to comply with Ark. Sup. Ct. R. 4-2(b)(2).

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[1]At the hearing, Kearney testified he paid $1,500 in cash to Guffy's son-in-law and obtained a signed receipt, but Kearney said he could not locate the receipt.

COLUMBIA MUTUAL INSURANCE COMPANY
v. Larry PATTERSON and Roger Perry

94-778 899 S.W.2d 61

Supreme Court of Arkansas
Opinion delivered May 22, 1995

Matthews, Sanders, Liles & Sayes, by: *Marci Talbot Liles* and *Roy Gene Sanders*, for appellant.

Kitterman Law Firm, by: *Gregory S. Kitterman*, for appellee.

DONALD L. CORBIN, Justice. Appellant, Columbia Mutual Insurance Company, appeals an order of the Pulaski County Circuit Court dismissing appellant's declaratory judgment action and directing a verdict in favor of appellees, Larry Patterson and Roger Perry. Jurisdiction of this appeal is properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(3). For reversal, appellant asserts two points of error. We find no error and affirm.

Appellant filed a complaint against appellees in which it alleged that, at all times relevant, it had in full force and effect an automobile liability insurance policy issued to Patterson; that Patterson had been sued in a separate action by Perry for damages Perry sustained as a passenger in a single-vehicle accident in which Patterson was driving a vehicle owned by Patterson's employer; and that the policy denied coverage for Perry's injuries because the vehicle Patterson drove in the accident was used by him without a reasonable belief that he was entitled to do so, and because it was not the "covered auto" under the policy. Appel-

lant prayed for a declaratory judgment that no coverage existed under the policy for Perry's injuries.

On March 17, 1994, the declaratory judgment action was tried to a jury. The only testimony abstracted by appellant is that of one of its witnesses, Charles Deaton, an individual employed by appellant as a claims adjuster. During Deaton's testimony, appellant unsuccessfully attempted to introduce into evidence a 25-page photocopy of a purported certified copy of the full policy. The abstract reveals no objection was made on the basis of the "best evidence rule." At the conclusion of appellant's proof, appellees moved for a directed verdict on the ground that the allegations of appellant's complaint were not proved by credible evidence. The motion was granted. The trial court's order granting appellees' motion for directed verdict and dismissing appellant's complaint with prejudice was filed on March 29, 1994. This appeal arises therefrom.

The 25-page writing which appellant sought to introduce into evidence was composed of: (1) a ten-page standardized form which was identified by Deaton as the basic policy provisions common to all automobile policies issued by appellant (identified as "Plaintiff's Exhibit 4"), and (2) fifteen additional pages which included a cover page, quick reference index, declarations page, and endorsements (identified as "Plaintiff's Proffered Exhibit 5"). Although it is undisputed that Plaintiff's Proffered Exhibit 5 was never admitted into evidence, the parties differ as to whether Plaintiff's Exhibit 4 was admitted. Our review of the abstract shows the trial court initially admitted Plaintiff's Exhibit 4, but then reversed that ruling and excluded the exhibit. Thus, no part of the 25-page writing was ultimately admitted.

Appellant's first argument for reversal is that the trial court erred in refusing to admit all of the 25-page writing as inadmissible hearsay because appellant failed to comply with A.R.E. Rule 803(6), the so-called "business record hearsay exception." Rule 803(6) provides as follows:

> Rule 803. Hearsay exceptions — Availability of declarant immaterial. — The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or disagnoses [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 or 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.

Appellant asserts the trial court mistakenly interpreted Rule 803(6) to require the record's sponsoring witness be the custodian or "keeper of the record" and have personal knowledge of the record's content. Appellant acknowledges that Deaton is not the custodian of the record, but contends Rule 803(6) is satisfied if the sponsoring witness is a "qualified witness," within the meaning of the Rule, and that Deaton was a qualified witness. Further, appellant asserts personal knowledge of the record's content is not required of the qualified witness by Rule 803(6).

We agree that Rule 803(6) does not require that a custodian or keeper of the record be the record's sponsoring witness. Rule 803(6) expressly states that, in addition to the custodian of the record, a "qualified witness" may provide the testimony required to lay the foundation for the admission of a business record. *See Wilburn* v. *State*, 317 Ark. 73, 876 S.W.2d 555 (1994); *Smith* v. *Chicot-Lipe Ins. Agency*, 11 Ark. App. 49, 665 S.W.2d 907 (1984). Without addressing the issue of whether Deaton was a qualified witness, we find, for the reasons stated below, that the trial court's misstatement of the requirements of Rule 803(6) did not result in injury to appellant, and therefore does not constitute reversible error.

After consideration of the trial court's observations that Deaton lacked personal knowledge of Patterson's policy

endorsements and based on the facts recited below, we conclude that, aside from any hearsay issue, the trial court implicitly held the 25-page writing was not properly authenticated as Patterson's complete policy by this witness. The requirement of authentication is separate from the requirement that a hearsay document must satisfy an applicable hearsay exception for admissibility. Our conclusion that the 25-page writing was not properly authenticated is consistent with the fact that the objection voiced by appellees at trial was based on lack of authentication, not hearsay. Our conclusion is also consistent with the language of A.R.E. Rule 901 which provides "[t]he requirement of authentication or identification as a condition precedent to admissiblity [admissibility] is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Among the examples of authentication which conform with Rule 901, is "[t]estimony of a witness with knowledge that a matter is what it is claimed to be." Rule 901(a), (b)(1).

[redacted] The 25-page writing was not a self-authenticating document. A.R.E. Rule 902. Hence, appellant was required to comply with Rule 901 and offer sufficient evidence that the document was what appellant claimed it to be, that is, a photocopy of a certified copy of Patterson's insurance policy. Deaton's testimony is replete with reference to his lack of knowledge that the 25-page writing was, in fact, a copy of appellee Patterson's insurance policy. Deaton testified he was without knowledge of the policy endorsements unless permitted to refer to the purported policy declaration page which was, itself, a part of the document to be authenticated, or a computer printout from his office which he did not have with him in court. Further, the purported certification of the 25-page writing which had been photocopied to produce the document offered into evidence consisted of the stamped phrase "TRUE & CERTIFIED" above a stamped cursive signature reading "Pam Senor" on each page. Deaton testified, however, that he was not familiar with Ms. Senor, that she had signed the certified copy prior to the time he was employed by appellant, and that he could not tell the court whether she did or did not sign it.

During an extended bench conference which was continued *in camera* while Deaton was on the witness stand, the trial court and counsel for the parties debated the admissibility of the pol-

icy copy. We find the trial judge's remarks that the document was unreliable for lack of identification as Patterson's complete policy are consistent with our conclusion that appellant failed to properly authenticate the document. We note the following excerpts from the record:

> THE COURT: The difficulty I'm having here is that I let the basic policy in because this witness testified, not that this policy that was introduced was Larry Patterson's policy, but that the language of this policy, the basic policy, was what everybody had, that's why I let it in, it wasn't in as a business exception to the hearsay rule. Then he testified that he does not know whether or not Columbia would issue, does issue an endorsement that would change one, so that makes this an unreliable document and we don't have Larry Patterson's policy.
>
> . . . .
>
> THE COURT: He can't testify this is the policy that was in effect, that's the kicker, if he could testify this is the policy that's in effect and bring that in under some exception to the hearsay rule —
>
> MR. BAXTER: We've already shown, he can't do that.
>
> MR. SANDERS: He can say that this is Larry Patterson's policy, based upon the records of the company, which show that this is his policy.
>
> THE COURT: I'm not going to argue with you, I'm not going to receive it into evidence. . . .
>
> . . . .
>
> THE COURT: I'm not going to accept this document, it is just totally unreliable. I mean, I was willing for it to come in as long as the testimony was simply that every person who has a policy has this particular language, but once he established that, in essence, that "we don't know whether this is the policy that Larry Patterson had or not." I'm experienced enough with insurance policies, as are each of you lawyers, that is, boy, if you don't have an exact copy and somebody is unable to say that this is the policy he had, we're in deep trouble if we try to speculate on

> whether that was the policy, especially when we're talking about policy language, and, often times, one section of a policy can make another section entirely different.

Rulings on evidentiary matters are within the trial court's discretion, and are not modified by this court absent an abuse of that discretion. On this record, for lack of authentication of the document, we cannot say the trial court abused its discretion in excluding from evidence the 25-page writing. The trial court's ruling will be affirmed if correct, even if the reason given for that decision was wrong. *Higginbottom* v. *Waugh*, 313 Ark. 558, 856 S.W.2d 7 (1993); *Riley* v. *City of Corning*, 294 Ark. 480, 743 S.W.2d 820 (1988).

Appellant's second argument for reversal is that the trial court erred in directing the verdict in light of the fact that Plaintiff's Exhibit 4 was admitted into evidence and the liability provisions upon which appellant relied to prove non-coverage were contained in that part of the policy. Appellant contended that Plaintiff's Proffered Exhibit 5 which contained the policy endorsements did not change the coverage provided by the basic policy provisions which were in evidence as Plaintiff's Exhibit 4.

This argument is based on a false premise and is therefore without merit. As noted above, the record shows that no part of the policy copy was ultimately admitted into evidence. However, even assuming, *arguendo*, that Plaintiff's Exhibit 4 was introduced into evidence, we are unable to address appellant's argument due to his failure to adequately abstract Plaintiff's Proffered Exhibit 5 for our review on appeal. *Jones* v. *McCool*, 318 Ark. 688, 886 S.W.2d 633 (1994).

The trial court's judgment is affirmed.

GLAZE, J., concurs.

BROWN and ROAF, JJ., dissent.

904 S.W.2d 218

ROBERT L. BROWN, Justice, dissenting. I would reverse and remand.

The majority opinion states that Rule 803(6) does not require a custodian or keeper of the record to be the sponsoring witness of an insurance policy but that a "qualified witness" could do

so. That is correct, and we have held that the phrase "other qualified witness" under Rule 803(6) should be given the broadest interpretation. *Wilburn* v. *State*, 317 Ark. 73, 876 S.W.2d 555 (1994). The trial court, however, never considered whether Charles Deaton, the Columbia Mutual claims adjuster, was such a "qualified witness." Rather, the trial court agreed with Larry Patterson's counsel that Arkansas Rule of Evidence 803(6) requires that the sponsoring witness be a "custodian with knowledge," who had to be familiar with the precise terms of the policy. That was incorrect, and that error was the basis for the court's refusal to allow the insurance policy into evidence.

The majority opinion agrees that the trial court misstated the requirements of Rule 803(6). But the opinion proceeds forward and states that the trial court's ruling "implicitly" was a finding that Patterson's insurance policy was not properly authenticated under Arkansas Rule of Evidence 901(b)(1). The majority is affirming in effect on the basis that the trial court was correct in its ruling but for the wrong reason. *See West* v. *G.D. Searle & Co.*, 317 Ark. 525, 879 S.W.2d 412 (1994).

Rule 901(b)(1) states:

> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming to the requirements of this rule:
>
> > (1) Testimony of Witness With Knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be.

In concluding that Mr. Deaton was not a "witness with knowledge," the majority is making a finding of fact for the first time on appeal. Moreover, a "witness with knowledge" under Rule 901(b)(1) seems directly synonymous with a "qualified witness" under Rule 803(6). Neither "witness" under either rule is required to be a "custodian of the record."

Mr. Deaton testified that he was familiar with the standard automobile policy issued by the company and the liability section of that policy and that the standard policy is what Larry Patterson had. (Indeed, both Larry Patterson and Roger Perry admitted in their answers to Columbia Mutual's complaint that Larry

Patterson had coverage with the company.) Mr. Deaton then identified for the jury's benefit the declaration page of the policy that named Larry Patterson as the insured. He next read the "Exclusions" language from the standard policy to the jury. It is the "Exclusions" language that lies at the heart of the litigation.

Much discussion was had at trial about the endorsements to the standard policy and whether Mr. Deaton had knowledge of what the endorsements specifically accomplished. Two points are relevant here. First, the rules do not require that the qualified witness or witness with knowledge know the precise terms of the policy —only that he know that it is the policy at issue. 29A Am. Jur. 2d, *Evidence* § 1033 (1994); *see also New Orleans Saints* v. *Griesedieck*, 612 F. Supp. 59 (E.D. La. 1985). Secondly, neither Larry Patterson nor Roger Perry nor Columbia Mutual ever contended that the endorsements changed the "Exclusions" section of the standard policy in any respect. In fact, Columbia Mutual stated in its appellant's brief that the endorsements did not alter that facet of the policy, and the appellees did not contest this in their brief. The endorsements are simply not material to the Exclusions issue in this appeal.

Because an erroneous standard was employed to deny admission of the policy, a reversal and remand for trial are warranted. I respectfully dissent.

ROAF, J., joins.

Tod HALL *v.* PULASKI COUNTY CHANCERY COURT,
Seventh Division, Honorable Rita Gruber, Presiding

95-80 898 S.W.2d 46

Supreme Court of Arkansas
Opinion delivered May 22, 1995

Melinda R. Gilbert, P.A., for appellant.

Randell Templeton, for appellee.

ROBERT L. BROWN, Justice. Petitioner Tod Hall seeks a writ of prohibition against the Pulaski County Chancery Court, Juve-

nile Division, to deter it from proceeding with a paternity suit. The writ is denied.

On June 13, 1988, Doug Freeman was granted a divorce from Jamie Freeman, now Jamie McFall, in Pulaski County Chancery Court on grounds of general indignities. The decree referred to one child of the marriage, S.F., age ten months. Custody of S.F. was placed in Jamie McFall. Doug Freeman was to pay child support, and he was given visitation rights. On March 2, 1994, Doug Freeman filed a paternity complaint against Jamie McFall[1] and his nephew, Tod Hall, in Pulaski County Chancery Court, Juvenile Division, and alleged that Hall was the putative father of S.F. He prayed that the court order blood testing of all parties, including S.F., and that if Hall was determined to be the father, he be relieved of all child support obligations.

On April 8, 1994, Hall moved to dismiss the paternity suit and gave as his reasons (1) any determination of paternity should be made in chancery court; (2) paternity was decided by the 1988 divorce decree and is *res judicata*; and (3) Doug Freeman has no standing to seek a paternity determination because he is not a "putative father." Jamie McFall agreed that there was a high probability that Hall was S.F.'s father and agreed to the blood tests.

On June 24, 1994, Hall moved for summary judgment on essentially the same grounds as those raised in his motion to dismiss. The chancery court, juvenile division, ordered that the 1988 divorce matter in chancery court be consolidated with the paternity suit. The court further ordered that a guardian ad litem be appointed for S.F. Hall next filed various motions seeking clarification and renewing his motion to dismiss on grounds of lack of subject matter jurisdiction. On January 25, 1995, the juvenile court issued a letter opinion denying the motion to dismiss and directing blood tests "as soon as possible." Hall's petition for writ of prohibition followed.

The Arkansas General Assembly may vest jurisdiction in separate courts of chancery. Ark. Const. art. 7, § 1. In 1989, the General Assembly passed four acts which apply to paternity juris-

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[1]The paternity suit designates her as "Jamie Freeman."

diction. Those four acts are now codified, and the relevant part of each is set forth:

> (a) The juvenile court shall have exclusive original jurisdiction of and shall be the sole court for the following proceedings governed by this subchapter:
>
> . . . .
>
> (3) Proceedings for establishment of paternity . . . of a juvenile alleged to be illegitimate.

Ark. Code Ann. § 9-27-306(a)(3) (Repl. 1993).

> The juvenile division of the chancery court shall be a trial court with original and exclusive jurisdiction in the counties in which it sits, of . . . bastardy . . . and such other juvenile matters as may be provided by law.

Ark. Code Ann. § 16-13-603(a)(1) (Repl. 1994).

> (a)(1) The chancery court shall have concurrent jurisdiction with the juvenile division of chancery court in cases and matters relating to paternity.
>
> (2) The chancery court shall have exclusive jurisdiction of paternity matters which arise during pendency of original proceedings brought under equity jurisdiction.
>
> (3) The juvenile division of chancery court shall have exclusive jurisdiction of paternity matters which arise during pendency of original proceedings brought pursuant to Arkansas Juvenile Code of 1989, § 9-27-301 et seq.

Ark. Code Ann. § 9-10-101(a) (Repl. 1993).

> (b) Notwithstanding the provisions of the Arkansas Juvenile Code of 1989, § 9-27-301 et seq., or any other enactment which might be interpreted otherwise, the chancery court or any division of chancery court shall have jurisdiction for all cases and matters relating to paternity.

Ark. Code Ann. § 16-13-304(b) (Repl. 1994).

The parties have premised their respective arguments on these statutes. Doug Freeman contends that he has alleged ille-

gitimacy with respect to S.F., which confers exclusive jurisdiction in chancery court, juvenile division, under § 9-27-306(a)(3). Hall contends, on the other hand, that the original divorce in chancery court is ongoing and that exclusive jurisdiction over paternity rests in that jurisdiction under § 9-10-101(a)(2).

[redacted] This court faced a similar dilemma in the case of *Barnes* v. *Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992). In *Barnes*, Billy Joe Barnes and Anna Barnes (Hicks) were divorced in January 1989. Hicks testified that she and Barnes had sexual intercourse in December 1989. In January 1991, she filed a paternity suit, claiming that Barnes was the father of her child born in September 1990. Barnes claimed that the juvenile division of chancery court lacked subject matter jurisdiction. We disagreed and noted that exclusive jurisdiction in chancery court lies under the statute "when a paternity matter arises during the pendency of an action already within its jurisdiction." 311 Ark. at 292, 843 S.W.2d at 837. We further emphasized that concurrent jurisdiction lay in both chancery and juvenile courts under §§ 9-10-101(a)(1) and 16-13-304(b) and decided that jurisdiction was appropriate in chancery court, juvenile division.

[redacted] The case before us is somewhat different from *Barnes* v. *Barnes* but analogous. Here, based on what we have before us, the paternity issue did not *arise* during the original 1988 divorce action, and that is what § 9-10-101(a)(2) requires for exclusive jurisdiction to reside in chancery court. To be sure, there was some proof in the paternity suit that Doug Freeman suspected Tod Hall was the father of S.F. prior to the divorce, but, according to the record, that issue was not raised in chancery court by either Doug Freeman or Jamie McFall or developed in that action in any way. The divorce was concluded in 1988, though the court did retain jurisdiction to modify and enforce the rights of the parties. Under these facts, there are insufficient grounds for finding exclusive jurisdiction in chancery court. Moreover, there is no question but that sections 9-10-101(a)(1) and 16-13-304(b) evince a strong preference by the General Assembly for concurrent jurisdiction in chancery court and in chancery court, juvenile division, over paternity matters. And, finally, Doug Freeman alleges in the paternity suit that S.F. may have been the offspring of a relationship out of wedlock which would confer jurisdiction in chancery court, juvenile division, under

§ 9-27-306(a)(3). We conclude that jurisdiction appropriately lies in chancery court, juvenile division.

Hall vigorously asserts that the divorce matter decided S.F.'s paternity in 1988 and that this is *res judicata* or collateral estoppel. *Res judicata* and collateral estoppel are affirmative defenses to be pursued by Hall in chancery court, juvenile division, but not reasons for denying subject matter jurisdiction in that court. *See Tucker Enterprises, Inc.* v. *Hartje*, 278 Ark. 320, 650 S.W.2d 559 (1983).

Because we cannot say that chancery court, juvenile division, is wholly without jurisdiction over this matter, the petition is denied. *See West Memphis Sch. Dist. No. 4* v. *Circuit Court*, 316 Ark. 290, 871 S.W.2d 368 (1994).

Writ denied.

David M. CLARK *v.* SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

94-1293 898 S.W.2d 446

Supreme Court of Arkansas
Opinion delivered May 22, 1995

Clarence W. Cash, for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *John C. Calhoun, Jr.*, for appellee.

ANDREE LAYTON ROAF, Justice. Appellant David M. Clark appeals from a decision of the Supreme Court Committee on Professional Conduct (Committee). The Committee unanimously found Clark violated Rules 1.1, 1.3, and 8.4(d) of the Model Rules of Professional Conduct and suspended the appellant from the practice of law for a period of six months. We affirm.

In August of 1989, Mrs. Frances Paradiso was injured while visiting a construction site. Mrs. Paradiso and her husband had hired a contractor to construct a home. While visiting the construction site, Mrs. Paradiso leaned against a porch railing which collapsed; she broke her arm and wrist, injured her shoulder, and suffered a shock to her nervous system.

Approximately two years later, the Paradisos hired appellant Clark to represent them in a personal injury action against Vir-

gil Griffin, the general contractor. On February 25, 1991, a complaint was filed in Sharp County Circuit Court against Virgil Griffin, d/b/a Lazy Acres Construction. On September 24, 1991, the defendant filed a motion to dismiss because the complaint was filed in the wrong county and the Sharp County Circuit Court did not have jurisdiction. Appellant Clark admits receipt of the motion to dismiss; however, unbeknownst to appellant, an Order of Dismissal was entered on September 27, 1991. Clark learned of the dismissal from another attorney in June or July of 1993, after the claim was barred by the three year statute of limitations. The Paradisos maintain they were never advised of the dismissal and the suit was never refiled in the proper county.

Upon receipt of the September 24 motion to dismiss, Clark contacted the Paradisos and verified that the suit had been filed in the wrong county. The Paradisos have a Hardy, Arkansas mailing address, and the majority of Hardy is located in Sharp County; however, the Paradisos actually live in Fulton County. Clark testified he informed the Paradisos that the lawsuit needed to be refiled in Fulton County and that he thought they still had a lawsuit. Appellant Clark stated that he "didn't tell them that I would, but I didn't tell them I wouldn't" refile the lawsuit. Mrs. Paradiso testified Clark informed her he was going to refile the lawsuit in Fulton County.

The record indicates the Paradisos continued to contact the appellant's office during 1991, 1992, and 1993. At least some of the calls concerned a separate matter regarding the Paradisos' land. Appellant Clark suggested the Paradisos contact another attorney, Larry Kissee, regarding their land. However, the Paradisos continued to contact the appellant regarding the status of their complaint against Griffin. Clark testified that in "most of our conversations they would want to know what was going on and I would tell them that I hadn't gotten any more response back from the private investigator and that I still wanted them to hire another attorney."

The appellant asserts that due to his repeated advice to the Paradisos to hire another attorney and his repeated attempts to express the fact that he no longer wanted to represent the Paradisos, the Court should find that the Committee's decision was clearly erroneous. We review the Committee's action *de novo*

and affirm unless it is clearly against the preponderance of the evidence. *Finch* v. *Neal*, 316 Ark. 530, 873 S.W.2d 519 (1994); *Muhammed* v. *Arkansas Supreme Court Committee on Professional Conduct*, 291 Ark. 29, 722 S.W.2d 280 (1986). Further, the Committee's factual determinations are sustained on appeal unless clearly erroneous because the Committee is in the superior position to determine the credibility of witnesses and weigh the preponderance of the evidence. *Colvin* v. *Committee on Professional Conduct*, 309 Ark. 592, 832 S.W.2d 246 (1992). In the instant case, we cannot say the Committee's decision was clearly erroneous.

The Committee found Clark violated Rules 1.1, 1.3, and 8.4(d) of the Model Rules of Professional Conduct. Rule 1.1, Competence, provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.3, Diligence, provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." Finally, Rule 8.4, Misconduct, provides in part: "It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice."

Appellant Clark admitted that he knew there was a danger the case could be dismissed at any time after the motion to dismiss was filed. Clark testified that after he received the motion to dismiss the "mistake I made at that point probably was not just flat out telling Mr. and Mrs. Paradiso that as far as I was concerned our relationship was ended, and they were going to have to refile, and they should contact another attorney." In addition, he stated "the mistake I made on the front end was not just saying, when the Motion to Dismiss was filed, you all need to go find another lawyer, instead of trying to continue to do something." Further, Clark testified that he "should have withdrawn in September . . . that's what I should have done." However, Clark admits he was the attorney of record and all his discovery had been "informal."

In its letter opinion to Clark, the Committee stated "You testified that you continued to encourage the Paradisos to seek other counsel, but [you] never sent them a letter to that effect or that you felt their best interests would be served by withdraw-

ing. Neither did you respond to the Motion To Dismiss believing you could request a non-suit and refile." Even in his brief on appeal, Clark principally asserts he "encouraged" and "suggested" that the Paradisos hire another attorney. Clark did testify that he told the Paradisos they needed to hire another attorney; however, he continued to "work" on the case and simply informed the Paradisos that he had not received any response from the private investigator.

Based upon the findings of fact, the Committee could reasonably conclude the appellant violated Model Rules 1.1, 1.3, and 8.4(d). In fact, the Comment to Rule 1.3 provides in part:

> Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. . . . Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

The appellant essentially ignored his clients' case for nearly two years after the defendant's motion to dismiss was filed. Further, the appellant was aware that the motion to dismiss was well-founded. Although he suggested the Paradisos should obtain another attorney, Clark continued to "work" on the matter and discussed his "progress" with the Paradisos.

For his second point, the appellant asserts the suspension of his law license is excessive discipline considering the facts of this case. The appellant urges the Court to consider the guidelines for sanctions discussed by Justice Glaze in his concurring opinion in *Colvin* v. *Committee on Professional Conduct*, 309 Ark. 592, 832 S.W.2d 246 (1992). In *Colvin*, however, we noted that in the context of criminal law we will not reduce or compare sentences that are imposed within statutory limits. *Id.* Further, we noted that in the civil context of damage awards, a comparison of awards made in other cases cannot be relied on as a measure of excessiveness. *Id.* Consequently, because the Committee's action was within the range of sanctions for a violation of a provision of the Model Rules, we affirmed the Committee's decision. *Id.*

Section 7(A) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law provides that when the Committee finds that an attorney has violated any provision of the Model Rules, the Committee is authorized to suspend the attorney for a period up to but not exceeding one year. Because the Committee's action is within the range of sanctions authorized for a violation of a provision of the Model Rules, the decision of the Committee is affirmed.

Affirmed.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. By its decision today, this court continues its callous disregard of a practicing attorney's due process rights when imposing serious sanctions against him or her. While Mr. Clark failed to act with due diligence and competence in allowing a statute of limitations to run on the Paradisos' tort claims, the Professional Conduct Committee and this court is clearly wrong in suspending Clark's license for the ethical violation. At most, Clark's action amounts to malpractice which has caused serious harm to the Paradisos, and Clark should be determined liable for his negligent action. Instead, the Committee and this court prevents Clark from practicing law, thereby making it even more difficult for the Paradisos to obtain recompense.

Clark, too, has also been made subject to disparate treatment compared to that imposed previously for similar misconduct. For example, in *Walker* v. *Supreme Court of Arkansas Committee on Professional Conduct*, 275 Ark. 158, 628 S.W.2d 552 (1982), the attorney had failed to file a personal injury suit arising from an automobile accident within the statute of limitations period. This court upheld the Committee's imposition of a "caution" sanction. The court stated the following:

> It is also to be noted that the citation levied by the Committee was a "caution" rather than a "reprimand." We believe such action is not incommensurate with the neglect of appellant Walker as reflected by the evidence in his proceeding.

In a concurring opinion in *Colvin* v. *Committee on Professional Conduct*, 309 Ark. 592, 832 S.W.2d 246 (1992), I pointed out

that, without clear guidelines for imposing sanctions, the Committee, considering the large number of cases it hears and decides, innocently runs the risk of imposing different sanctions to situations where the same or similar misconduct may be involved.[1] Again, when comparing the facts and decision in *Walker*, the Committee's suspension of Clark's license is much too severe.

In my mind, the most serious question raised by this court's decision is why is this court so reluctant to define the court's permissible sanctions? Shouldn't attorneys, who have violated the canons, know what punishment can be imposed? Shouldn't the more serious sanctions of suspension and disbarment be reserved for those attorneys committing intentional and wilful acts such as defalcation or felonies as opposed to acts of negligence? Should an attorney who has committed repeated canon violations, regardless of intent or wilfulness, be subject to the more serious sanctions? If so, shouldn't this court set forth the standards which would trigger when those serious sanctions apply?

This court's failure to define its sanctions gives the court and its Committee unbridled discretion when imposing sanctions in any given case regardless of the misconduct involved. This is wrong.

In conclusion, I mention that the issue concerning sanctions and this court's woeful refusal to define them was raised over two years ago in the *Colvin* case, but nothing has been forthcoming to address this matter. In fact, there are some court members and attorneys who, for whatever reason, do not think it wise to define sanctions. Frankly, I can think of no valid reason why they should not be defined. Nonetheless, until or unless the

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[1]Although not suggested as a complete or final answer, I listed in my concurring opinion certain guidelines that might be considered. Those are as follows:

(1) WARNING - to be given when there is some reasonable question as to whether there was in fact a violation.

(2) CAUTION - to be given when there has been a violation but no irreparable harm.

(3) REPRIMAND - to be given when there has been a violation with irreparable harm.

(4) SUSPENSION - to be imposed when the violation is intentional or includes moral turpitude.

Arkansas Bar Association, itself, decides the issue defined hereinabove is worthy of discussion, this court, no doubt, will continue its custom to do nothing on the matter. I will, however, continue to write, hoping sanctions for legal misconduct will eventually be defined. Fairness and due process require it.

Carolyn ROSS *v.*
UNITED SERVICES AUTOMOBILE ASSOCIATION

94-444 899 S.W.2d 53

Supreme Court of Arkansas
Opinion delivered May 22, 1995
[Rehearing denied June 26, 1995.*]

*Special Justices Ann Parker and Timothy Grooms, join. Holt, C.J., and Newbern, J., not participating.

Nolan, Caddell & Reynolds, P.A., by: *Bennett S. Nolan*, for appellant.

Daily, West Core, Coffman & Canfield, by: *Jerry L. Canfield*, for appellee.

ANDREE LAYTON ROAF, Justice.

This is an insurance case that requires us to interpret our underinsured motorist statute, Ark. Code Ann. § 23-89-209 (Repl. 1992), and the amount of recovery an insured is entitled to when underinsured coverage is implied by operation of law.

Carolyn Ross, appellant, was in a motor vehicle accident on March 24, 1992, involving another vehicle operated by Michael Ceola. Ceola was apparently at fault. Ceola was insured with Liberty Mutual Insurance which had a $25,000 liability limit available to Ross for the accident. Ross was insured at the time by United Services Automobile Association, appellee, under a single policy covering four family vehicles with liability limits of $100,000 per person and uninsured motorist coverage of

$100,000 per person. Her policy contained anti-stacking language with regard to the uninsured motorist coverage. An informational form accompanying the policy and discussing underinsured motorist coverage provided that it was "optional but if ordered must equal your UM-BI limits, is available in limits of $50,000/100,000 or above."

Under our holdings in *Shelter Mutual Insurance Company* v. *Irvin*, 309 Ark. 331, 831 S.W.2d 125 (1992), and *Shelter Mutual Insurance Company* v. *Bough*, 310 Ark. 21, 834 S.W.2d 637 (1992), underinsured coverage will be implied by operation of law when there is not a signed rejection of the coverage. There was no signed rejection for the coverage in this case so coverage was implied, and United does not dispute that matter.

The point of contention is how much coverage Ross would receive. She claimed damages of $850,000, but United refused to pay more than $25,000. Ross brought suit against United and United moved for summary judgment alleging that under the underinsured motorist statute, the maximum it was required to pay, where coverage is implied by law, is $25,000. The trial court agreed and granted summary judgment to United.

Ross appeals from that judgment making two arguments: first, she argues that when our underinsured statute is implied by operation of law the insured will be covered to the extent of her injuries, pursuant to the statute; or that coverage should be implied in the amount equal to her liability and uninsured coverages of $100,000, or in the minimum amount available at that time through United of $50,000, pursuant to her policy. She also argues alternatively that she should have been allowed to stack coverage for her three other vehicles insured under the same policy in the amounts of $25,000, $50,000 or $100,000 per vehicle, depending on the resolution of the amount to be implied. We reverse the trial court's award of summary judgment on the issue of stacking.

LIMIT FOR IMPLIED COVERAGE UNDER ARK. CODE ANN. § 23-89-209

Ark. Code Ann. § 23-89-209 is our underinsured motorist statute and United does not argue that the coverage is not implied in this case. As previously noted, we held in *Irwin,*

supra, and *Bough, supra*, that the underinsured motorist coverage required to be offered under that statute would be implied by law when the insurance company failed to get a written rejection of the coverage.

The only issue in the case is the amount of coverage that should be implied under § 23-89-209, which provides in pertinent part:

> The coverage shall enable the insured or the insured's legal representative to recover from the insurer the amount of damages for bodily injury or death to which the insured is legally entitled from the owner or operator of another motor vehicle. *Underinsured motorist coverage shall be at least equal to the limits prescribed for bodily injury or death under § 27-19-605.* (Emphasis added.)

Section 27-19-605 is part of the Motor Vehicle Safety Responsibility Act, and requires $25,000 minimum liability coverage for bodily injury or death. Ross argues she should be able to recover up to the total extent of her damages pursuant to the first sentence of the statutory language quoted above. The insurance company argues that she is limited to the $25,000 minimum figure also referred to in the statute. Ross also argues that in the alternative, the court should look to the policy to imply coverage of either $50,000 or $100,000, based on the minimum underinsured coverage either available or required by United in its informational form.

We have not yet addressed this issue so we have looked to other jurisdictions for some guidance on the amount of coverage allowed when coverage is implied by operation of law. We found three jurisdictions that have addressed the issue, and all of them have held the insured was limited to the amount referred to in the underinsured coverage statute. *See Jablonski* v. *Mutual Serv. Cas. Ins. Co.*, 408 N.W.2d 854 (Minn. 1987); *Insurance Co. of N. Amer.* v. *Santa Cruz*, 800 P.2d 585 (Ariz. 1990); *Riffle* v. *State Farm Mut. Auto. Ins. Co.*, 410 S.E. 413 (W. Va. 1991).

The reasoning is that the insurer is not required to offer anything more than the limits listed in the statute, and to do otherwise would be to "force upon the insurance company something that is not present in the statute." *Jablonski* v. *Mutual Serv. Cas.*

Ins. Co., supra. We find that reasoning sound and adopt that approach in this state. The statutory language relied on by Ross sets forth the general purpose of the coverage, not the amount. Our statute clearly mandates that a minimum of $25,000 underinsured coverage be offered and not an amount equal to the liability insurance purchased by the insured.

[redacted] Therefore, we hold that, when underinsurance is implied by law under § 23-89-209, the insured will be limited to the minimum amount referred to in the statute of $25,000.

STACKING OF INSURANCE COVERAGE

In addition to the vehicle involved in the accident, Ross had three other vehicles insured under the same policy with United. She argues she should be able to "stack" those coverages toward the ultimate amount of damages she suffered. That is, because coverage will be implied by operation of law for the vehicle involved in the accident, *Shelter Mutual Insurance Company* v. *Irwin, supra*, we should also find underinsured coverage by operation of law on her other three cars in the alternate amounts of $25,000, $50,000 or $100,000.

United argues that before deciding whether to stack coverage, we must decide in the first instance if there is a basis for stacking the coverages and argues that none exists in either the policy or in the statute. We do not agree.

We have already recognized the propriety of stacking insurance coverages in *Farm Bureau Mutual Insurance Company* v. *Barnhill*, 284 Ark. 219, 681 S.W.2d 341 (1984). In that case we did not discuss the basis for stacking but focused on and found that the anti-stacking clause in the policy was not applicable to the particular case and that stacking was therefore appropriate.

We have also recognized that underinsured coverage will be implied by law where the insurance company has failed to offer it to the insured. *See, Shelter* v. *Irwin, supra.* There is no language in the underinsured statute requiring that result, but *Irwin* was based on our recognition of public policy. We found the legislature had indicated the "significant" and "vital" nature of the coverage and that coverage would be implied when the mandated offer had not been made. We noted this was also the rule in many jurisdictions. We subsequently followed *Irwin* in *Shelter Mutual*

Ins. v. *Bough, supra*, and *American Casualty Co.* v. *Mason*, 312 Ark. 166, 848 S.W.2d 392 (1993). We have not yet addressed the question of stacking where coverage is implied by law.

There is scant authority on this point and we have found only two jurisdictions that have considered the issue of stacking coverages implied by law and in both cases, stacking was allowed. *See Holiman* v. *All Nation Ins. Co.*, 288 N.W.2d 244 (Minn. 1980); *Riffle* v. *State Farm Mutual Auto Ins. Co.*, 410 S.W.2d 413 (W.Va. 1991). In neither of these jurisdictions did the statutes requiring that coverage be offered, authorize or even mention stacking, but the courts found stacking permissible on the basis of those statutes.

In *Holiman*, the court allowed stacking on the basis that Minnesota law required coverage for each vehicle and that each vehicle contain, or be offered such coverage. In *Riffle*, the court did not directly address the basis for the stacking, but found, based on the language of the underinsured statute, that while stacking of several cars under one policy was not allowed, the policies themselves could be stacked.

While we have not found any treatises discussing this issue, the relevant question of the limits of that liability is addressed in 3 Alan Widiss, *Uninsured and Underinsured Motorist Insurance* §32.7 (2d 1992), and is in keeping with the Minnesota and West Virginia cases. It is stated there as the general rule:

> When underinsured motorist insurance coverage is imposed by operation of law because an insurance company failed to comply with a legislative mandate, questions sometimes arise about the coverage limits for the insurance. Typically, legislation mandates that when an insurer fails to prove an effective offer, *the insurer must provide the minimum coverage required to be offered to the purchaser under the statute.* (Emphasis added.)

If we look at the minimum insurance required to be offered by our statute, § 23-89-209, we find there is a basis on which stacking is authorized. The relevant portion of that statute provides:

> (a) Every insurer writing automobile liability insurance covering liability *arising out of the ownership, mainte-*

> *nance, or use of any motor vehicles in this state*, shall provide underinsured motorist coverage unless rejected in writing by a named insured. (Emphasis added.)

We find the language suggests coverage is required to be offered for *every* vehicle. While we also note the presence of some ambiguity, that only strengthens our interpretation in favor of the insured. Statutes regulating the insurance industry are generally construed, as are insurance policies, against the insurance company. *See* 3A Norman J. Singer, *Sutherland Statutory Construction*, § 70.05 (5th Ed. 1992). It is there stated:

> In keeping with the judicial policy of construing insurance policies in favor of the insured, legislation enacted for his protection has also usually been liberally construed in favor of the public and the insured . . . .
>
> The law looks with disfavor upon the forfeiture of the rights of the insured, and so statutes protecting and extending those rights are treated with liberality.

That we will construe such statutes favorably and liberally for the insured is underscored in this case because the statute, in effect, has become part of the policy by operation of law.

Because we find the statute requires the insurance company to offer as a minimum, underinsured coverage for each car, we further conclude that when an insured has more than one car covered with the insurance company, the insured may stack the minimum coverages that should have been offered.

Although United asserts it had an anti-stacking clause in the policy, we note the clause was limited to prohibiting the stacking of *policies*, and not the stacking of *cars* within the policy. As we have always done with contracts of insurance, we construe this clause most strongly against the insurer, and find the anti-stacking clause inapplicable. *See Home Indemnity Co.* v. *City of Marianna*, 297 Ark. 268, 761 S.W.2d 171 (1987).

When finding insurance by operation of law, we do not speculate as to whether or not the insured would have accepted the offer, but simply find coverage as a matter of law. *See Irwin, supra*; and *Kuchenmiester* v. *Illinois Farmers Ins. Co.*, 310 N.W.2d 86 (Minn. 1981), where it was held the insured is not required

to prove he or she would have accepted the insurance in order to have it implied by law. The court said:

> Not only would that determination be too speculative, it would allow insurers to circumvent the intent of the legislature.

Similarly, we will not speculate as to whether the insured would have accepted the offer for each car but find coverage for each car by operation of law. We find that the trial court should have allowed stacking of coverage of the statutory minimum, for each car that appellant had insured with the company on her policy.

Affirmed in part.

Reversed in part and remanded for proceedings consistent with this opinion.

HOLT, C.J., and NEWBERN, J., not participating.

Special Justices ANNE A. PARKER and TIMOTHY W. GROOMS join in this opinion.

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

GLAZE, J., dissents as to part one.

ROBERT L. BROWN, Justice, concurring in part, dissenting in part. I concur with the amount of the implied coverage on the automobile involved ($25,000), but I disagree with the court's decision on stacking. Carolyn Ross had one policy covering four automobiles. Only one of those automobiles was involved in the accident. USAA failed to offer her underinsured coverage. As a result, we must decide USAA's liability under the operative statute, Ark. Code Ann. § 23-89-209 (Repl. 1992).

Section 23-89-209 is silent on the issue of stacking. It does not deal with it one way or the other. Hence, it cannot be ambiguous on the matter, as the majority concludes. The mere fact that the statute directs that underinsured coverage be offered for each motor vehicle owned by an insured does not translate into stacked coverage when only one of the vehicles is involved in the wreck.

As the majority opinion admits, one case cited by Ross, *Rif-*

fle v. *State Farm Mut. Auto. Ins. Co.,* 410 S.E.2d 413 (W. Va. 1991), is concerned with stacking separate policies which covered one vehicle. That is an entirely different fact situation. The only authority for doing what the majority seeks to do in this case is a Minnesota case, *Holman* v. *All Nation Ins. Co.*, 288 N.W.2d 244 (Minn. 1980).

The policy justification for stacking coverages of several vehicles under one insurance contract involving several cars may have merit. One justification may be that minimum coverage on one vehicle is not a sufficient penalty for failure to offer underinsured coverage. The General Assembly might well want to address this. But today the majority implies a penalty by stacking coverages on vehicles not involved in the accident without a statutory premise for doing so. I cannot go that far, and for that reason I respectfully dissent.

Gary ANDERSON *v.* STATE of Arkansas

CR 95-488 898 S.W.2d 53

Supreme Court of Arkansas
Opinion delivered May 22, 1995

John C. Bartlett, 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 December 19, 1994, whereas the judgment was not entered until January 9, 1995. 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 grant the motion for a belated appeal and direct that a copy of this opinion be forwarded to the Committee on Professional Conduct.

Jamie M. Hardin DIEMER, as Administratrix of the Estate of Jerry Keith Hardin, Deceased
v. YELLOW FREIGHT SYSTEM, INC., Tremco Incorporated and Roof Maintenance, Inc.

95-238 898 S.W.2d 53

Supreme Court of Arkansas
Opinion delivered May 22, 1995

The McMath Law Firm, P.A., by: *Sandy McMath*, for appellant.

Friday, Eldredge & Clark, by: *Donald H. Bacon*, for Yellow Freight System, Inc.

Allen Law Firm, by: *Sandra Jackson*, for Tremco, Inc.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Mike Huckabay*, for Industrial Painters, Inc.

PER CURIAM. Appellant's motion for reconsideration is denied.

BROWN, J., concurs.

GLAZE and ROAF, JJ., would grant.

NEWBERN, J., not participating.

ROBERT L. BROWN, Justice, concurring. I agree that the motion for reconsideration should be denied based on controlling precedent. But I also believe that the time has come for this court

to revisit the issue involved in this case. Simply stated, it concerns whether a notice of appeal filed on the same day that the judgment is entered, but minutes before that entry, should be deemed ineffective. We have held that it should be. *See Lawrence Bros., Inc.* v. *R.J. "Bob" Jones Excavating Contractor, Inc.*, 318 Ark. 328, 884 S.W.2d 620 (1994) (per curiam) (J. Brown and J. Hays dissenting on other grounds); *Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992), *overruling in part Joshua* v. *State*, 307 Ark. 79, 818 S.W.2d 249 (1991). In *Lawrence Bros.*, the facts were similar to the case at hand in that the notice of appeal was filed on the same day as entry of the pertinent judgment, but minutes before. We declared the notice to be of no effect.

Prior to the *Kelly* decision, this court had treated notices of appeal filed before entry of judgment as becoming effective at the time the judgment was entered. *See State* v. *Joshua, supra; Edmonds* v. *State*, 282 Ark. 79, 665 S.W.2d 882 (1984) (per curiam); *Caskey* v. *Pickett*, 272 Ark. 521, 615 S.W.2d 359 (1981); *Wilheim* v. *McLaughlin*, 228 Ark. 582, 309 S.W.2d 203 (1958). In *Wilheim*, Justice George Rose Smith wrote: "Many situations may be conceived in which needless hardship would result from an inflexible rule nullifying every notice of appeal filed before the entry of the judgment." 228 Ark. at 584, 309 S.W.2d at 204.

Though I would not go so far as some of our earlier cases, I believe that we should amend Ark. R. App. P. 4(a) and its counterpart in the criminal rules, Ark. R. Crim. P. 36.9(a), by per curiam order, so that notices of appeal filed *the same day* as judgments are treated as timely filed. Part of the problem here is that in many instances clerks determine the precise time when documents are filed on a particular date. The happenstance of when a filing transpires under these circumstances should not determine the rights of the parties.

Pearl WILLIAMS, as Administratrix of the Estate of Byron Riccardo Williams, deceased *v.* Jimmy INGRAM

94-884 899 S.W.2d 454

Supreme Court of Arkansas
Opinion delivered May 30, 1995

Walker, Roaf, Ivory & Dunklin, by: *Woodson D. Walker* and *Steven R. Smith*, for appellant.

Arnold, Grobmeyer & Haley, by: *Jacob Sharp, Jr.* and *David H. Pennington*, for appellee.

JACK HOLT, JR., Chief Justice. This is a wrongful death case. The appellant, Pearl Williams, acting as administratrix of the estate of Byron Riccardo Williams, raises three points for reversal: (1) the trial court erred in failing to allow the appellant's expert to testify concerning the standard of care required of the appellee and the nature and danger of river currents; (2) the trial court erred in failing to give the appellant's jury instructions dealing with the proper standard of care owed by the appellee, the standard of comparative fault, the applicable federal regulations concerning pleasure craft, and state statutes dealing with water vehicles; (3) the jury's verdict was not supported by substantial evidence. Finding no error, we affirm the judgment of the trial court.

Facts

On July 9, 1986, decedent Byron Williams, appellee Jimmy Ingram, and Danny Easterling, who were employed together at a Pine Bluff automobile dealership service center, left their workplace and went to Mr. Ingram's house near the Arkansas River, where he kept a party barge. On the way, they stopped at a liquor store and purchased two six packs of beer.

After they arrived at Mr. Ingram's house, the three men boarded the party barge, taking the two six packs with them, and proceeded to an area known as Slackwater Harbor. During the period of between ninety minutes and two hours that they were on the river, each of the men consumed several beers. According to the trial testimony of Mr. Ingram and Mr. Easterling, Mr. Williams had somewhere between two and four beers during the excursion.

The record reveals that, at one point, they stopped the boat

while Mr. Ingram and Mr. Williams went swimming in about four feet of water. Mr. Williams climbed out of the water and boarded the boat after suffering cramps. Subsequently, the three men resumed their water journey and moved from the harbor area into the Arkansas River with Mr. Williams operating the craft at some point. According to Mr. Ingram, while they were on the river, Mr. Williams asked that they stop and go swimming again. Mr. Ingram stated that he initially refused but then acceded to Mr. Williams's request.

Once the party barge was stopped, Mr. Ingram entered the water first, followed by Mr. Williams. Mr. Ingram swam back to the boat and climbed aboard. At that point Mr. Easterling called his attention to Mr. Williams, who had gone under the water once and now "had both hands in the air and had his mouth opened, just like he wanted to holler for someone to help him, but he was panicked."

Mr. Williams went under a second time before the two men on the party barge were able to offer any assistance, and he did not come up again. Mr. Ingram and Mr. Easterling waited in the area for fifteen or twenty minutes but saw no sign of Mr. Williams. The two men then drove the boat to a marina and reported the incident.

An autopsy was performed at the request of appellant Pearl Williams, the decedent's mother. Dr. Joseph Halka, the forensic pathologist who performed the autopsy, testified that he determined that the cause of death was drowning and that Mr. Williams had a blood alcohol level in the range of .30.

Mrs. Williams filed a complaint in Jefferson County Circuit Court on July 7, 1989, alleging that Mr. Ingram's "negligent, careless, reckless, and unlawful action" was the proximate cause of Mr. Williams's death and praying for judgment in the amount of $2,082,200. Following a jury trial on January 26 and 27, 1994, a verdict signed by ten of twelve jurors was returned in favor of Mr. Ingram. The trial court denied Mrs. Williams's motion for judgment notwitstanding the verdict or for new trial. From that decision, this appeal arises.

I. Expert testimony

In her first argument for reversal, Mrs. Williams con-

tends that the trial court erred in refusing to allow the testimony of David E. Cole, a maritime and marine safety expert, on the requisite standard of care and the nature and danger of river currents. Under Ark. R. Evid. 702, the test for admissibility of expert testimony is whether specialized knowledge will aid the trier of fact in understanding the evidence or in determining a fact in issue. *Banks* v. *Jackson*, 312 Ark. 232, 848 S.W.2d 408 (1993). Mrs. Williams asserts that Mr. Cole's credentials provided him with specialized knowledge relating to safety standards and river currents that went beyond the general knowledge of an average person and that, in line with Rule 702, would have assisted the trier of fact in understanding the evidence and in determining the facts in issue.

Whether a witness may give expert testimony rests largely within the sound discretion of the trial judge, and that determination will not be reversed absent an abuse of discretion. *Ford Motor Co.* v. *Massey*, 313 Ark. 345, 855 S.W.2d 897 (1993). On appeal, the appellant must shoulder the burdensome task of demonstrating that the trial court has abused its discretion. *Sims* v. *Safeway Trails, Inc.*, 297 Ark. 588, 764 S.W.2d 427 (1989).

Mr. Cole stated in his deposition that, as a hearing officer for the Eighth Coast Guard District in New Orleans, he regularly received reports of violations of federal boating regulations. He also noted that "Swimming in any major river like that is dangerous because of the current. . . . People who go swimming in the river usually will get swept away by the current. Or find themselves in a position where they just can't get back to their boat."

Although federal maritime and marine regulations may have relevance to the present case, nothing in the deposition indicates that the knowledge displayed by Mr. Cole was so specialized that it was beyond the ability of the trier of fact to understand and draw its own conclusions. *See Montgomery* v. *Butler*, 309 Ark. 491, 834 S.W.2d 148 (1992). The potential dangers of the Arkansas River's currents were not beyond the comprehension of the jury. Moreover, both Officer Bo Fontaine of the Jefferson County Sheriff's Department and Mr. Ingram agreed in their testimony that the river was "extremely dangerous" at the point where Mr. Williams drowned. Consequently, no prejudice resulted in this regard from the exclusion of expert testimony.

As for Mr. Cole's proffered testimony on the legal requirements for lifesaving equipment, both Mr. Ingram and Mr. Easterling testified that the party barge was equipped with United States Coast Guard-approved life jackets, a rope, and a ring buoy. Officer Fontaine testified with respect to the legal requirements for having life jackets on board a vessel. In addition, the trial court instructed the jury on Arkansas statutory specifications regarding the operation of motorboats and vessels, including the duty owed by the operator of a vessel and the requirement that "every motorboat shall have one life preserver, buoyant vest, ring buoy or buoy cushion of the type approved by the commander of the United States Coast Guard in good and serviceable condition for each person on board."

In sum, the trial court did not err in refusing to allow the administratrix's expert witness to testify.

II. Jury instructions

Mrs. Williams argues, in her second point for reversal, that the trial court erred in refusing to give four jury instructions. Three of the proffered plaintiff's instructions were based on federal admiralty and maritime law, while the fourth, which was refused in part and delivered in part, was a modified version of AMI Civil 3d, 601, incorporating Ark. Code Ann. § 27-101-201(a) (Repl. 1994).

With respect to the first three instructions, the 1989 complaint contained the phrase "admiralty and maritime law," but Mrs. Williams did not invoke the jurisdiction of the federal district court. Under 28 U.S.C. § 1333, the federal district courts have "original jurisdiction, exclusive of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Mrs. Williams made no effort to prosecute her claims under admiralty and maritime law. Neither did she seek or obtain a ruling from the trial court on whether her claims fell within the bounds of maritime tort. On the basis of the characterization of the claim in the 1989 complaint as an admiralty and maritime matter, Mr. Ingram sought to have it dismissed for lack of subject-matter jurisdiction, but the trial court denied the motion without comment.

A maritime tort occurs and admiralty jurisdiction is appropriate "when a potential hazard to maritime commerce arises out of an activity that bears a substantial relationship to traditional maritime activity." *Sisson* v. *Ruby*, 497 U.S. 358, 362 (1990). A federal court will initially assess whether the particular incident is likely to disrupt commercial activity and will then determine whether there is a "substantial relationship between the activity giving rise to the incident and traditional maritime activity." *Id.* at 364.

In *Southern* v. *Thompson*, 754 F.2d 151, 153 (4th Cir. 1985), the Fourth Circuit Court of Appeals noted that the allegation of navigational error "appears to be the key to admiralty jurisdiction when dealing with small pleasure craft." Applying the *Sisson* analysis in a case involving a diving injury sustained by a houseboat guest, the Ninth Circuit Court of Appeals concluded that the plaintiff had failed to show "a substantial relationship between aquatic recreation off a pleasure boat and traditional maritime activity." *Delta County Ventures, Inc.* v. *Magana*, 986 F.2d 1260, 1263 (9th Cir. 1993).

The Maryland federal district court considered a situation similar to that in the present case in *Smith* v. *Knowles*, 642 F. Supp. 1137 (D. Md. 1986). There, the plaintiff had filed suit after the decedent, while intoxicated, had drowned while diving off a pleasure boat. The plaintiff alleged that the defendant had been negligent because he knew that the decedent had been drinking and could not swim and because he did not offer life jackets or make immediate rescue efforts. In concluding that no maritime tort had occurred, the district court observed that, however tragic, the "failures of pleasure craft operators to provide life jackets, or to rescue their passengers, . . . will not impede maritime commerce. . . . As a matter of common sense, admiralty jurisdiction was not intended to cover cases like this one." *Id.* at 1140.

Given the absence of any maritime tort (and apart from jurisdictional considerations), Mrs. Williams was not entitled to the three maritime jury instructions. Moreover, although the violation of a statute or regulation is evidence that a jury may consider in determining whether a defendant is guilty of negligence, *Berkeley Pump Co.* v. *Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983), it was not necessary in the present case for

the instructions to have incorporated the provisions of federal law when another instruction based on an Arkansas statute covering essentially the same subject was delivered. In the partially refused, partially delivered 601 instruction, the trial court instructed the jury on the applicable standard of care. It is not error for the trial judge to refuse to give a jury instruction if other instructions cover the issue. *Precision Steel Warehouse, Inc.* v. *Anderson-Martin Mach. Co.*, 313 Ark. 271-A, 856 S.W.2d 306 (1993), *Supp. op. on denial of reh'ing.*

[redacted] The trial court did not commit reversible error in refusing Mrs. Williams's instructions.

III. Substantial evidence

Finally, Mrs. Williams asserts that the jury verdict is not supported by substantial evidence. Despite her claim that she "renewed" her request for a directed verdict, neither the abstract nor the record indicates that such a motion was renewed or even made in the first place. Mrs. Williams did, however, make a motion for a new trial, which was denied by the trial court.

[redacted] On appellate review, when a motion for judgment n.o.v. or new trial is denied, the test is whether the verdict is supported by substantial evidence, giving the verdict the benefit of all reasonable inferences permissible under the proof. *Schuster's, Inc.* v. *Whitehead*, 291 Ark. 180, 722 S.W.2d 862 (1987). In determining on appeal whether the evidence is substantial, this court need only consider the evidence on behalf of the appellee and that part of the evidence that is most favorable to the appellee. *Muskogee Bridge Co.* v. *Stansell*, 311 Ark. 113, 842 S.W.2d 15 (1992).

The evidence as presented at trial has been set forth in detail in the recitation of facts above. It should be added, however, that Mr. Ingram stated that he had no personal knowledge of whether Mr. Williams could swim and that Mr. Easterling reported that Mr. Williams "did tell us that he could swim." Evidence indicated that Mr. Williams had previously entered the water without serious incident (other than experiencing "cramps") before he jumped in again to swim and drowned.

Mr. Ingram said that he was "not sure" if he had a ring buoy on board at the time of the drowning. Mr. Easterling testified

that "[t]he best I can remember," the rope on the party barge had a ring attached to it. Mr. Ingram stated that he had ten or fifteen life preservers on the boat, and Mr. Easterling agreed that he "had plenty of life preservers," estimating the number at "eight or ten or more."

It is readily apparent from a review of the record that the jury accepted Mr. Ingram's version of events. Disputed facts and the credibility of witnesses are within the province of the jury to resolve. *France* v. *Nelson*, 292 Ark. 219, 729 S.W.2d 161 (1987). A jury has the right to believe or to disbelieve all or any part of the testimony at trial and is in a superior position to judge the credibility of the witnesses. *Muskogee Bridge Co.* v. *Stansell, supra.*

As for Mr. Williams's blood-alcohol content, even Dr. Halka testified that decomposition, which had begun during the five days that the body remained submerged and missing, "will contribute fermentation of body substances, especially in the fluids of the body, and they will contribute [to] a gradual increase [in blood-alcohol content]." The issue of the degree of Mr. Williams's intoxication was a matter for the jury to resolve, as was the question concerning his ability to swim.

From the evidence presented, when viewed in the light most favorable to Mr. Ingram, there was substantial evidence to support the jury verdict.

Affirmed.

ROAF, J., not participating.

Thomas O. DAVLIN *v.* STATE of Arkansas

CR 94-1452 899 S.W.2d 451

Supreme Court of Arkansas
Opinion delivered May 30, 1995

William M. Pearson, for appellant.

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

ROBERT H. DUDLEY, Justice. Appellant was previously convicted of rape and sentenced to life imprisonment. We reversed and remanded for a new trial. *Davlin* v. *State*, 313 Ark. 218, 853 S.W.2d 882 (1993). Upon retrial, he was again convicted of rape and sentenced to life imprisonment. This time, we affirm.

Appellant's first assignment is that the trial court erred in

refusing to allow evidence of the rape victim's prior sexual conduct. Appellant filed a pretrial motion pursuant to Ark. Code Ann. § 16-42-101(c), a part of the Rape Shield Statute, in which he alleged that the victim's prior sexual conduct was relevant for either of two purposes. One was to impeach one of the State's witnesses, Michael Yarbrough, and the other was to demonstrate that injuries suffered by the victim were inflicted by the victim's husband before the rape occurred. Appellant alleged that the victim's husband caused the black eye when he struck her after discovering that she was having an extra-marital affair.

Two witnesses testified at the hearing. The first witness, Ernie Joe Tate, testified that the victim had a black eye the day before the rape occurred. He indicated the victim received the black eye from her husband, but his only knowledge of the incident came from conversations with other people. Tate also thought that the victim was having a sexual affair with Michael Yarbrough during this time. Appellant also testified. He testified that he was living in a trailer with Michael Yarbrough, and he thought Yarbrough and the victim were having a sexual affair, although he never observed them engaging in a sexual relationship. Appellant testified that the victim's husband struck her because she spent the night at Yarbrough's trailer and that was the cause of the black eye. Appellant testified that this information came from his overhearing a conversation between the victim's sister and the victim.

Under the Rape Shield Statute, a trial court has discretion in the admission of evidence of the victim's prior sexual conduct. *Laughlin* v. *State*, 316 Ark. 489, 872 S.W.2d 848 (1994). We will not reverse a trial court's decision absent an abuse of discretion. *Drymon* v. *State*, 316 Ark. 799, 875 S.W.2d 73 (1994). Here, the trial court ruled that the testimony about the black eye existing before the rape occurred was admissible, but excluded any testimony regarding the existence of a sexual relationship between the victim and Michael Yarbrough. Under this ruling appellant was free to bolster his claim of consent by showing that the victim had a black eye before the rape occurred. However, the reason the victim's husband supposedly struck the victim was only minimally relevant, and its prejudice substantially outweighed its probative value. Moreover, as noted by the trial court, the evidence about the cause of the argument was entirely hearsay.

Appellant also argues that the evidence was admissible to impeach the credibility of Michael Yarbrough, one of the State's witnesses. The trial judge allowed appellant to put on testimony of the close relationship between Yarbrough and the victim, but ruled that evidence of a sexual affair between them was not admissible. The ruling was in accordance with the Rape Shield Statute. Appellant failed to show how evidence of the alleged sexual affair would impeach Yarbrough's credibility. While the credibility of a witness is always in issue, *see* A.R.E. Rule 608, the testimony must be relevant to a determination of credibility or veracity, and appellant offered no link between evidence of the alleged sexual affair and Yarbrough's credibility. In summary, the trial court did not abuse its discretion by excluding evidence that the close relationship included a sexual affair.

In his second assignment appellant contends the trial court erred in admitting a photograph of appellant which was taken shortly after his arrest. It depicts appellant sitting down, shirtless, with his hands behind his back. Appellant argues that the admission of this photograph prejudiced him because his hands are shown behind his back and that implies he was handcuffed. We have held that it is not prejudicial, per se, for a jury to witness a defendant in handcuffs. *Hill* v. *State*, 285 Ark. 77, 685 S.W.2d 495 (1985). The arresting officer testified that the picture accurately depicted appellant immediately after he was arrested. The trial judge did not abuse his considerable discretion in the decision to admit State's exhibit number ten.

Appellant next contends the trial court erred in admitting a photograph of the victim that contains three small arrows that point to contusions on the victim's neck and one circle drawn around a bruise on her jaw. These marks were made by a witness at the first trial. Appellant argues that the marks distort the photograph, rendering it inadmissible as prior testimony and hearsay, and that the photograph should have been excluded under the best evidence rule. Appellant did not make the hearsay argument below, and, consequently, we do not consider that argument.

The marks are hardly noticeable and do not distort the photograph. The examining physician gave testimony about the victim's injuries and discussed the injuries denoted by the marks. Other witnesses testified that the photograph accurately

depicted the victim's injuries after the incident. Even if the small marks constitute prior testimony, appellant offers no authority and does not make a convincing argument that they render the entire photograph inadmissible. *See Robinson* v. *State*, 317 Ark. 407, 878 S.W.2d 405 (1994). Appellant also contends that the photograph was inadmissible under the best evidence rule, A.R.E. Rule 1002. The Rule requires an original of a photograph in order to prove its contents, except as otherwise provided in the Rules. Appellant does not assert that the photograph is not the original, merely that it is not in its original form. This fact would not trigger the application of the best evidence rule. Appellant has not shown that the trial court abused its discretion in admitting this photograph.

In his final assignment appellant contends that the trial court erred in allowing the examining physician to testify about the ultimate issue. He also argues that the physician's testimony was inadmissible because the issue was not beyond the comprehension of the average juror.

Rule 704 of the Arkansas Rules of Evidence provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." We have stated that the trend of authority is not to exclude opinion testimony because it amounts to an opinion on the ultimate issue. *Long* v. *State*, 284 Ark. 21, 25, 680 S.W.2d 686, 688 (1984). There, we noted that while the opinion testimony embraced the ultimate issue, it did not mandate a legal conclusion. *Id.* Under this standard we have held in a child sexual abuse case that the opinion of an expert that a child has been sexually abused is not objectionable on the basis that it is an opinion on the ultimate issue. *Johnson* v. *State*, 292 Ark. 632, 732 S.W.2d 817 (1987).

In the case at bar, the physician testified about the physical examination of the victim that he conducted immediately after the rape. He testified that the victim had a small bruise in her vaginal area. The prosecutor asked the doctor whether or not the injuries in the vaginal area were the result of forced sex. He responded:

> It would, it would be consistent with that. It would — With the other, the other findings, the seminal fluid, . . .

> the other things, it would be consistent with that. However, I mean, it would be possible to get the contusion in that area, but it would require a blow with something fairly, fairly small.

While this testimony embraced the ultimate issue of forced sex, it did not mandate a legal conclusion. The testimony did not exclude other causes for the bruising. Thus, it was not inadmissible opinion testimony on the ultimate issue. Further, the testimony was admissible because it aided the jurors in determining the facts in dispute. Expert testimony is admissible if it will aid the trier of fact in understanding the evidence or determining a fact in issue. A.R.E. Rule 702; *Utley* v. *State*, 308 Ark. 622, 826 S.W.2d 268 (1992). Here, the physician conducted a physical examination of the victim immediately after the rape, and the results of that exam assisted the jurors in determining whether the victim had been forced to have sexual intercourse.

The sentence in this case is life imprisonment. Accordingly, an examination of the entire record has been made to determine if there were any erroneous rulings adverse to appellant that would cause reversal. Ark. Sup. Ct. R. 4-3(h). There are no such reversible errors.

[redacted]

Paula NORRIS *v.* John L. BAKKER, D.D.S.

95-1 899 S.W.2d 70

Supreme Court of Arkansas

Opinion delivered May 30, 1995

[redacted]

Donald C. Donner and *Michael R. Shahan*, for appellant.

Davis, Cox & Wright, PLC, by: *Constance G. Clark*, and *Walter B. Cox*, for appellee.

TOM GLAZE, Justice. On January 21, 1994, appellant Paula Norris filed a complaint against her dentist, appellee John Bakker, alleging that in either late 1989 or early 1990, Bakker examined her breast under the pretense of performing a lymph node examination. Alleging a breach of fiduciary duty, Norris claimed compensatory and punitive damages for invasion of privacy and medical injury. In his answer, Bakker denied examining Norris' breasts and affirmatively pled the statute of limitations.

On February 9, 1994, Bakker filed a motion for summary judgment along with a supporting affidavit and Norris' dental chart reflecting that he had last treated Norris on March 17, 1989. Norris responded with an affidavit restating the allegations in her complaint, and in addition, claimed Bakker intentionally and fraudulently concealed the true purpose of his examination which she did not discover until December 14, 1993.

The trial court determined that the cause of action accrued on March 17, 1989, and there was no evidence of fraudulent concealment by Bakker. Therefore, the trial court granted Bakker's motion for summary judgment based on the running of both the two year statute of limitations for medical injury and the three

year statute of limitations for invasion of privacy. On appeal, Norris argues the trial court erred by failing to find the limitations period for a medical injury had been tolled by fraudulent concealment, and erred by finding her cause of action for invasion of privacy accrued at the time the alleged wrongful act occurred. Because we find no merit to either of Norris' arguments, we affirm.

Summary judgment is a remedy that should only be granted when there are no genuine issues of material fact to litigate and when the case can be decided as a matter of law. *Hampton* v. *Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994). The burden of showing there is no remaining genuine issue of material fact and entitlement to judgment as a matter of law is upon the movant for summary judgment. Any doubt and all inferences must be resolved against the moving party. *Mt. Olive Water Assoc.* v. *City of Fayetteville*, 313 Ark. 606, 856 S.W.2d 864 (1993). Once the moving party makes a prima facie showing of entitlement, however, the responding party must meet proof with proof in order to demonstrate a genuine issue of material fact remains. *Id.* The response and supporting material must set forth specific facts showing there is a genuine issue for trial. *Hampton*, 318 Ark. 771, 887 S.W.2d 535.

First, Norris claims Bakker's act was something so furtively planned and secretly executed as to keep her cause of action concealed from her because she lacked the essential medical knowledge to realize that such touching was not a necessary part of a lymph node examination. Because of the doctor-patient relationship, Norris argues Bakker had an imperative duty to inform her that he had inflicted a medical injury on her. For support, Norris cites *Burton* v. *Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934), where this court held that a physician who negligently left a roll of gauze in a patient's abdomen after surgery had an imperative duty to disclose this fact to her, and the physician's failure to inform the patient was a continuing act of negligence. In *Burton*, this court held the physician's failure to inform the patient tolled the statute of limitations until he either removed the object, or the patient learned or should have learned of its presence.

Since *Burton* was decided, the legislature enacted Ark. Code Ann. §§ 16-114-201—209 (1987 and Supp. 1993),

which govern causes of action for medical injuries. Pursuant to § 16-114-203(a), all actions for medical injury shall be commenced within two years after the cause of action accrues. Under § 16-114-203(b), the date of accrual is the date of the wrongful act complained of and no other time, unless otherwise excepted under the statute. Here, the medical injury claimed by Norris is not one that is otherwise excepted. To support his motion for summary judgment, Bakker presented undisputed evidence that the alleged wrongful act could not have occurred later than March 17, 1989, the date of Norris' last visit to Bakker's office and over four years before she filed her complaint in 1994.

This court has held that where the affirmative acts of concealment by the person charged with fraud prevent the discovery of that person's representations, the statute of limitations will be tolled until the fraud is discovered or should have been discovered with the exercise of reasonable diligence. *Wilson* v. *General Electric Capital Auto Lease, Inc.*, 311 Ark. 84, 841 S.W.2d 619 (1992). Here, Bakker did nothing to prevent Norris from discovering the falsity of his reputed representation that touching her breasts was necessary to a lymph node examination. As this court has stated:

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

Id. at 87 (citations omitted). *See also Hampton* v. *Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994). In the present case, Norris failed to show how Bakker prevented her from learning that his representation was false.

Further in her affidavit, Norris merely restated that it was her opinion that fraudulent concealment occurred. Ark. R. Civ. P. 56(e) provides that when a motion for summary judgment is made and supported by affidavits and other documents, the adverse party may not rest upon mere allegations or denials of

the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Lubin* v. *Crittenden Hospital Assoc.*, 295 Ark. 429, 748 S.W.2d 663 (1988). Norris failed to meet proof with proof, and set forth specific facts by which Bakker caused his act or its purpose to be concealed.

Next, Norris contends, like with her medical injury claim, Bakker invaded her privacy by intrusion on December 14, 1993, when she learned that his touching was inappropriate.[1] Because her injury was one to the psyche, Norris argues she did not suffer injury until she realized her privacy had been invaded, thus, Ark. Code Ann. § 16-56-105 (1987), the three year statute of limitations for invasion of privacy, had not expired when she filed her complaint.

Once again, in the absence of concealment of the wrong, the statutory period begins to run when the wrongful act occurs, not when it is discovered. *Hampton* v. *Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994). Because Norris failed to show an affirmative act of concealment by Bakker, Norris' cause of action advanced under either a medical injury or invasion of privacy theory accrued on March 17, 1989, her last treatment date.

The trial court was correct in granting summary judgment for the reasons discussed. Therefore, we affirm.

ROAF, J., not participating.

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[1]We do not determine whether a cause of action for invasion of privacy by intrusion exists under the facts of this case.

Norman WILLIAMS *v.* Loyde HUDSON, M.D.

94-1465 898 S.W.2d 465

Supreme Court of Arkansas
Opinion delivered May 30, 1995

Carney & Cooper Law Firm P.A., by: *Mark F. Cooper*, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *J. Michael Cogbill*, for appellee.

DONALD L. CORBIN, Justice. Appellant, Norman Williams, appeals an order of the Marion County Circuit Court refusing to reconsider its previous order granting summary judgment to appellee, Loyde Hudson, M.D., on appellant's claim for medical malpractice arising from a surgery to repair appellant's hiatal hernia. In its previous order, the trial court applied our decisions in *Weidrick* v. *Arnold*, 310 Ark. 138, 835 S.W.2d 843 (1992), and *Thomas* v. *Cornell*, 316 Ark. 366, 872 S.W.2d 370 (1994), and ruled appellant's claim was barred by the two-year statute of limitations on medical malpractice claims, Ark. Code Ann. § 16-114-203 (Supp. 1993). The Arkansas Court of Appeals certified this case to us for statutory interpretation. Jurisdiction is therefore properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(3), (d)(1).

Because the timely filing of a notice of appeal is essential to our jurisdiction, *LaRue* v. *LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980), we first consider appellee's assertion that appellant's notice of appeal was not timely filed. The order granting appellee's motion for summary judgment was entered July 7, 1994. On July 12, 1994, appellant filed a motion to reconsider the granting of summary judgment. This motion also requested a new trial pursuant to Rule 59 of the Arkansas Rules of Civil Procedure on the grounds that the decision by the trial court was clearly contrary to the preponderance of the evidence and contrary to the law. On August 8, 1994, appellant amended his motion for reconsideration and new trial to include a claim that appellee was either estopped from relying on the statute of limitations or had waived the defense by waiting too long to pursue it.

The trial court entered an order on September 6, 1994, denying appellant's motion for reconsideration of the summary judgment and new trial. Appellant then filed a notice of appeal from the September 6 order on September 15, 1994. We note that the notice of appeal did not mention the July 7 order granting summary judgment. However, this court has previously held that a notice of appeal from an order denying a motion for new trial was

not defective in failing to refer to the original judgment, since an order denying a motion for new trial is final and brings up for review any preceding order involving the merits. *DeClerk* v. *Tribble*, 276 Ark. 316, 637 S.W.2d 526 (1982); *see* Ark. R. App. P. 2(b).

Appellee contends that, pursuant to Rule 4(c) of the Rules of Appellate Procedure, the motion for reconsideration and new trial was deemed denied on August 11, 1994, thirty days from the filing of the original motion. Therefore, appellee argues, for the notice of appeal to have been filed timely, it must have been filed by September 10, 1994, or within thirty days of the "deemed denied" date, August 11, 1994. This court has held that a trial court loses jurisdiction if a motion for new trial is not decided within thirty days from its filing pursuant to Rule 4(c), which provides that if a trial court neither grants nor denies a new trial motion within thirty days of its filing, the motion is deemed denied as of the thirtieth day. *Arkansas State Hwy. Comm'n* v. *Ayres*, 311 Ark. 212, 842 S.W.2d 853 (1992).

In his reply brief, appellant contends, in effect, that the filing of the amended motion for reconsideration and new trial on August 8 commenced a new thirty-day period from which the amended motion would be deemed denied for purposes of Rule 4(c). Thus, according to appellant, if the trial court had not ruled on the amended motion, it would have been deemed denied on September 7, thirty days from August 8, 1994. However, appellant points out that the trial court indeed entered an order denying the amended motion on September 6, 1994. Thus, appellant contends he had until October 6, 1994, thirty days from September 6, in which to file his notice of appeal. As he filed the notice of appeal on September 15, appellant contends it was timely filed.

Appellant cites no authority, and we are unaware of any, supporting his argument that an amendment to a posttrial motion begins anew the running of the Rule 4(c) thirty-day period for the filing of a notice of appeal. To the contrary, the better rule, though not expressly stated in the Rules of Appellate Procedure, is one similar to the rule on relation back of amended pleadings found at ARCP Rule 15(c), which provides that an amended pleading relates back to the date of the original plead-

ing upon specified conditions not relevant here. *See* ARCP Rule 15(c). For these purposes, we hold that a posttrial motion permitted by Rule 4(b) may be timely amended, but that the amendment will relate back to the date the original posttrial motion was filed and will not extend the time for filing the notice of appeal as provided in Rule 4(c). To hold otherwise would be to allow an appellant to prolong and extend indefinitely the time for filing an appeal simply by filing numerous posttrial motions and amendments. This court has previously disapproved, though not prohibited, the filing of numerous posttrial motions. *See Widmer* v. *State*, 243 Ark. 952, 422 S.W.2d 881 (1968).

In summary, appellee is correct in his assertion that the notice of appeal filed in this case on September 15, 1994, was not timely. The motion for reconsideration and new trial was deemed denied on August 11, 1994, thirty days after it was originally filed. The deadline for filing the notice of appeal was thirty days thereafter, or by September 10, 1994. Because the notice of appeal filed on September 15, 1994, was untimely, it leaves this court without jurisdiction to address the merits of this case and we must dismiss the appeal. *Eddings* v. *Lippe*, 304 Ark. 309, 802 S.W.2d 139 (1991).

Dismissed.

Robert CORTESE *v.* ATLANTIC RICHFIELD

95-59 898 S.W.2d 467

Supreme Court of Arkansas
Opinion delivered May 30, 1995

Hicks Law Firm, by: *George R. Wise, Jr.* and *Edward O. Moody, P.A.*, for appellant.

Wright, Lindsey & Jennings, by: *N.M. Norton, Jr, Edwin L. Lowther, Jr.*, and *Charles L. Schlumberger*, for appellee AT&T, Okonite, and Square D.

Meeks & Carter, P.A., by: *William Russell Meeks, III*, for appellee Westinghouse Elec.

Bridges, Young, Matthews & Drake PLC, by: *Michael J. Dennis*, for appellees Graybar Electric and Ericsson, Inc.

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellee Phelps Dodge Corp.

McGlinchey, Stafford Lang, by: *Carolyn B. Witherspoon*, for appellee Keathley-Patterson.

Mitchell, Williams, Selig, Gates & Woodyard, by: *Marcella J. Taylor*, for appellee USX Corporation.

Friday, Eldredge & Clark, by: *Frederick S. Ursery*, for appellee Carol Wire & Cable.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Tim A. Cheatham*, for appellee American Insulated Wire.

ROBERT L. BROWN, Justice. Appellant Robert Cortese appeals an order of dismissal and summary judgment. Cortese originally sued approximately 34 defendants in an asbestos products liability case. The trial court granted summary judgment to several defendants on the basis that the three-year statute of limitations had expired. The record on appeal, however, does not reflect the disposition of this action against three defendants. Accordingly, we dismiss the appeal pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure.

This is the second time that this matter has been before us on appeal. *See Cortese* v. *Atlantic Richfield*, 317 Ark. 207, 876 S.W.2d 581 (1994) (*Cortese* I). In *Cortese* I, we dismissed the appeal for failure to show what action had been taken against some 20 of the defendants sued in this matter. We concluded that the order was not a final judgment for purposes of Rule 54(b).

Following our decision in *Cortese* I, a corrected order of non-suit was entered dismissing 17 additional defendants. Despite the new order, the record before us still does not reflect final action with respect to defendants American Electrical Cable, Tennessee Valley Electric Supply Co., and Treadway Electric Co., Inc. It is true that the Amended Notice of Appeal and Designation of Record filed by Cortese on June 24, 1993, designates orders of dismissal and summary judgment concerning these three defendants to be included in the record. But the record filed in this case does not contain those orders.

[redacted] We have said many times, and specifically in *Cortese* I, that the fundamental policy behind Rule 54(b) is to avoid piecemeal appeals. *See, e.g., General Motors Acceptance Corp.* v. *Eubanks*, 318 Ark. 640, 887 S.W.2d 292 (1994); *Maroney* v. *City of Malvern*, 317 Ark. 177, 876 S.W.2d 585 (1994). Further, it is the duty of Cortese to produce a record on appeal showing that the jurisdictional requirements of Rule 54(b) have been met. That was not done in this case for a second time.

Appeal dismissed.

GLAZE, J., not participating.

STATE of Arkansas *v.* Rebecca BICKERSTAFF

CR 94-1141 899 S.W.2d 68

Supreme Court of Arkansas
Opinion delivered May 30, 1995
[Rehearing denied July 3, 1995.*]

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

Bowden Law Firm, by: *David O. Bowden*, for appellee.

ROBERT L. BROWN, Justice. On May 30, 1993, the appellee, Rebecca Bickerstaff, was cited by Arkansas Game and Fish Wildlife Officer James Hartness for fishing without a license, an offense prohibited under Game and Fish Commission Regulation 3.02. She entered a plea of not guilty in the Municipal Court for the City of Sheridan, but following trial, the judge found her guilty and fined her $50 and assessed costs of $72.25. She appealed to Grant County Circuit Court, but before trial, she moved to have the citation against her dismissed because Offi-

*Roaf, J., not participating.

cer Hartness had not been elected by the Game and Fish Commission in direct contravention of Amendment 35 of the Arkansas Constitution. The circuit court agreed that a vote by the Commission as a body was required for the employment of Officer Hartness and that that had not transpired. The court held that the employment of personnel such as Officer Hartness was not delegable by the Commission, and it dismissed the charges on appeal as violative of the Arkansas Constitution.

The State of Arkansas now appeals the dismissal under Arkansas Rule of Criminal Procedure 36.10. We dismiss for lack of subject matter jurisdiction.

Neither party raised the issue of subject matter jurisdiction, but we are obliged to do so on our own. *State* v. *Gray*, 319 Ark. 356, 891 S.W.2d 376 (1995); *State* v. *Edwards*, 310 Ark. 516, 838 S.W.2d 356 (1992). The precise question before us is whether the State has the authority to appeal from a dismissal of the offense involved, which is a violation of Game and Fish Commission Regulation 3.02. We have made it clear in the past that appeals by the State are authorized in only the narrowest of instances. *State* v. *Mazur*, 312 Ark. 121, 847 S.W.2d 715 (1993); *State* v. *Hurst*, 296 Ark. 132, 752 S.W.2d 749 (1988). The reason is simple. The State has considerable resources to appeal a dismissal or acquittal, which places the defendant at a pronounced disadvantage.

A threshold question in an appeal by the State is whether the requirement under Rule 36.10(b) of the Arkansas Rules of Criminal Procedure has been met. Rule 36.10(b) reads:

> (b) Where an appeal, other than an interlocutory appeal, is desired on behalf of the state following either a misdemeanor or felony prosecution, the prosecuting attorney shall file a notice of appeal within thirty (30) days after entry of a final order by the trial judge.

Clearly, the rule refers to an appeal by the State following either a misdemeanor or felony prosecution. Just as clearly, neither is involved in the case before us. What is involved is a violation of Game and Fish Regulation 3.02 for fishing without a license. A violation of that regulation carries with it, in the way of a penalty, a fine of between $50 and $1,000.

Under state law, a "violation" is a separate category of offense from a misdemeanor and a felony and is defined as an offense that carries with it a fine or forfeiture or civil penalty. *See* Ark. Code Ann. § 5-1-108 (Repl. 1993). In the instant case, we are concerned not with a statutory violation but with one established by agency regulation. In any event, a violation is not a misdemeanor or a felony, and those are the only two categories of prosecution which can generate an appeal by the State.[1]

Because there is no basis for the State to prosecute this appeal under Rule 36.10, we must dismiss for lack of jurisdiction. *State* v. *Mazur, supra; State* v. *Edwards, supra.*

Appeal dismissed.

ROAF, J., not participating.

Johnny A. RUCKER *v.* STATE of Arkansas

CR 94-445 899 S.W.2d 447

Supreme Court of Arkansas
Opinion delivered May 30, 1995

[1]We are aware that there is a state statute which provides that fishing without a fishing license is a "misdemeanor." *See* Ark. Code Ann. § 15-42-101 (Repl. 1994). Appellee Bickerstaff was not charged under this statute, however, but under Game and Fish Regulation 3.02. Moreover, section 8 of Amendment 35 of the Arkansas Constitution expressly endows the Game and Fish Commission with the authority to "fix penalties for violations." *See State, ex rel. Wright* v. *Casey*, 225 Ark. 149, 279 S.W.2d 819 (1955).

Janice Williams Wheeler and *Benny M. Tucker*, Public Defenders for appellant.

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

ANDREE LAYTON ROAF, Justice. Appellant Johnny Rucker was tried and convicted of capital murder and was sentenced to life imprisonment without parole. Appellant raises ten points for reversal. We find no merit to any of these points and affirm.

The body of Cindi Smith was found by her father in her mobile home in Arkadelphia about 10:00 a.m. on February 10, 1993. Appellant, a crack cocaine user, was living with her at the time of her death. The victim's body was found on its side on the floor with a .22 caliber pistol resting on her left hand. She had been shot in the back of the head. The victim's car was missing, and the Arkadelphia police had been receiving reports that morning that someone was attempting to cash checks on the victim's bank account at various local businesses. Based on this information, the Arkadelphia police put out a "be on the lookout" (BOLO) message, which described the vehicle and gave its license plate number, and stated that Johnny Rucker was probably the driver and had been passing forged checks in Arkadelphia, and that the owner of the vehicle had been found dead.

The city marshall in Gurdon heard the message and stopped appellant about 1:00 p.m. and held him at gunpoint until another Gurdon officer arrived. The officers handcuffed appellant, read him his rights, told him he was under arrest for passing forged checks and placed him in the police car. A Clark County officer arrived shortly and questioned appellant about the checks. Appellant admitted he had been cashing checks on Cindi Smith's account and that he had been using the money to buy drugs. Arkadelphia police then arrived and searched the car, finding .22 shells, and Cindi Smith's purse and blank checks. Appellant was taken to Arkadelphia where he gave two statements implicating himself in the murder. He claimed in one version that the victim was shot during a struggle over her gun. After the officers questioned this version, he then claimed that he shot her in the back of the head

from about 6 feet away, because he did not want her to stop him from leaving in her car to obtain more drugs. He claimed to have been high on crack cocaine when the shooting occurred.

Appellant first submits that there was insufficient corroborating evidence to support a conviction based on his confession. Appellant moved for a directed verdict at the close of the state's case, stating, "the defense moves for a directed verdict on the grounds of the insufficient evidence and a *lack of corroboration of the defendant's statements sufficient to prove this charge as alleged in the information.*" (Emphasis added.) Appellant made a renewal of his directed verdict motion at the close of all the evidence.

[redacted] The requirement of corroboration is statutory. Ark. Code Ann. § 16-89-111(d) (1987) provides:

> A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that *the offense was committed.* (Emphasis added.)

In order for the state to comply with this statute, it is only necessary to show that the crime has been committed, and not any further connection between the crime and the defendant. *Harte* v. *State*, 301 Ark. 200, 783 S.W.2d 40 (1990).

[redacted] Appellant argues that the testimony of the state's medical examiners established that the gunshot wound was a contact wound, which was inconsistent with appellant's statement that he shot the victim from a distance of six feet, and also left open the possibility that the victim committed suicide. However, both pathologists who testified stated that, in their opinion, the shooting was homicide and not suicide, based on the location of the entry wound and the path the bullet made through the head. This testimony constituted substantial evidence to corroborate the defendant's confession that the death was the result of criminal activity and not suicide.

Rucker next argues that the trial court erred in allowing the state to amend the information on May 13, 1993, to add an alternative charge. Rucker was originally charged by information on February 11, 1993, with capital felony murder, on the basis that the victim was killed in the furtherance of the commission of a

felony, pursuant to Ark. Stat. Ann. § 5-10-101 (Repl. 1993). The information was amended to add as an alternative, the charge of premeditated and deliberated murder, pursuant to § 5-10-101. The trial was held on September 27, 1993. Rucker argues that the rule permitting alternative charges for the same offense, Ark. Stat. Ann. § 16-85-404(a) (1987), is in conflict with § 16-85-407(b), which prohibits an amendment to an indictment which changes the nature or degree of the crime charged.

This argument is without merit as this court has held that such a change involved in the alternative charge does not change the nature of the crime charged, as prohibited by § 16-85-407(b). *Baumgarner* v. *State*, 316 Ark. 373, 872 S.W.2d 380 (1994); *Smith* v. *State*, 310 Ark. 247, 827 S.W.2d 279 (1992).

Rucker argues that the trial court erred in not rearraigning him on the alternative charge. However, he failed to properly object, or to obtain a ruling from the trial court on this issue and we do not address this argument. *Johnson* v. *State*, 303 Ark. 313, 796 S.W.2d 342 (1990).

Appellant next submits that the trial court erred in denying his motion to suppress the items found in the victim's car and his confession on the basis that they were the fruits of an illegal arrest. He argues that the stop and search were in fact pretextual and that based on this court's holding in *Friend* v. *State*, 315 Ark. 143, 865 S.W.2d 275 (1993), the BOLO message issued by the Arkadelphia police did not contain an instruction to make an arrest as required by *Friend*, and the Gurdon officers lacked the requisite trustworthy information necessary to constitute probable or reasonable cause without an instruction to arrest from officers actually possessing the information. However, in *Friend*, Arkansas State Police arrested the defendant based on a message received from Sevier County officers which requested '[a]ttempt to locate, stop and *hold for homicide investigation*, Michael Friend . . . .' (Emphasis added.) No further information regarding the homicide was provided in this message. This court held that the Sevier County officials did not instruct the arresting officers to arrest appellant, but merely to stop and hold him for questioning in a homicide investigation. Although we do not have a verbatim statement of the Arkadelphia officers' radio message, the testimony indicates that the BOLO message

gave a description of the car, the license plate number and the fact that Johnny Rucker was probably the driver, that he was passing forged checks in Arkadelphia, and that the owner of the vehicle he was driving had been found dead in her home. Unlike the message in *Friend*, which merely stated that the suspect should be held for investigation, the BOLO message aired by the Arkadelphia police contained sufficient information to enable the Gurdon officers and the Clark County officers to make the arrest in this instance.

The appellant argues that the court erred in finding that he made a voluntary confession; he claims to have been high on cocaine when he talked to the officers, and that his confession was not freely and voluntarily given under the circumstances. For a review of the voluntariness of confessions, we make an independant determination based on the totality of the circumstances and reverse the trial court only if clearly erroneous. *Everett* v. *State*, 316 Ark. 213, 871 S.W.2d 568 (1994).

Appellant submits that the combination of his cocaine intoxication and low IQ would be sufficient to render the waiver and the resulting confession involuntary. The factors to consider when there is a claim of alcohol or drug intoxication are set out in *McDougald* v. *State*, 295 Ark. 276, 746 S.W.2d 340 (1988). When such a claim is advanced, the level of a defendant's comprehension is a factual matter to be resolved by the trial court. *Anderson* v. *State*, 311 Ark. 332, 842 S.W.2d 855 (1992). In this case, the trial court heard defense witnesses' testimony (other inmates) who claimed that appellant was under the influence of cocaine at various times during and after his interrogation, and also heard testimony from the officers who had interrogated the appellant; the officers' testimony supported the trial court's finding that appellant was not under the influence of drugs, and the trial court obviously resolved the conflict in testimony in favor of the state. The defendant's claim of mental impairment is also without merit; a psychologist's report indicated that Rucker was 25 years old, had graduated from Sparkman High School, and that at the time of the commission of the offense did not suffer from mental illness or lack the capacity to appreciate the criminality of his conduct.

Appellant also asserts the court erred in not allowing

testimony of two men who had been in the Arkadelphia jail when he was interrogated and gave his confession. Both were allowed to testify at the suppression hearing on the issue of Rucker's alleged impairment as it pertained to the voluntariness of his statement. The prospective witnesses first observed appellant several hours after his interrogation commenced. One of these witnesses testified at the suppression hearing that Rucker's behavior could have been due to stress and lack of sleep as opposed to the effects of drugs. The trial court ruled that their testimony would not be relevant. The question of relevance is within the sound discretion of the trial court. *Simpson* v. *Hurt*, 294 Ark. 41, 740 S.W.2d 618 (1987).

However, we have also addressed this issue in a number of cases and have found that the purpose of the *Denno* hearing (Ark. Code Ann. § 16-89-107 (1987)) is to prevent a jury from hearing a confession before the court determines whether it has been voluntarily given and not to restrict evidence after the court has made the determination of voluntariness. *Kagebein* v. *State*, 254 Ark. 904, 496 S.W.2d 435 (1973). The defendant still has the constitutional right to have his case heard on the merits by a jury, including the weight and credibility the jury might give to the voluntariness of the confession. *Walker* v. *State*, 253 Ark. 676, 488 S.W.2d 40 (1972). Here, the testimony of the two fellow prisoners would have been only cumulative, as there was other evidence presented, including the defendant's statements, that he was using drugs before and after the commission of the crime. Thus, the defendant has failed to show prejudice, and even if the exclusion of the testimony was error, it was harmless error in this instance.

Rucker next argues that the trial court erred in failing to order a psychiatric evaluation by the state hospital, that the psychologist's report actually performed was not certified, and that a hearing should have been held on this matter. The latter two points were not raised below. Arguments not raised at trial or which change the grounds of an objection made below will not be addressed on appeal. *Smith* v. *State*, 310 Ark 247, 837 S.W.2d 279 (1992); *Dixon* v. *State*, 310 Ark 460, 839 S.W.2d 173 (1992). As to the first point, the trial court correctly determined that the evaluation by a local, approved psychologist was a proper alternative and was in compliance with Ark. Code Ann.

§ 5-2-305 et seq. (Repl. 1993). Further evaluation is discretionary with the trial court, and this argument therefore lacks merit.

Finally, appellant challenges the admission of testimony regarding the source of the money that was in the victim's bank account, arguing that the probative value of the evidence presented was outweighed by its prejudicial effect pursuant to Ark. R. Evid. 403. The appellant makes no convincing arguments concerning the prejudicial effect of the testimony and we find no abuse of discretion in admitting it.

Throughout his arguments, appellant asserts violation of his constitutional rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments. However, he presents merely conclusory allegations without supporting authority, and we decline to consider these arguments. *See Taylor* v. *State*, 297 Ark. 627, 764 S.W.2d 447 (1989); *Collins* v. *State*, 308 Ark. 536, 826 S.W.2d 231 (1992).

The record in this case has been reviewed pursuant to Ark. Sup. Ct. R. 4-3(h) for other procedural error and no such error has been found.

The jury's verdict and sentence are affirmed.

Mark SWANEY *v.* Vincent B. TILFORD,
as President and Custodian of Records,
Arkansas Development Finance Authority

94-1323 898 S.W.2d 462

Supreme Court of Arkansas
Opinion delivered May 30, 1995

Robert C. Harder, for appellant.

Winston Bryant, Att'y Gen., by: *John D. Harris*, Asst. Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Justice. Appellant, Mark Swaney, as a citizen of Arkansas, brought action in the Washington County Circuit Court against the Arkansas Development Finance Authority (ADFA) to compel production of the auditor's working papers prepared in connection with ADFA audits for the years 1985-1993, pursuant to the Arkansas Freedom of Information Act, Act 93 of 1967 (Act).

The ADFA had provided appellant with copies of the audits and other information specified in his FOI requests, but denied having actual or constructive possession of the requested auditor's working papers. The matter was submitted to the court on

stipulated facts and briefs of the parties. The court found the working papers of private auditors hired by the state are public records, but the Act does not require a state agency to obtain records from a private entity. Appellant appeals from the Order dismissing his complaint. We reverse.

On April 27, 1994 Swaney requested by fax that the ADFA provide him with audits for 1985-1993, auditor's working papers for the audits, and certain other information, by May 3, 1994. The ADFA responded by telephone on April 29, 1994 stating that the audits would be provided but that the auditing firm, Deloitte Touche, would not release its working papers without a subpoena.

On May 4, 1994 the agency also responded in writing, stating that it did not have access to the working papers and that the auditor considered the papers confidential and would release them only if subpoenaed. The parties also later stipulated that ADFA had requested the working papers from the Deloitte Touche firm and its request was refused.

Appellant's sole point on appeal is that the trial court erred in ruling that the ADFA is not obligated to obtain the working papers from Deloitte Touche. He relies on the legislative intent of FOIA § 25-19-102, that "public business be performed in an open and public manner," and it be possible for citizens "to learn and report fully the activities of their public officials."

This Court has held that the Act "was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved." *Laman* v. *McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968).

In *City of Fayetteville* v. *Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990), access was sought to legal memoranda and work product generated by a lawsuit involving the city of Fayetteville. The city had hired a private law firm with public funds, and resisted the FOI request on the grounds that the documents were not "public records" as contemplated by the Act, and that the records were not in the city's possession, but were in the custody of the private law firm. We found the documents were public records and that possession of documents subject to disclosure under the act was not determinative, stating:

> The specially retained attorneys were the *functional equivalent of the regular city attorney*. The City cannot avoid the FOIA requirements by substituting a private attorney for the city attorney. To condone such logic would arguably enable public officials to shield from disclosure sensitive or controversial material by hiring an outside attorney instead of using its regular city attorney. *The FOIA requirements cannot be circumvented by delegation of regular duties to one specifically retained to perform the same task as the regular employee or official.* (emphasis added).

The audits which are the subject of this appeal are mandated by statute. Ark. Code Ann. § 15-5-210, Annual Report, reads:

> (a) On or before January 31 in each year the authority shall make an annual report of its activities for the proceeding calendar year to the Governor of the state and to the general Assembly.
>
> (b) The report shall contain an audit of the preceding calendar year, prepared by a firm of nationally recognized certified public accountants.

By requiring the audits to be performed by a private auditing firm and not the state auditor, the state has elected to employ a private firm to perform a task normally carried out by state employees or officials, as the city did in *Edmark*. The audit working papers of the Legislative Joint Auditing Committee are considered public records subject to the Act. *Legislative Joint Auditing Comm.* v. *Woosley*, 291 Ark 89, 722 S.W.2d 581 (1987).

However, the question presented in this appeal is not answered by the holding in *Edmark*. The parties do not dispute that the private auditor's working papers are public records or that they are subject to public inspection under the Act, the very issues which were in contention in *Edmark*. Here the only issue is who is to be responsible for obtaining production of the records from Deloitte Touche, the public agency (ADFA), or the private individual seeking disclosure of the records.

The FOIA is silent with regard to the lengths an agency must go to provide access to public records not within its control. Ark. Code Ann. § 25-19-105 provides in part

> (a) . . . all *public records* shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the *custodian of the records.*
>
> . . .
>
> (d) Reasonable access to public records and reasonable comforts and facilities for the full exercise of the right to inspect and copy those records shall not be denied to any citizen.
>
> (e) If a public record is in other use or storage and therefore not available at the time a citizen asks to examine it, *the custodian* shall certify this fact in writing to the applicant and set a day and hour within three (3) working days at which time the record will be available for the exercise of the right given by this chapter. (emphasis added).

It is undisputed that the ADFA is not in possession of the records requested by the appellant. However, the statute clearly provides that a citizen have reasonable access to public records. The term "custodian of the records" has not been defined by statute or case law in Arkansas. The trial court found that the private entity in this case was the custodian of the records and should therefore be subject to the Act.

Nevertheless, the legislative intent of the Act supports the proposition that the agency must provide reasonable access to the requesting citizen, where it is undisputed that the records requested are "public records" pursuant to the Act.

Appellee argues that it does not have constructive possession or administrative control over the files of Deloitte Touche, has in fact never seen the requested records, and that it cannot produce records it does not possess or have in its control. These factors are initially relevant to the determination of whether a document will be considered a public record, which was of course the predominate issue in *Edmark, supra.* Once that issue is conceded, the statutory scheme and the legislative intent of the Act mandates that the burden be placed on the appropriate state agency to make arrangements for *reasonable* access to the records in its office or the office of the private custodian. Appellee does not contend that it is otherwise not the appropriate governmental

entity to which the FOI request should have been directed, nor was that issue developed or argued below.

We hold that where the records in question are established as "public records" pursuant to Ark. Code Ann. § 25-19-103 (1) and not otherwise exempted from disclosure, the appropriate governmental agency, in this case the ADFA, shall have the responsibility to provide reasonable access for examination and copying of such public records which are in existence at the time of the request, as provided by Ark. Code Ann. § 25-19-105. This matter is reversed and remanded for further proceedings consistent with this opinion.

Ivan Floyd PIPKIN *v.* STATE of Arkansas

CR 94-515 898 S.W.2d 54

Supreme Court of Arkansas
Opinion delivered May 30, 1995

A. Wayne Davis and *Al Schay*, for appellant.

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

PER CURIAM. In September of 1991, Ivan Floyd Pipkin, appellant, was charged in Stone County Circuit Court with possession of marijuana with intent to deliver. He was tried and convicted in October of 1993. On November 15, 1993, appellant's attorney, A. Wayne Davis, filed a timely notice of appeal, and on May 17, 1994, the transcript was filed in this court.

On June 24, 1994, Davis requested a seven-day clerk's extension for the filing of his brief, and the clerk granted the extension. His brief was then due on July 5, 1994. On October 27, 1994, the clerk of this court notified Davis that his brief was overdue and asked him to file the brief immediately. Davis refused to respond.

On November 21, 1994, this court ordered Davis to appear and show cause why he should not be held in contempt for failure to file Pipkin's brief. *Pipkin* v. *State*, 319 Ark. 762-A, 887 S.W.2d 309 (1994). Davis pleaded not guilty. This court appointed a Master to make findings of fact. The Master conducted a hearing and found no fact that would go to a meritorious defense. This court found Davis in contempt of court and fixed sentence. *Pipkin* v. *State*, 319 Ark. 237, 238, 892 S.W.2d 240, 241 (1995).

On February 13, 1995, this court appointed Al Schay as additional counsel to assist Davis in the preparation of Pipkin's direct appeal. Mr. Schay has now filed a brief for Pipkin, but that brief states that Pipkin no longer wishes to pursue his direct appeal filed by Davis because he has completed his imprisonment and is on parole and because the direct appeal could lead to a retrial, which he does not want. Mr. Schay's brief is accordingly limited to a post-conviction argument that asks us to void the conviction because of ineffective assistance by Davis.

On March 31, 1995, Davis tendered Pipkin's brief on direct appeal. It was not filed by the clerk of the court because it does not comply with Rule 4-2 of the Rules of the Supreme Court. Mr. Davis still has not corrected the deficiencies in the contents of the brief. On April 4, 1995, Davis filed a motion to file a belated brief.

On May 23, 1995, appellant Pipkin filed a motion to dismiss that part of his direct appeal that is included in Davis's brief,

which was tendered but not filed. The court today grants Pipkin's motion to dismiss that part of the appeal. The court will now proceed with only that part of the appeal argued in the brief filed by Mr. Schay. A copy of this opinion is being forwarded to the Supreme Court Committee on Professional Conduct.

GLAZE, J., not participating.

Allen SMITH *v.* STATE of Arkansas

CA CR 94-687 898 S.W.2d 468

Supreme Court of Arkansas
Opinion delivered May 30, 1995

Etoch Law Firm, by: *Louis A. Etoch*, for appellant.

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

PER CURIAM. Appellant was convicted of two counts of aggravated assault and sentenced to six years imprisonment. He appealed. The Court of Appeals dismissed the appeal because no effective notice of appeal was filed. *Smith* v. *State*, 49 Ark. App. 73, 896 S.W.2d 450 (1995). Appellant's attorney subsequently filed a motion styled "Motion For A Belated Appeal" and has stated it was his error that resulted in the failure to give an effective notice of appeal. He asks that, because of his error, we grant a belated appeal.

Under authority of Ark. R. Crim. P. Rule 36.9, we

grant belated appeals because of attorneys' errors, but those are granted before the case has been submitted to an appellate court. *See, e.g., Krein* v. *State*, 318 Ark. 172, 883 S.W.2d 481 (1994). This case, however, has already been taken under submission and decided, and a signed opinion by the Court of Appeals has been handed down. See Ark. Sup. Ct. R. 5-2(a).

This same month we decided this identical issue in an unrelated case. *See Pannell* v. *State*, 320 Ark. 390, 897 S.W.2d 552 (1995). There, we stated:

> After the signed opinion was handed down in this case, the petitioner could have timely filed a petition for rehearing, but a petition for rehearing is limited to calling attention to specific errors of law or fact which the opinion is thought to contain. Ark. Sup. Ct. R. 2-3(g). A rehearing does not encompass a set of new facts, new briefs, and new arguments. Yet, that is precisely what would occur if we granted a motion for a belated appeal after an appellate opinion was handed down. If we were to allow such a practice there would be much less finality to appellate opinions.

Accordingly, the petition for belated appeal is denied. There still may be available to appellant a remedy under Rule 37 of the Arkansas Rules of Criminal Procedure, and neither this per curiam order nor the per curiam order in *Pannell* v. *State, supra*, denies an appellant that remedy.

J.B. HUNT TRANSPORT, INC. *v.*
Arbert "Della" DOSS and Robert DOSS

94-1123 899 S.W.2d 464

Supreme Court of Arkansas
Opinion delivered June 5, 1995
Rehearing denied July 3, 1995.

[redacted]

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Bruce E. Munson* and *Julia L. Busfield*, for appellant.

Boyett, Morgan, Millar & Killough, P.A., by: *Comer Boyett, Jr.*, for appellee Arbert "Della" Doss.

Kent Pray for appellee Robert Doss.

JACK HOLT, JR., Chief Justice. This is a tort case. The appellant, J.B. Hunt Transport, Inc., raises five points for reversal of a judgment in favor of appellees Arbert "Della" Doss and Robert Doss: (1) the trial court erred in excluding the testimony of J.B. Hunt's accident-reconstruction expert; (2) there was no substantial evidence to support the jury's verdict that appellee Robert Doss was acting within the course and scope of employment; (3) the trial court erred in denying J.B. Hunt's motion for a directed verdict on the issue of punitive damages and/or failing to set aside such an award; (4) the trial court erred in denying J.B. Hunt's motion for a new trial based upon the error in the assessment of punitive and compensatory damages; (5) the trial court erred as a matter of law in dismissing J.B. Hunt's third-party complaint against Robert Doss and in denying J.B. Hunt's claim for indemnity. We cannot say that the trial court committed reversible error.

Facts

On October 1, 1990, shortly after 7:00 p.m., appellee Robert Doss was driving a tractor-trailer owned by appellant J.B. Hunt Transport, Inc., when he collided with an automobile driven by his former wife, appellee Arbert "Della" Doss. Mrs. Doss filed suit against J.B. Hunt Transport on May 8, 1992, alleging that Mr. Doss was an employee "acting within the scope of his employment at all times pertinent to this complaint" and requesting both compensatory and punitive damages. Mrs. Doss did not sue Mr. Doss.

J.B. Hunt denied the allegations contained in Mrs. Doss's complaint and subsequently, on January 8, 1993, filed a third-party complaint against Mr. Doss, stating that Mrs. Doss's "damages, if any, are attributable to conduct and actions of Robert Doss which were outside the scope of his employment in that, at the time of the accident, Mr. Doss was engaged in a personal endeavor solely for his own benefit and not for the benefit of his employer." Further, J.B. Hunt contended that Mr. Doss had "acted intentionally to inflict damage and injuries on the Plaintiff and therefore was outside the scope of his employment." J.B. Hunt sought, in the event it should be adjudged liable to Mrs. Doss, to be awarded indemnification and contribution from and judgment against Mr. Doss. Moreover, J.B. Hunt asserted that Mr. Doss, acting alone or in conspiracy with Mrs. Doss, made false statements to his employer, law enforcement officers, and others regarding the accident.

The matter was tried before a jury in Woodruff County Circuit Court on October 19 and 20, 1993. The trial court denied J.B. Hunt's motions for directed verdicts on the issues of scope of employment and punitive damages. Upon interrogatories, the jury awarded Mrs. Doss $170,000 in compensatory damages and $100,000 in punitive damages. In an order filed on March 23, 1994, the trial court denied J.B. Hunt's motion for indemnification and contribution from Mr. Doss and dismissed its third-party complaint against Mr. Doss with prejudice.

J.B. Hunt then filed a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, arguing that the verdict should be set aside as there was no substantial evidence to support a verdict that Robert Doss was acting in the scope of his employment. In addition, J.B. Hunt argued that the award of punitive damages should be set aside as contrary to the law and facts and as a violation of due process. In the alternative, J.B. Hunt sought a new trial because the jury's verdict was clearly against the preponderance of the evidence and there was an error in the assessment of damages. The trial court denied the motion, and this appeal followed.

I. Accident reconstruction expert

In its first point for reversal, J.B. Hunt argues that the trial court erred in excluding testimony of Steve Jackson, the defense's

accident reconstruction expert. After the jury had been seated, a recess was called and a hearing was held regarding Mrs. Doss's motion in limine to prohibit introduction of the testimony of Mr. Jackson. The defense proffered the testimony of Mr. Jackson, who stated that he had examined photographs taken of the vehicles and the accident site that appeared to be inconsistent with statements of Mr. and Mrs. Doss that Mrs. Doss's vehicle was stopped at a stop sign when it was struck.

According to Mr. Jackson, the photographs indicated that

> the impact was clearly on the shoulder in the intersection rather than in proximity to the stop sign, and that indicated by debris and tire marks where the impact occurred. And those tire marks have a particular characteristic that actually show that there was an impact.

On cross-examination, counsel for Mrs. Doss questioned Mr. Jackson about the reliability of the investigating officer's report:

> Q Now, if a State Police Officer investigated the accident this night and recorded his data while it was fresh on his mind, wouldn't you agree that he would be a better judge how the accident occurred and the points of impact rather than looking at photographs over a year later?
>
> A Well, if it were a simple matter of doing that, he would, yes.
>
> Q What specifically could you offer by looking at those photographs that a State Trooper could not offer who was there at the scene of the accident and was familiar with the intersection and investigated that particular wreck on that night as compared with the investigation of another person who was not there?
>
> A Well, first of all, I don't know if he's investigated other accidents at that intersection. I take your word for it that he has if you want it put on the record that he has.
>
> Secondly, I don't know the process that he used to document — I don't know where he started his documentation measurements, and since there was no conflict in the statement of either driver as to where it happened, I

> don't know that he had had a whole lot of reason to have a real detailed documentation of the scene.

In questioning by the court, Mr. Jackson noted that the investigating officer

> didn't indicate that he found any debris, nor did he document any debris on the highway. . . . Also, there was no documentation of the kind of scrub marks, the kind of tire-scrubbing that you'd find in an impact area.
>
> . . .
>
> What he [the State Trooper] says was that his investigation revealed that it happened at the stop sign, and that the tire marks began at the stop sign and went on to the west, *but the photographs don't show that to be the case, and that's our disagreement problem there.*

(Emphasis added.)

At the conclusion of Mr. Jackson's proffered testimony, the trial court declared that

> at this time, I'm going to direct Mr. Jackson not to testify about the point of impact. The reliance on photographs as to where all the debris lay seems to me possibly misplaced, certainly not conclusive, unless the trooper says that — and I assume the trooper uses the same kind of — Mr. Jackson has taught there, and the trooper uses the same kind of ground evidence to determine point of impact. I always hear about the debris and where it falls, and *if Trooper Hudson testifies that it occurred at the stop sign as an eyewitness, I'm going to prohibit Mr. Jackson from testifying it occurred someplace different.* On the other hand, if Mr. Hudson does not know where it occurred or doesn't testify, is silent on that, he can go into that. But at this point, now, at least on the assumption Mr. Hudson is going to say, as he, I think, implied to me, that it occurred at the stop sign, *I'm going to prohibit him, based upon the photographs, deciding it occurred someplace else since the photographs may or may not be inclusive.*

(Emphasis added.) The trial court went on, however, to allow

Mr. Jackson to testify concerning tire marks on Mrs. Doss's car.

Explaining his rejection of Mr. Jackson's testimony on the area of impact, the judge stated that

> I'm allowing the trooper, assuming the trooper does a proper foundation, that is, where he says the debris landed and that sort of thing, I'm going to let him testify as to where the impact occurred based upon the fact that he was there and had the full range of view of the impact area. *My problem with Mr. Jackson doesn't have to do with his inability to analyze where the debris is. It's that whether the photographs are in fact inclusive of the entire area, and that's what my problem is. It doesn't have to do with the fact of what he saw. I'm not questioning what he saw. I'm questioning whether he was able to see the entire area. That's where I'll leave it.*

(Emphasis added.)

It is important to note that the trial court did not exclude Mr. Jackson's entire testimony. Instead, J.B. Hunt elected not to call its accident reconstruction expert after the trial court had excluded that portion of his testimony concerning the point of impact. The trial court based its limited exclusion on the adequacy of the photographs upon which Mr. Jackson relied — "whether the photographs are in fact inclusive of the entire area."

This court observed, in *Banks* v. *Jackson*, 312 Ark. 232, 848 S.W.2d 408 (1993), that while, as a general rule, attempts to reconstruct accidents by means of expert testimony are viewed with disfavor, we have consistently recognized exceptions when it appears that a particular situation is beyond the jurors' ability to understand the facts and draw their own conclusions. Whether a particular case should be governed by the general rule or should be treated as an exception is a matter within the trial judge's discretion. *McElroy* v. *Benefield*, 299 Ark. 112, 771 S.W.2d 274 (1989); *Drope* v. *Owens*, 298 Ark. 69, 765 S.W.2d 8 (1989).

In all evidentiary matters, the trial judge must be afforded broad latitude because he or she alone is in the best position to decide what evidence would aid the jury and what would confuse the issues. *Firestone Tire & Rubber Co.* v. *Little*, 276 Ark. 511, 639 S.W.2d 726 (1982). Unless the trial judge is

clearly wrong, we will not substitute our judgment for his or hers. *Id.*

Here, the reconstructionist's opinion on the point of impact was based in large part on photographs of the scene. The trial court had the benefit of those photographs in determining the admissibility of Mr. Jackson's testimony. On appeal, however, J.B. Hunt has failed to abstract the photographs in question.

In order for us to determine whether the trial court was clearly wrong in its ruling, we must have a clear understanding of the excluded testimony. As Ark. Sup. Ct. R. 4-2(a)(6) provides:

> Whenever a map, plat, *photograph*, or other similar exhibit, which cannot be abstracted in words, must be examined for a clear understanding of the testimony, *the appellant shall reproduce the exhibit by photography or other process and attach it to the copies of the abstract* filed in the Court and served upon the opposing counsel, *unless this requirement is shown to be impracticable and is waived by the Court upon motion.*

(Emphasis added.) It is essential that the photographs of the accident site be available in the abstract for our examination. As we have pointed out repeatedly, it is a practical impossibility for seven justices to examine the single transcript filed with this court, and we will not do so. *Edwards* v. *Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993); *Hunter* v. *Williams*, 308 Ark. 276, 823 S.W.2d 894 (1992); *Mills* v. *Holland*, 307 Ark. 418, 820 S.W.2d 63 (1991); *Zini* v. *Perciful*, 289 Ark. 343, 711 S.W.2d 477 (1986); *Shorter University* v. *Franklin*, 75 Ark. 571, 88 S.W. 974 (1905).

Therefore, we cannot consider the merits of J.B. Hunt's first argument.

II. Course and scope of employment

For its second point for reversal, J.B. Hunt contends that the trial court erred in denying its motions for directed verdict and alternative motions for judgment n.o.v. or new trial on the basis that there was no substantial evidence to support a finding that Robert Doss was acting within the course and scope of his employment at the time of the accident.

[redacted] Substantial evidence is that evidence which is of sufficient force and character that it will, with reasonable certainty and precision, induce the mind to pass beyond suspicion or conjecture. *Bank of Malvern* v. *Dunklin*, 307 Ark. 127, 817 S.W.2d 873 (1991). We are persuaded that the record offers sufficient evidence that Mr. Doss was acting within the course and scope of his employment when the truck he was driving ran into Mrs. Doss's car.

The parties stipulated that the truck involved in the accident was owned by J.B. Hunt and that Robert Doss, the operator of the truck, was an employee of J.B. Hunt. Despite the fact that, at the time of the collision, Mr. Doss was on his way to the Fast Lane Truck Stop in McCrory, Arkansas, to "check with a buddy" and had been drinking in violation of company policy, he was nevertheless wearing a J.B. Hunt uniform and was planning to spend the night at the truck stop before embarking on a twelve-hour, 600-mile drive to make a delivery in Alsip, Illinois. He testified that, under company policy, he was allowed "discretion" to pace his driving as he chose, provided that he made his delivery on schedule. According to his testimony, Mr. Doss was attempting to hook up a citizens' band radio when he looked up and saw his former wife's car in front of him.

[redacted] For purposes of *respondeat superior*, whether an employee is acting within the scope of employment is not necessarily dependent upon the situs of the occurrence but on whether the individual is carrying out the object and purpose of the enterprise, as opposed to acting exclusively in his own interest. *Razorback Cab of Fort Smith, Inc.* v. *Lingo*, 304 Ark. 323, 802 S.W.2d 444 (1991). In the present case, there was substantial evidence that Mr. Doss was engaged in an employer-approved assignment, the details of the execution of which had been entrusted to his discretion. 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 trial court did not abuse its discretion in submitting to the jury the question of whether Mr. Doss was acting in the course and scope of his employment at the time of the accident.

III. Punitive damages or set-aside — directed verdict

In its third point on appeal, J.B. Hunt asserts that the trial court erred in denying its motion for a directed verdict on the issue of punitive damages and/or in failing to set aside such an excessive award. We will address the question of excessiveness under Point IV.

Punitive damages are justified only when the defendant acts wantonly or with such conscious indifference to the consequences of his acts that malice may be inferred; negligence, however gross, will not support such an award. *Missouri Pacific Railroad Co.* v. *Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988). In *Honeycutt* v. *Walton*, 294 Ark. 440, 442, 743 S.W.2d 809, 810 (1988), this court reiterated its long-held position that "malice may be inferred from the operation of a motor vehicle, a potentially lethal machine, by one whose judgment, responses and coordination are impaired by alcohol."

Mr. Doss failed a breathalyzer test and was reported to have smelled of alcohol. A corporation may be held liable for punitive damages for acts done by its agents or servants acting within the scope of their employment. *B & F Engineering, Inc.* v. *Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992); *Miller* v. *Blanton*, 213 Ark. 246, 210 S.W.2d 293 (1948).

J.B. Hunt also argues that the amount of punitive damages awarded ($100,000) was excessive and violative of "procedural safeguards" required by the United States Constitution. We hold that the Arkansas general standard for punitive damages, employed in this case, passes constitutional muster because it ensures meaningful and adequate review for the trial court as required by *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991). *See Robertson Oil Co.* v. *Phillips Petroleum Co.*, 779 Fed. Supp. 994 (W.D. Ark. 1991).

The trial court did not abuse its discretion in submitting to the jury the issue of punitive damages.

IV. Punitive and compensatory damages — new trial

The fourth argument advanced by J.B. Hunt is that the trial court erred in denying its motion for a new trial based upon the error in the assessment of punitive and compensatory damages.

This point overlaps a portion of the third in its focus on the asserted excessiveness of the damages.

[redacted] We are thwarted in our review by J.B. Hunt's failure to abstract any of Mrs. Doss's medical bills, amounting to $20,149.08 (Plaintiff's Exhibit 1) or the oral deposition of Mrs. Doss's treating physician, Dr. Terry Green, who testified to Mrs. Doss's 20 percent permanent partial disability rating. Our review on appeal is limited to the record as abstracted, and we will not reach the merits of an issue when the documents in the transcript that are necessary for an understanding of the matter are not abstracted. *See Burns* v. *Carroll*, 318 Ark. 302, 885 S.W.2d 16 (1994).

V. Dismissal of third-party complaint and denial of indemnity

Finally, J.B. Hunt argues that the trial court erred as a matter of law in dismissing the company's third-party complaint against Robert Doss and in denying the employer's claim for indemnity.

[redacted] J.B. Hunt's liability was premised on the theory of *respondeat superior*. A common law cause of action for indemnity against the employee is available to an employer who has been held vicariously liable for the actions of the employee. *Transport Insurance Co.* v. *Manufacturers Casualty Insurance Co.*, 226 F. Supp. 251 (E.D. Ark. 1964), *aff'd sub nom. Pacific National Insurance Co.* v. *Transport Insurance Co.*, 341 F.2d 514 (8th Cir. 1965). The liability of the servant is based upon his contract, and he is bound to indemnify the master for damages resulting from his failure to perform the duty that he owes to his master. 53 Am. Jur.2d *Master and Servant*, § 108.

The trial court issued the following order:

> A jury finding for HUNT on its complaint against R. DOSS would have established indeminication (*sic*) for HUNT.
>
> The jury found that R. DOSS was acting whithin (*sic*) the scope of his employment with HUNT.
>
> IT IS, THEREFORE CONSIDERED AND ORDERED the (*sic*) HUNT's [M]OTION FOR INDEMNIFICATION AND CONTRIBUTION is DENIED. IT IS FURTHER CONSIDERED AND ORDERED that HUNT'S THIRD PARTY

COMPLAINT against R. DOSS is DISMISSED with prejudice.

Yet, despite the elliptical phrasing, the trial court did not commit reversible error in denying J.B. Hunt's motion for indemnification and dismissing the third-party complaint.

It was necessary for J.B. Hunt to ask for jury instructions on the elements of the counterclaim. Having failed to proffer the relevant jury instructions, the appellant waived the matter and cannot now take issue with the trial court on this point.

Affirmed.

Thomas E. MARONEY and Larry E. Parker
v. CITY of MALVERN and AS&GC, Inc.

94-1143 899 S.W.2d 476

Supreme Court of Arkansas
Opinion delivered June 5, 1995

Baxter, Wallace, Jensen & McCallister, by: *Ray Baxter* and *Karen Virginia Wallace*, for appellants.

Glover, Glover & Roberts, by: *David M. Glover* and *Mark Roberts*, for appellees.

ROBERT H. DUDLEY, Justice. Appellants Maroney and Parker own a forty-acre tract of land that lies east of, and abuts, the Southgate subdivision in Malvern. Appellants' forty-acre tract is outside the city limits, while the Southgate subdivision is inside the City. Appellants contended below that they were entitled to an injunction allowing them to use a road in the Southgate subdivision to get to their forty-acre tract. The chancellor dismissed appellants' complaint. We affirm.

In 1968, James L. Scott developed the Southgate subdivision with the approval of the Malvern Planning Commission. Subsequently, in 1970, Scott developed an addition to Southgate with similar approval. On both occasions the city planning commission authorized Scott to retain ownership of a reserve strip at the end of Southgate Drive. The end of Southgate Drive is at the city limit and abuts appellant's tract. The reserve strip is two feet wide and crosses the entire fifty feet of the street right of way.

Years ago, before appellants purchased the forty-acre tract and before Southgate subdivision was developed, appellant Thomas E. Maroney used an unimproved road to get to appellants' forty-acre tract to cut firewood. That unimproved road was located where Southgate Drive is now located. In July or August 1991, appellants started construction of a road on their forty acres. The road is apparently located in the same place as the old unimproved road. Appellants intended for the improved road to connect with Southgate Drive, so that the completed road would extend from inside the City to their forty-acre tract. They could then sell their forty acres as residential lots located just outside the City. However, shortly after appellants improved the road on their land, the City placed a locked gate on the reserve strip at the end of Southgate Drive. The result was that appellants' improved road stopped at the city limits.

Appellants filed this chancery court action seeking an injunction to prevent the City and James L. Scott, the alleged owner of the reserve strip, from maintaining the gate and from blocking the road. Appellants pleaded that the forty-acre tract was "serviced by a public road known as Southgate Drive," that it was the only access to their property, and that by erecting the gate the City

had violated its own ordinance which provides, "There shall be no reserve strips controlling access to land dedicated or intended to be dedicated to public use." The City, in effect, filed a general denial. Scott filed a motion to dismiss for failure to state a cause of action, A.R.C.P. Rule 12(b)(6), and additionally pleaded that he had sold the reserve strip to AS&GC, Inc. Subsequently, the complaint against Scott was dismissed with prejudice. The dismissal with prejudice was apparently because Scott had sold the reserve strip to AS&GC, Inc. and not for failure to state a cause of action.

AS&GC, Inc. was allowed to intervene and claim ownership of the reserve strip. It denied that Southgate drive was appellants' only means of access to their forty acres. It additionally pleaded that it was the owner of the reserve strip and asked that appellants be restrained from trespassing on the strip.

Subsequently, AS&GC pleaded that it had mistakenly alleged ownership of the reserve strip and that it was in fact owned by Scott. Scott moved to set aside the order dismissing with prejudice the complaint against him. The motion was denied. Thus, Scott was not a party to this lawsuit when the final judgment was entered. The City of Malvern filed a counterclaim in which it asked that if appellants were allowed to cross the reserve strip, they be required to construct their road according to the City's master street plan.

The case proceeded to trial, and the trial court found:

> (1) James L. Scott owns title to the reserve strip, and [appellants] should be enjoined from crossing the reserve strip.
>
> (2) [Appellants] "contend they are landlocked," and county court has exclusive and original subject-matter jurisdiction of the cause of action.

Based upon the above findings, the chancellor entered an order enjoining appellants from crossing the reserve strip and dismissing appellants' complaint because of lack of jurisdiction.

On appeal, appellants first contend that the chancellor erred in ruling that Scott owned the reserve strip. Initially, we note that appellants' complaint did not seek to divest Scott

of ownership of the reserve strip; it only prayed for an injunction against the maintenance of the gate on the strip. Scott subsequently mistakenly pleaded that he had sold the strip to AS&GC, Inc. and soon thereafter sought to correct the mistake. The initial question then is whether such action constituted an abandonment of the reserve strip by Scott. We think not. Title to real estate is not lost by abandonment unless the abandonment is accompanied by circumstances of estoppel and limitation. *Helms* v. *Vaughn*, 250 Ark. 828, 407 S.W.2d 399 (1971); *Carmichael* v. *Arkansas Lumber Co.*, 105 Ark. 663, 152 S.W.2d 286 (1912). There were no circumstances between Scott and appellants that would give rise to estoppel or limitation. In addition, clear, unequivocal, and decisive evidence is required to establish abandonment of real property. *Hendrix* v. *Hendrix*, 256 Ark. 289, 506 S.W.2d 848 (1974). The decisive issue is not whether Scott owned the property because, regardless of whether the reserve strip was owned by Scott, AS&GC, Inc., or someone else, it was not owned by appellants, and they were not entitled to an injunction allowing them to cross someone else's property.

Appellants next contend that the City, by its code, was prohibited from allowing anyone to own the reserve strip. In 1968, Scott obtained approval of the original plat of the subdivision including the reserve strip. He obtained the approval of the addition in 1970. The city ordinance prohibiting reserve strips was not passed until 1973. Thus, Scott owned the reserve strip before such strips were prohibited. Even so, appellants ask us to retroactively apply the ordinance prohibiting reserve strips. We decline to so do. A statute or ordinance which interferes with antecedent rights will not be given retrospective application unless the ordinance expresses such intent in unequivocal and inflexible terms. *United States* v. *Security Industr. Bank*, 459 U.S. 70 (1982); *Gannett River States Publishing Co.* v. *Arkansas Industr. Dev. Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990). Moreover, there is a real question about whether an ordinance could ever be applied retroactively so that it took away one's established property rights, but that is a question we need not answer here.

Appellants next argue that the chancellor erred in dismissing the case on the ground that county court had exclusive subject-matter jurisdiction of this case. The argument is valid, but it does not afford the appellants any relief.

Subject-matter jurisdiction is determined from the pleadings; the complaint, answer, or cross-complaint. *Union Pac. R.R. Co.* v. *State ex rel. Faulkner County*, 316 Ark. 609, 873 S.W.2d 805 (1994). Subject-matter jurisdiction "is tested on the pleadings and not the proof." *See e.g., Pryor* v. *Hot Spring County Chancery Court*, 303 Ark. 630, 633, 799 S.W.2d 524, 526 (1990). Subject-matter jurisdiction is given to a particular court by the Arkansas Constitution. *Hargis* v. *Hargis*, 292 Ark. 487, 731 S.W.2d 198 (1987). The chancery court had subject-matter jurisdiction of this case, and in fact, the chancellor exercised subject-matter jurisdiction when he heard the case and decided some of the issues.

Appellants did not file a complaint in which they asked the county court to exercise its power of eminent domain and to open a road for them at their expense. For a landlocked landowner to petition the county court to open a road, he must file a complaint in county court alleging that he has no reasonable means of gaining access to his land, plead that he has tried but is unable to unlock his land, ask the county to use its power of eminent domain to establish a road, ask the county judge to appoint viewers to determine the least inconvenient route to the other landowners, post bond with the county clerk sufficient to pay all damages to the landowner against whom the county will exercise the right of eminent domain, and deposit with the court clerk "all costs and expenses accruing on account of the petition, notice, view, and survey of the private road." Ark. Code Ann. §§ 27-66-401 to -403 (Repl. 1994). None of this was pleaded. Thus, the chancellor erred in ruling that subject-matter jurisdiction was exclusively in county court.

However, the error does not afford appellants any relief. Equity cases are tried *de novo* on appeal, an appellate court resolves all of the issues of law and fact on the record made in the chancery court, and the fact that the chancellor based his decision upon an erroneous conclusion does not preclude an appellate court's reviewing the entire case *de novo* and entering such judgment as the chancery court should have entered on the undisputed facts in the record. *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). Here, the record clearly shows that appellants' complaint sought an injunction against maintenance of the gate located on the reserve strip. Appellants did not plead, nor

did they prove, that they were entitled to an easement across the reserve strip. Thus, the chancellor correctly declined to issue the injunction against maintenance of the gate and correctly dismissed appellants' complaint, albeit for the wrong reason.

Affirmed.

Bob HARRIS *v.* STATE of Arkansas

CR 94-1273 899 S.W.2d 459

Supreme Court of Arkansas
Opinion delivered June 5, 1995

Stockland & Trantham, P.M., by: *Charles S. Trantham*, and *Batchelor & Batchelor*, by: *Fines F. Batchelor, Jr.*, for appellant.

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

TOM GLAZE, Justice. On April 22, 1994, a jury found Bob Harris, thirty-six years old, guilty of having engaged in sexual intercourse or deviate sexual activity with a girl who was under fourteen years of age. He received a cumulative sentence of more than thirty years imprisonment. Harris appeals, setting out seven points for reversal. None has merit.

We first consider Harris's argument that the trial court abused its discretion in denying his motions for continuance and new trial. He points out that the state's original information filed on December 3, 1993, accused him of committing rape between the 15th of April and the 15th of August, 1993. On January 10, 1994, Harris filed a motion for specific facts, information and materials. In early and mid-March of 1994, Harris filed motions for discovery, sanctions, and a hearing and continuance, and on March 25, 1994, the state responded by furnishing Harris with answers and materials that Harris had requested. The state further informed Harris's counsel of the prosecutor's open file policy, inviting him to inspect the state's entire file. Harris continued to request more time, information and sanctions and added a motion in limine, seeking to prevent Dr. James Green from testifying that the alleged victim had said that Harris had sexual contact with her.

On April 18, 1994, three days prior to trial, the trial court considered Harris's continuing motions, information furnished by the state and argument of counsel, and it denied Harris further relief. At the same hearing on April 18, the trial court, prosecutor and defense counsel discussed that Harris had requested the specific dates on which the sexual contacts were alleged to have occurred, and the prosecutor responded that the acts occurred on the nights and weekends the victim and her siblings had stayed with Harris in 1993. The prosecutor indicated that the period probably began in February 1993. The court asked the state if it would amend its information to which the prosecutor said, "I may have to, I think it goes back further." One day before trial, the prosecutor amended the information, reflecting that the dates of the offense occurred between February 19 through September 15, 1993, rather than between the April 15 through August 15 dates set out in the original information. Harris objected to

the state's amended information and again requested a continuance, but the trial court overruled Harris's objection, stating that the defense previously had been notified that the information would need to be amended to reflect new dates. On appeal, Harris concedes the amended information did not change the nature or degree of the crime with which he was charged. Nevertheless, he argues that, if he had known of the new dates, he could have furnished witnesses to rebut the victim's testimony that they had sex on February 19, 1993.[1]

By statute and case law, it is established that generally the time a crime is alleged to have occurred is not of critical significance unless the date is material to the offense. *Fry* v. *State*, 309 Ark. 316, 829 S.W.2d 415 (1992). That is particularly true with sexual crimes against children and infants. *Id.* In *Fry*, the state charged Fry with having raped ten and nine-year-old victims "on or about June or July, 1989." However, one of the victims testified she was living with her mother and stepfather, Fry, and attending school which was "about the end of May." The victim further said that "along those days, Fry would put his hand inside my underpants, stick his finger inside of me, between my legs and move it up and down." She said that it happened more than once, but not after school was out.

Fry contended he was entitled to a directed verdict since the state alleged the offenses occurred in June or July, but the victim testified the incidents did not occur after school was out at the end of May. In rejecting Fry's argument that the trial court erred in denying his motion, this court related that the victim's testimony that school was out "around the end of May" is not a categorical certainty and school may have extended over into June. The court added that, giving that proof a margin of error produces no prejudice to Fry, whose defense was that the alleged incidents with the victims never occurred and were entirely fabricated.

In the present case, the victim testified on direct that Har-

[1]Harris claims he had no time to procure a doctor to explain Harris had sustained an injury that rendered him unable to have performed the sexual acts on the February date alleged. In addition, he contended that, with more time, he could have checked records to show the victim, her mother and siblings and friends were wrong with respect to the February date.

ris first sexually abused her sometime in February and on cross-examination, she said, "It was approximately February 19." Like the defense in Fry, Harris's defense here is that the offenses never happened. And concerning the February date in issue, the victim merely related that one of the incidents occurred "around the nineteenth."

We also find the case of *Huffman* v. *State*, 288 Ark. 321, 704 S.W.2d 627 (1986), helpful. There, Huffman was charged with deviate sexual activity with a girl under the age of eleven. Huffman argued that the trial court should have granted a continuance when, just before the trial began, the state amended its information to allege that the crime occurred between November 1, 1983 and January 15, 1984. Citing Ark. Stat. Ann. § 43-1015 (Repl. 1977) [now Ark. Code Ann. § 16-85-405(d)(1987)], this court rejected Huffman's argument, stating that, in a case of this kind, the particular time is not an ingredient of the offense, so the amendment was permissible. The court pointed out that the prosecutrix testified that there was intercourse both before and after Christmas (1983).

Here, as noted above, the victim testified on direct that Harris sexually abused her in February 1993, and it occurred on the first occasion when she stayed overnight at Harris's house. She could offer no exact date, but recalled the first incident occurred on the second day of her having first stayed at Harris's. She thought she had spent three nights at the Harris house, and Harris had sex with her on the second and third nights. Although she testified Harris first had sex with her in February 1993, she then related other sexual encounters, ending in September 1993, when she spent weekends at the Harris abode. Other incriminating evidence was introduced including a card and numerous letters from Harris to the victim. The card began, "Know where I'd Like to Be Right Now? Between *you* and this card." The letters were replete with terms of affection and love, in one was included a post script, "P.S. Hope you don't wear your birthday suit to school on your birthday. That's my suit! (he he) I Love You!"

Prior to trial, the state revealed all the evidence it had to Harris's counsel concerning what the young prosecutrix had said as to when she claimed Harris first had sex with her. That was to have occurred in February 1993. While Harris, for defense

purposes, would like to limit the girl's claim to having first had sex with him on the February 19 date set out in the amended information, he knew quite well that the girl's allegations covered her first weekend stay over at Harris's house. In this case, the particular time is not an ingredient of the offense with which Harris was charged, nor can we conclude the circumstances here show Harris was prejudiced by the amended information.

In another argument, Harris refers to the Fifth, Sixth and Fourteenth Amendments and asserts the trial court should have quashed the entire jury panel because the panel did not reflect the composition of the community at large.[2] He says that of the 385 names drawn for the jury panel, only 112, or 29%, were ever assigned to jury duty and the remainder were never served, excused or they never appeared. He said that, for unexplained reasons, fifty-eight persons were listed on the jury panel for his case, but only forty-four appeared. Harris moved to quash the jury panel, but the trial court denied the motion, stating that the forty-four jurors present were plenty.

Harris cites *Lockhart* v. *McCree*, 476 U.S. 162 (1986), for the proposition that, when large sectors of the public are excluded from the jury panel, that alone contravenes the fair-cross-section requirement and dictates reversal. First, we need mention that *Lockhart* dealt with death-qualified juries, and the Supreme Court there merely held that such juries do not violate the fair-cross-section requirement of the Sixth Amendment. *Lockhart* has little application to the situation now before us. The *Lockhart* court did, however, announce that the essence of a "fair-cross-section" claim is the systematic exclusion of a "distinctive group" in the community, but such a group is not defined in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors. *Id.* at 174. Here, at the time the jury was selected, Harris's objection to the jury panel focused only on the limited number of jurors assigned to the panels, not to the exclusion of any distinctive group. He waited until after trial in his motion for new trial to raise his contention that the limited number of assigned jurors somehow deprived him of peers of his own age group "who

[2]Harris never questioned whether the statutory procedures for empaneling petit jurors were followed.

would be expected to better understand his position in this case." Harris's objection was untimely. *See Smith* v. *State*, 318 Ark. 142, 883 S.W.2d 837 (1994). However, timeliness aside, he offers no criteria used to determine the boundary limits when defining the "age group" excluded or that such an age group was systematically excluded. Nor does Harris cite legal authority or present convincing argument that such an age group falls within a "distinctive group" in the community as is required under the fair-cross-section component of the Sixth Amendment.

In reviewing the record, we recognize an apparent problem existed in the jury selection process since only a limited number of jurors were assigned and appeared for jury duty. The trial courts are obliged to correct any such problems when the selection process is properly challenged and timely brought to their attention. Nonetheless, in the situation at hand, we hold no deliberate or systematic exclusion of any distinctive class was timely shown, nor did Harris show he was prejudiced by the selection process. *See Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984); *see also Ruiz* v. *State*, 299 Ark. 144, 772 S.W.2d 297 (1989), (where 403 venirepersons were subject to call as potential jurors, but 198 were excused by the trial judge for various reasons and some could not be contacted or were thought to be dead or unavailable, leaving only 90 to show up for the jury selection, the trial judge was held not to have abused his discretion in granting excuses or in depriving the defendants of a jury representing a fair-cross-section of the community).

Harris also claims error because, on voir dire, one of the jurors failed to reveal he was a candidate for sheriff. He urges that the fact the juror was seeking the office of sheriff created or evidenced a bias towards Harris. We cannot agree.

A potential juror may be challeged for cause if he or she is actually biased. This court has held that a venireperson is actually biased if he or she cannot try the case impartially and without prejudice to the substantial rights of the party challenging. *Henry* v. *State*, 309 Ark. 1, 828 S.W.2d 346 (1992). This determination lies within the sound discretion of the trial court. *Id.*

Here, on voir dire, the questioned juror was never asked if he was a candidate, but he did disclose he was the chap-

lain for the sheriff's department. When asked if there was anything known to him that would present any problem in rendering a fair and impartial jury verdict, the juror said no. On this point, Harris presents no legal citation or authority that a juror may be presumed biased merely because he chose to run for sheriff or any other office. Authority does exist which holds that bias will not be presumed merely because a juror works in law enforcement. *Tinsley* v. *Borg*, 895 F.2d 520 (9th Cir. 1990). In sum, Harris fails to show that the trial court abused its discretion in refusing to exclude the juror challenged by Harris.

[redacted] Harris's next argument challenges the trial court's admission of a medical report into evidence. That report contained the victim's statements to Dr. James Greene that she had had sexual intercourse with Harris. Below, Harris contended that the report contained inadmissible hearsay that deprived him of his rights under the Fifth, Sixth and Fourteenth Amendments. On appeal, however, he asserts the state failed to lay a proper foundation for admission of the medical report as a Business Record exception under Rule 803(6) of the Uniform Rules of Evidence. It is well settled that arguments not raised at trial will not be addressed for the first time on appeal and that parties cannot change the grounds for an objection on appeal, but are bound on appeal by the scope and nature of their objections as presented at trial. *Stricklin* v. *State*, 318 Ark. 36, 883 S.W.2d 465 (1994).

[redacted] In his fifth argument, Harris complains that he was not allowed to testify that the victim's father, Frank Brock, physically abused her and her siblings and that Harris's actions were consistent with helping the family escape from that abuse. The record, however, reflects considerable testimony was elicited concerning the father and how he physically abused his children. Harris testified how Brock had jerked and thrown his daughter around, one time causing her to sustain a cut arm. Brock's son also related that his father had whipped him with a belt and left stripes on his back. A state police officer also testified that Brock had beaten and roughed up his children. This and other evidence was introduced at trial, and we fail to see how, in any significant way, Harris failed to get what he wanted on this issue before the jury. Harris suffered no prejudice.

Harris's final argument involves his claims that the statutory bifurcation process is unconstitutional because (1) no appellate review of his sentence is provided, (2) the process contains a "sunset provision," (3) the process denies him the right to confront and cross examine witnesses, (4) the process does not allow for voir dire regarding possible sentences and (5) the bifurcation law violates the *ex post facto* clause.[3] Below, Harris made a general objection to a bifurcated trial by stating the following:

> And, if the Court please, it is further respectfully submitted that such statute is unconstitutional and in violation of the Arkansas and Federal Constitutions, particularly, Amendments Five, Six, and Fourteen to the United States Constitution, and similar provisions of the Arkansas Constitution, in that they do not permit the defendant's jury trial as contemplated by the constitutional provisions.

As is readily discerned from his objection, Harris failed to preserve at trial the specific constitutional questions he now seeks to advance in this appeal. This court does not consider arguments which are not supported by compelling argument or citations of law. *Keifer* v. *State*, 297 Ark. 464, 762 S.W.2d 800 (1989). We do point out, however, that this court recently fully addressed and rejected the *ex post facto* argument in *Williams* v. *State*, 318 Ark. 846, 887 S.W.2d 530 (1994).

For the reasons above, we affirm.

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[3]Harris sets out a seventh point, but it concerns the trial court's denial of his motion for new trial and merely covers issues already addressed.

Casey MEADOWS *v.* STATE of Arkansas

CR 94-1393 899 S.W.2d 72

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Opinion delivered June 5, 1995

Robert E. Irwin, for appellant.

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

TOM GLAZE, Justice. Appellant Casey Meadows entered a plea of *nolo contendere* to the charge of Battery First Degree on February 22, 1993. After a sentence hearing on March 15, 1993, the judge orally pronounced a sentence of twenty years imprisonment, but suspended the execution of the sentence conditioned upon Meadows (1) living a law-abiding life, (2) paying $200 per month towards the victim's medical bills, (3) paying a $15 per

month supervision fee and (4) paying court costs in the sum of $78.25. The conviction judgment reflecting Meadows' sentence was not filed until August 13, 1993, or five months later, and the judgment, when entered, contained a blank where the restitution amount was to appear. The judgment also read, "Restitution and court costs shall be paid as follows:", but left blank lines obviously meant to contain directives of how the restitution was to be paid. Meadows acknowledged receipt of this March 15, 1993 (filed August 13, 1993) judgment by signing the judgment following the judge's signature.

Sometime after August 13, 1993, a question arose concerning Meadows' payment of restitution, and on December 13, 1993, a hearing was held on that issue. No testimony was taken but the victim's medical bills, totaling $196,014.47, were introduced without objection. During this hearing, the trial judge remarked that, to correct matters, an amended judgment was probably necessary so as to reflect a suspension of imposition of sentence conditioned upon Meadows' performing the original conditions the judge had ordered on March 15, 1993. The judge further found that, when he previously pronounced Meadows was to pay $200 per month restitution payments, the total amount of the victim's medical bills was unknown, and that was probably the reason the restitution amount and its manner of payment was omitted in the earlier March 15th judgment. Following the December 13, 1993 hearing, the trial court signed a "Restitution Order," supplying the information missing in the earlier March 15th order by setting out the victim's medical bills in the total amount of $196,014.47. This order also set out the manner of payment by providing what amounts to a partial restitution at the rate of $200 per month payable over Meadows' twenty-year probation period. The judge's new "Restitution Order" did not include the correction, as the judge suggested at the December 13 hearing, that his order should suspend the imposition of Meadows' sentence.

In this appeal, Meadows first argues that, assuming the trial court's original judgment was valid, the court had no power to amend Meadow's sentence in any fashion because 90 days had expired after entry of judgment. Meadows cites no legal authority in support of his contention, and he offers no real argument or rationale to aid us in understanding his assigned error. Therefore, we do not address this point further.

In another but related argument, however, Meadows urges that the sentence set out in the original judgment is illegal because the trial court had no authority to suspend the execution of his sentence.[1] The state concedes this point, and we agree.

[redacted] This court has held that sentencing in Arkansas is entirely a matter of statute, *State* v. *Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993), and the sentencing procedures pertinent here are found in Title 5. Criminal Offenses, Ark. Code Ann. §§ 5-14-101–618 (Repl. 1993). This court has consistently held that sentencing shall not be other than in accordance with the statute in effect at the time of the commission of the crime. *State* v. *Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993).

[redacted] Here, Meadows committed his offense on May 17, 1992, and at that time, Title 5, Chapter 4 of the Code did not authorize trial courts to suspend execution of sentences. Thus, because Meadows' sentence was unauthorized and is illegal, we must reverse and remand this case for resentencing. It is also noteworthy to mention that, effective March 16, 1993, (after Meadows committed his offense), the General Assembly, by specific terms, prohibited trial courts from suspending execution of sentences by enacting Sections 5 of Acts 532 and 550 of 1993 [compiled now as Ark. Code Ann. § 5-4-104(e)(1)(B)(ii) (1993)]. Such enactment is consistent with holding the General Assembly never provided or intended suspended execution of sentences should be sanctioned in these circumstances. In conclusion, we mention, too, the considerable delay by Meadows to question the legality of his sentence since he raises no issue concerning it until the December 13, 1993 hearing. This court has adhered to the general rule that, if the original sentence is illegal, even though partially executed, the sentencing court may correct it. *See Hodge* v. *State*, 320 Ark. 31, 894 S.W.2d 927 (1995); *Lambert* v. *State*, 286 Ark. 408, 692 S.W.2d 238 (1985).[2] In view of

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[1]Although Meadows also argues the trial court's restitution order was invalid because the court failed to conduct a hearing following the requirements in Ark. Code Ann. § 5-4-205 (Repl. 1993), we need not reach this issue since the trial court, on remand, will have every opportunity to comply with this restitution provision, if required to do so.

[2]Compare, however, Rule 37 post-conviction relief procedures; there a petitioner in custody, who claims a sentence is illegal or illegally imposed, has certain time lim-

the rule and the circumstances in this case, we are obliged to reach Meadows' challenge of his sentence.

For the foregoing reasons, we reverse and remand for resentencing.

James Randall DURHAM *v.* STATE of Arkansas

CR 94-1051 899 S.W.2d 470

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itations within which he or she must file for relief. *See* A.R.Cr.P. Rules 37.2(b) and 37.2(c).

Christopher O'Hara Carter, Baxter County Public Defender, for appellant.

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

ANDREE LAYTON ROAF, Justice. This is an appeal from a conviction for kidnapping, attempted murder and aggravated robbery. Three points are raised on appeal; none have merit, and we affirm.

On October 29, 1993, the Mountain Home police department received a call concerning an abduction of Sandi Schultz, the proprietor of a store called, "New to You." The victim told police that shortly after she opened her store, a man entered, approached her from behind, and sprayed her face with mace. The man said to her, "Shutup, Sandi, I've got a gun. I can kill you." The victim struggled with her attacker but was unable to get away as he remained behind her with his arm around her neck and was significantly larger and stronger. She finally went limp, realizing the struggle was futile. She then tried to talk to him in an attempt to persuade him not to harm her.

He did not respond verbally, but instead began to choke her as she was lying on the floor. She said that she must have lost consciousness as the next thing she remembered she was waking up in a different room in the store. Her hands were bound behind her back with duct tape. She could hear her attacker in the next room, apparently trying to open the register because it was making a beeping sound, which it would do when it was not being opened properly.

Her assailant then returned and got the key to the front door from her pocket. She heard him lock the front door, and saw him go to the fuse boxes and turn off all the lights. He next found a cardboard box and placed her in it with her legs curled up against her chest. He also gagged her.

The victim reported that he taped the box shut, picked it up

and carried it outside the store where she was able to kick through the box and break out. She spit out her gag and ran to a nearby store and screamed, "Lock the door, lock the door. He's got a gun and he tried to kill me." The assailant ran away after her escape.

The police were contacted and the victim told them she recognized her assailant as someone who had come into her store within the last two weeks. Leads were developed and a photo lineup was put together with pictures of James Durham, the appellant, and five other men. The victim looked at the photo spread and identified appellant as her attacker.

Appellant was arrested and gave the police a statement. He told police he had been to the victim's store in the past week with his wife, inquiring about a child's safety seat. He admitted going into the victim's store on the 29th, spraying the victim's face with mace, struggling with her and binding her with duct tape. He said it was his intention to steal baby clothes and strollers for his pregnant wife. Appellant stated that when he put the victim into the box, he intended to take her out along the road and leave her there. He also stated that when he put her in the box, she was mumbling and "carrying on."

Appellant was charged with kidnapping, aggravated robbery and attempted first degree murder. A jury trial was held and appellant testified in his own behalf. He indicated to the jury that he did not remember providing the taped confession and that he was not guilty of the charges. On cross-examination, he stated that he was not saying that he did not commit the crimes, but that he did not remember committing them and had only a vague memory of the interview with the police.

Appellant was found guilty on all three charges and was sentenced to fifty years each for the kidnapping and aggravated robbery and ten years for the attempted murder. The trial court ordered the kidnapping and robbery charges to run consecutively and the attempted murder to run concurrently with the other two. Appellant appeals from that judgment.

SUFFICIENCY OF THE EVIDENCE

Appellant first argues that the trial court erred in denying his motion for a directed verdict on all three charges. As to the

kidnapping, he argues that, under the facts of the case, the state had only a charge of an attempt to dispose of a dead body and not kidnapping because the victim testified that at one point during the episode she "played dead;" on the aggravated robbery charge appellant argues there was no proof anything was taken; and on the attempted murder charge he argues there was no evidence to show there was attempted murder.

At trial, appellant made a directed verdict motion at the close of the state's case specifying the same grounds he now argues on appeal. He then made a second motion for directed verdict at the conclusion of his case, incorporating the arguments made in connection with his initial motion. After rebuttal, at the close of all the evidence, appellant simply stated "I would renew all previous motions I have made."

A motion for a directed verdict is a challenge to the sufficiency of the evidence. To preserve that objection, the motion must be made at the close of the state's evidence and at the close of the case. A.R.Cr.P. 36.21(b). The motion must also be sufficiently specific to apprise the trial court of the ground asserted for the motion. *Jones* v. *State*, 318 Ark. 703, 889 S.W.2d 706 (1994); *Daffron* v. *State*, 318 Ark. 182, 885 S.W.2d 3 (1994); *Walker* v. *State*, 318 Ark. 107, 883 S.W.2d 831 (1994).

The state argues we should not reach the merits of the directed verdict motion because appellant's renewal of the motion at the close of all the evidence was general in nature only. The state acknowledges that appellant made a proper motion at the close of the state's case but argues under our cases and rules, specificity is required at the close of all the evidence as well as at the close of the State's case. We do not agree that the defendant should be required to restate his grounds for directed verdict in cases such as the one before us, where the defendant has made a specific motion at the close of the State's case, and incorporates the same arguments by the later renewal.

In *Walker* v. *State, supra*, we announced a "bright line" rule requiring specificity in directed verdict motions, and that general motions would no longer suffice. *See also, Monk* v. *State,* 320 Ark. 189, 895 S.W.2d 904 (1995)*; Davis* v. *State*, 319 Ark. 739, 894 S.W.2d 597 (1995); *Jones* v. *State, supra,*; *Davis* v, *State*, 319 Ark. 460, 892 S.W.2d 472 (1995); *Daffron* v. *State, supra; Goins*

v. *State*, 318 Ark. 688, 886 S.W.2d 633 (1995); *Houston* v. *State*, 319 Ark. 498, 892S.W.2d 274 (1995).

It is also true that we have held that a defendant waives the first motion made when he presents a case. *Rudd* v. *State*, 308 Ark 401, 825 S.W.2d 565 (1992). It is further true that we have taken pains in this area to assure that the trial court is apprised of the same arguments that are raised to us on appeal. *Stricklin* v. *State*, 318 Ark. 36, 883 S.W.2d 465 (1994). But neither series of cases militates against the *renewal* of the same earlier, specific directed verdict motion at the end of all the proof. Durham effectively raised the same grounds by his renewal at the end of all the evidence, as he had earlier presented to the trial court at the close of the State's case. He now argues the same grounds on appeal. His initial motion was specific as required by *Walker, supra*, was renewed at the close of all the evidence and we will thus reach the merits of his arguments.

MERITS

Appellant first argues that the offense of kidnapping is inconsistent with the facts of the case, including the victim's testimony that she "played dead," and the additional charge of criminal attempt to commit first degree murder; in other words, he could not have intended to both kidnap and kill her. He suggests that the State has only established an attempt to dispose of a dead body under the facts, and that one cannot kidnap a dead body. In support of this novel argument appellant states that he did not provide a motive to the victim during the incident or to the police officers during his subsequent interrogation. He further states the facts at trial show that the victim was "grabbed, bound, gagged, placed in a box, choked until she passed out and then played dead."

As to the charge of aggravated robbery, appellant argues that he took nothing from the store and made no statement or demand of the victim to indicate he contemplated a theft. He states that he did not respond when the victim offered to show him where the money was, but concedes that, at trial, she testified she heard him trying to open the cash register.

For the final charge of criminal attempt to commit first degree murder, appellant argues that the facts as alleged by the State and the evidence presented would only give rise to a charge

of battery. In support of this argument he suggests that, other than the can of mace, he had no weapon and none was found at the scene, the victim was not severely injured and he denied any intent to kill the victim in his confession.

The following exchanges from appellant's confession, which was admitted into evidence, provide substantial evidence in support of the kidnapping and robbery charges:

Officer: . . . What was on your mind to do?

Durham: Go down there and spray mace in her face and take all the baby clothes that I could and strollers. Anything for the new baby, that Jennifer's carrying of mine.

. . .

Durham: That was my original intent was to get some clothes cause we didn't have no baby clothes. That's the truth. I wasn't there for money cause I had money in my wallet. I wasn't there to rape her cause I had a wife at home.

Officer: Why would you have bound her and put her in a box and tried to take her away from there? What were you gonna do? What was in your mind, Randall?

Durham: I was gonna take her off and drop her off somewhere. Just leave her there.

Officer: Well, hoping that she was lifeless, fairly appeared to be lifeless at that point, right?

Durham: She was talking and mumbling. I don't know what she was saying.

Officer: Were you afraid that you had killed her?

Durham: Pardon?

Officer: Were you afraid that you had killed her?

Durham: No.

Officer: Were you afraid that she was hurt bad enough that she was gonna die?

Durham: No.

. . .

His confession flatly contradicts the allegation that he believed the victim to be dead and it was therefore impossible for him to kidnap her. He stated that she was talking and mumbling when placed in the box and he denied being afraid that he had killed her.

[redacted] He clearly confessed to the intent to commit theft which, along with the victim's testimony about sounds she heard coming from the cash register provided substantial evidence to support the aggravated robbery verdict. The aggravated robbery offense, Ark. Code Ann. § 5-12-103 includes the definition of robbery, A.C.A. § 5-12-102:

> (a) A person commits robbery if with the *purpose of* committing *a felony or misdemeanor theft* or resisting apprehension immediately thereafter, *he employs* or threatens to immediately employ *physical force upon another*. [Emphasis added.]

An actual theft or taking of property is not an element of the offense.

Finally, appellant's argument that the trial court erred in denying a directed verdict on the attempted first degree murder charge is also without merit. His argument is that no weapon was seen and that there was no attack or injuries to the victim that would support a charge of attempted murder. However, there is no requirement that attempted murder be pursued with a deadly weapon. What is required is "conduct that constitutes a substantial step in a cause of conduct intended to culminate in the commission of an offense." Ark. Code. Ann. § 5-3-201.

[redacted] Here, the victim testified that appellant choked her until she passed out; this testimony surely is substantial evidence to support the finding of attempted murder. The intent to commit the offense may be inferred from the defendant's conduct and the surrounding circumstances. *Easter* v. *State*, 306 Ark. 615, 816 S.W.2d 602 (1991).

The appellant's arguments on the issue of the trial court's failure to direct a verdict on all three charges are meritless.

CONSECUTIVE RUNNING OF SENTENCES

Appellant was sentenced to two fifty-year terms which the court ordered to run consecutively. Appellant argues that contrary to the law, the trial court relied on the jury's recommendation and not on its own discretion to make this decision. Although the state now argues this matter was not preserved for appeal because appellant did not object to the consecutive sentences at the time they were pronounced, the state allowed appellant's post-trial motion on the matter to be heard without objection.

Arkansas Code Annotated § 5-4-403 (Repl. 1993) provides that the choice between concurrent and consecutive sentences rests with the discretion of the trial judge. *Edwards* v. *State*, 300 Ark. 4, 775 S.W.2d 900 (1989). We have remanded for resentencing when it was apparent that the trial court did not exercise its discretion. *Brown* v. *State*, 316 Ark. 724, 875 S.W.2d 828 (1994); *Wing* v. *State*, 286 Ark. 494, 696 S.W.2d 311 (1985).

In *Wing, supra*, we remanded based on the trial court's comments on sentencing. Those comments indicated the trial court was relying completely on the jury's determination. The trial court said:

> If it had been left to me in the first instance, I feel I would have had a lot more leeway to act. I think it is somewhat presumptuous of me to go against a jury verdict. I have never done that except in a rare case where it's clearly out of line. I'm going to set and fix punishment, 20 years on the Burglary, 10 years on the Theft of Property, and direct that they run consecutive. I think if the jury had wished otherwise, they would have noted otherwise.

We remanded the case for resentencing because the trial court "tried to implement what he perceived the jury wanted rather than exercising his own discretion." In contrast, the trial court's comments in this case indicate the opposite:

> That was the court's concern in this case, this is — the court regards Mr. Durham as an extremely dangerous individual. Not only does he have a substantial criminal history, but the court was aware of some similar circumstances in a Missouri case in which he was tried and acquitted; but there were several parallels to this case, including

> the strangulation of the woman that there may have been a murderous intent both in that case and in the case that was tried before this court. *So this court regards Mr. Durham as an extremely dangerous individual, so that was the reason the court ran those sentences consecutively.* I think that it was the court's impression that was the way the jury viewed it as well, was that they wanted him to receive consecutive sentences. Because even with consecutive sentences, he will be eligible for parole in 25 years or something. (Emphasis added.)

Giving the above comments their most reasonable interpretation, the trial court based its decision entirely on its own discretion. The short reference to the jury's desire was more in the nature of a comment and clearly not the motivation for the trial court's decision.

VOLUNTARINESS OF CONFESSION

Appellant last argues his confession was not voluntary because it was the result of a promise of reward. He argues the police offered him a deal of 20–40 years if he cooperated and he did so by giving his statement. However, he contends that in return he was only made a minimum offer of 60 years, which he refused to accept.

All custodial confessions are presumed to be involuntary and the burden is upon the state to show the statement was voluntarily made. *Jackson* v. *State*, 284 Ark. 478, 683 S.W.2d 606 (1985). When reviewing the question of voluntariness of a confession, this court makes an independent review of the totality of the circumstances and reverses only if the trial court's finding is clearly against the preponderance of the evidence. *Hurst* v. *State*, 296 Ark. 448, 757 S.W.2d 558 (1988).

When a statement has been induced by a false promise of reward, the confession is not voluntary. *Hamm* v. *State*, 296 Ark. 385, 757 S.W.2d 932 (1988). We explained there that some statements are clearly a promise of reward, and when so, the confession is found involuntary. In other cases, the promise is more ambiguous. In those instances, we also look to the vulnerability of the defendant to aid in the determination.

In this case, appellant has misstated what the police said to

him. There was no offer to appellant for a 20–40 year bargain as he suggests. Instead, while interviewing appellant, the officers indicated that it could be important to him for them to get his side of the story, and one officer stated as an example: "So, instead of going to the joint for 40 years, a guy goes for 20." Further, after making this remark, the officers made it abundantly clear by repeating several times that it was the prosecutor, not the police, who could make the deals and that, at most, they could only make recommendations to the prosecutor.

Because of the limited example the officers gave appellant, and their clear and express statements that they had no power to strike a bargain with him, we do not find the officer's statement ambiguous in the first instance so there is no need to examine the appellant's vulnerability.

Affirmed.

IN the MATTER of the ESTATE OF Venita J. GOSTON, Deceased, et al. *v.* FORD MOTOR COMPANY, et al.

94-1229 898 S.W.2d 471

Supreme Court of Arkansas
Opinion delivered June 5, 1995
[Rehearing denied July 10, 1995.]

C. Marshall Friedman, P.L., by: *C. Marshall Friedman* and *Kenneth E. Rudd* and *Law Offices of William T. Finnegan*, by: *William T. Finnegan*, for appellant.

Matthews, Sanders, Liles & Sayes, by: *Gail O. Matthews*, for appellees.

ANDREE LAYTON ROAF, Justice. This tort case presents the question of whether the Circuit Judge was correct in dismissing a claim on the basis of res judicata. We affirm the result reached by the trial court, but for the reason that the appellant's claim was precluded by Ark. R. Civ. P. 13(a), which requires that a compulsory counterclaim be pled.

This case arises from an accident between two vehicles that occurred on February 12, 1988. Leo Goston, appellant, was heading north on John Barrow Road in Little Rock and was attempting to make a left turn onto a side street. Freddie Craig, appellee, was heading south on Barrow road and collided with Goston's car as it was in the process of making the turn.

The Goston car burst into flames and Leo Goston's wife Venita, a passenger, was severely burned and subsequently died. Leo Goston also claimed injuries as did Freddie Craig. There were two lawsuits between Goston and Craig based on this accident and this appeal is only from the latter of the two, in which Goston sued Craig.

On December 19, 1988, Freddie Craig filed a personal injury action against Leo Goston. Craig alleged that the accident occurred as the result of negligence on the part of Goston. Goston did not file an answer within the required time, but filed an untimely motion to dismiss. On the basis of that untimely response Craig moved for a default judgment. A default judgment was granted in favor of Craig on February 15, 1989.

Goston made unsuccessful attempts to get the judgment set aside and appealed the judgment. This case was affirmed in *Goston* v. *Craig*, 34 Ark.App. 23, 805 S.W.2d 92 (1991), on March 6, 1991.

In February 1991, Goston filed suit against Craig, Ford Motor Company, and Walt Bennett Ford based on the same accident. Goston asserted his individual cause of action, a wrongful death for Venita Goston, and derivative claims of the statutory beneficiaries of Venita Goston. Both Ford and Walt Bennett filed cross claims against Craig; Walt Bennett filed a cross claim against Ford.

Craig answered and moved for summary judgment on the basis of res judicata by reason of the default judgment Craig had obtained against Goston in the first suit. The trial court granted Craig's motion on that basis in an amended order entered December 19, 1991. Goston filed a notice of appeal from that order.

Goston's initial appeal of the order of December 19, 1991 was dismissed by this court on the basis of Ark. R. Civ. P. 54(b).

In March, 1993, Goston filed an amended complaint, including along with the originally named defendants, three additional defendants. He later obtained dismissal by non-suit of all claims and cross-claims except his individual claim against Craig, non-suiting the last defendant on August 12, 1994. He again filed his notice of appeal of the December 19, 1991 order granting summary judgment to Craig.

The appeal before us now is from the December 19, 1991 order which granted summary judgment to Craig on the basis of res judicata. While we do not agree with the basis on which the trial court granted the motion for summary judgment, this court will affirm the trial court where it has reached the right conclusion for the wrong reasons. *Summers Chevrolet, Inc.* v. *Yell County*, 310 Ark 1, 832 S.W.2d 486 (1992). We therefore affirm on the basis that Rule 13(a) precludes the appellant from pursuing his claim against Craig.

Goston raises three points on appeal: (1) that the trial court erred in granting the motion for summary judgment based on the doctrine of res judicata, (2) that the compulsory counterclaim provisions of Ark. R. Civ. P. 13(a) do not bar his claim against Craig for his personal injuries and (3) that summary judgment was entered in error because Craig waived or should be estopped from asserting that Goston was required to have litigated the issues of Craig's negligence in the previous action filed by Craig.

Goston first argues that the doctrine of res judicata or "claim preclusion" does not operate to permit the default judgment obtained by Craig to bar Goston from asserting his separate cause of action against Craig, even though both claims arose from the same accident. Craig responds to the argument by asserting that it is collateral estoppel or "issue preclusion," that actually bars Goston's claim.

This court has addressed the distinction between claim and issue preclusion on a number of occasions. The difference between the two concepts is stated in *John Cheeseman Trucking Inc.* v. *Pinson*, 313 Ark. 632, 855 S.W.2d 941 (1993):

> The concept of *res judicata* has two facets. One being issue preclusion and the other being claim preclusion. Issues in connection with this appeal are governed by the issue

> preclusion facet of the concept of *res judicata*. Claim preclusion forecloses further litigation on a cause of action. *Bailey* v. *Harris Brake Fire Protection Dist.*, 287 Ark. 268, 697 S.W.2d 916 (1985). Issue preclusion precludes further litigation in connection with a certain issue. Issue preclusion is limited to those matters previously at issue, which were directly and necessarily adjudicated. *Smith* v. *Roane*, 284 Ark. 568, 683 S.W.2d 935 (1985).

This court has elaborated on that distinction in *Bailey* v. *Harris*, supra:

> [C]laim preclusion bars not only the relitigation of issues which were actually litigated in the first suit, but also those which could have been litigated but were not. *Wells* v. *Ark.Pub.Serv.Comm'n*, supra; and *Lovell* v. *Mixon*, 719 F.2d 1373 (8th Cir. 1983). In contrast, issue preclusion, or the collateral estoppel aspect of res judicata, is limited to those matters previously at issue which were directly and necessarily adjudicated. *Smith* v. *Roane*, 284 Ark. 568, 683 S.W.2d 935 (1983).

The Restatement (Second) of Judgments' (1982) definition of claim preclusion is found at §18 and it provides:

> When a valid and final personal judgment is rendered in favor of the plaintiff:
>
> (1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment; and
>
> (2) In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action.

The definition of issue preclusion is found at § 27 of the Restatement:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

This case clearly does not present a situation for the application of claim preclusion. We do not have a case of the plaintiff, in this case Craig, attempting to relitigate the same claim or any other claim which he could have raised in his cause of action arising from this accident.

However, the question of whether the matter is one of issue preclusion must also be resolved. Issue preclusion, or collateral estoppel, is usually applied to all issues other than a plaintiff's claim in determining the effect of a judgment in precluding relitigation of an issue. The question of whether an issue was previously litigated is interpreted very narrowly for purposes of collateral estoppel. See *Smith* v. *Roane*, 284 Ark. 568, 683 S.W.2d 935 (1983).

Although the issue of Goston's negligence as the cause of Craig's injuries was decided by the entry of the default judgment, this is not the same issue as whether Craig's negligence was the proximate cause of Goston's injuries. The finding that Goston was negligent does not equate to a finding that Craig was free of negligence in the same accident. The issue of Craig's negligence was not actually litigated, nor was determination of his negligence essential to the default judgment rendered in favor of Craig. Craig's default judgment is thus not conclusive in this subsequent action by Goston, and the trial court's order on the basis of res judicata was incorrect.

We therefore conclude that neither the doctrine of res judicata nor collateral estoppel would preclude Goston from bringing his claim against Craig.

However, Ark. R. Civ. P. 13(a) does clearly present a bar to Goston's claim. This rule provides:

> (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which, at the time of filing the pleading, *the pleader has against any opposing party, if it arises out of the transaction or occurrence* that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. (emphasis added).

We stated in *Bankston* v. *McKensie*, 288 Ark. 65, 702 S.W.2d

14 (1986) that the reason for this rule is to require parties to present all existing claims simultaneously to the court or be forever barred, thus preventing a multiplicity of suits arising from one set of circumstances. There is no question but that Goston's present claim arose out of the same "transaction or occurrence" as did Craig's, and that Goston would be required to plead his counterclaim in Craig's case or waive it, under Rule 13(a). See e.g. *Wasp Oil* v. *Arkansas Oil & Gas*, 280 Ark. 420, 658 S.W.2d 397 (1983).

Goston argues that we should not apply Rule 13(a) to default judgments. Although this court has not previously addressed this issue, Rule 13(a) is virtually identical to its federal counterpart and we can look to federal sources for guidance on this question.

Wright, Federal Practice and Procedure, § 1417 (1990), discusses Rule 13(a):

> However, if notions of estoppel or waiver are used to preclude defendant from asserting his claim in a later suit, should they apply when the first action has resulted in a consent or a default judgment? The Advisory Committee Note to Rule 13(a) only states that an independent suit is barred if the earlier action has "proceeded to a judgment," without indicating what kind of judgment is contemplated, which has the effect of leaving the question unanswered. *Typically, courts have given default judgments full effect and have held that a counterclaim omitted from an action that terminates in a default judgment will be barred from any subsequent suits*. However, if the parties resolve their dispute by means of a consent judgment, defendant may reserve the right to bring a later action on his counterclaim and no bar will result. (emphasis added).

Here, Goston's failure to present his counterclaim in the original action filed by Craig is the proper basis for the trial court's ruling that Goston is barred from now raising this claim.

Appellant Goston also argues that Craig should be estopped from asserting that Goston was required to have litigated his claim in the prior action filed by Craig, and cites to *Clark* v. *Yosemite Community College Dist.*, 785 F.2d 781 (9th Cir. 1986),

for the proposition that "a party who successfully blocks litigation of a cause of action in one proceeding may not hide behind the defense of res judicata in the second proceeding."

However, appellant makes this argument for the first time on appeal. Failure to make an objection below and get a ruling on it will waive the argument on appeal. *Thomas* v. *Cornell*, 316 Ark. 366, 872 S.W.2d 370 (1994); *Shelter Mut. Ins. Co.* v. *Page*, 316 Ark. 623, 873 S.W.2d 534 (1994). We therefore do not consider the merits of the argument.

The judgment of the trial court is affirmed.

BROWN, J., concurs.

Tony Franklin WILSON *v.* STATE of Arkansas

CR 95-112 898 S.W.2d 469

Supreme Court of Arkansas
Opinion delivered June 5, 1995

Robert A. Newcomb, for appellant.

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

ANDREE LAYTON ROAF, Justice. Tony Wilson was convicted of raping his twelve year old daughter and sentenced to 60 years in prison. His sole contention on appeal is that there was insufficient evidence to prove his guilt beyond a reasonable doubt. We find no merit to his argument and affirm the judgment.

At trial, the victim testified that her father raped her in his trailer when she was visiting with him over the weekend of November 6, 1993. However, she did not tell her mother, with whom she lived, until some months later, and was not examined for evidence of sexual assault until March, 1994. The exam revealed a healed injury consistent with traumatic vaginal penetration.

At trial, appellant, his mother, sister and two of his children who lived with him all testified that the victim had not spent the weekend of November 6, 1993 at the appellant's trailer, and that she had not spent the night with appellant since some time in July, 1993.

Appellant's motion for directed verdict based on insufficiency of the evidence was denied by the trial court, and he appeals from this denial.

Appellant argues that because all his witnesses refuted the

victim's testimony that she spent the weekend of November 6, 1993 with appellant and because she gave differing versions of some details of the rape, the evidence was insufficient to support the verdict. There is no merit to the argument.

A motion for a directed verdict is a challenge to the sufficiency of the evidence, and when such a challenge is made we review the evidence in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Tisdale* v. *State*, 311 Ark. 220, 843 S.W.2d 803 (1992). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion or conjecture. *Robinson* v. *State*, 317 Ark. 17, 875 S.W.2d 837 (1994). If there is any substantial evidence to support the verdict we will affirm.

On matters of credibility of the witnesses and conflicting testimony, we have repeatedly held that the determination of those issues is left to the trier of fact. *Byrum* v. *State*, 318 Ark. 87, 884 S.W.2d 248 (1994); *Miller* v. *State*, 318 Ark. 673, 887 S.W.2d 280 (1994); *Lukach* v. *State*, 310 Ark. 119, 835 S.W.2d 852 (1991); *Cope* v. *State*, 294 Ark. 391, 730 S.W.2d 242 (1987); *Mann* v. *State*, 291 Ark. 4, 722 S.W.2d 266 (1987). The jury in this case judged the credibility of the victim's testimony and returned a guilty verdict.

We have also long and repeatedly held that the uncorroborated testimony of a rape victim, adult and children alike, is substantial evidence and sufficient to support the verdict. *Caldwell* v. *State*, 319 Ark. 243, 891 S.W.2d 42 (1995); *Byrum* v. *State*, supra; *Lukach* v. *State*, supra; *Dillon* v. *State*, 317 Ark. 384, 877 S.W.2d 915 (1994); *Laughlin* v. *State*, 316 Ark. 489, 872 S.W.2d 898 (1994); *Fox* v. *State*, 314 Ark. 523, 863 S.W.2d 568 (1993); *Bishop* v. *State*, 310 Ark. 479, 839 S.W.2d 6 (1992); *Davis* v. *State*, 308 Ark. 481, 825 S.W.2d 584 (1992).

Appellant argues that the evidence was insufficient to establish that the victim spent the weekend with him on the date charged by the State. However, lack of certainty as to the date does not defeat a charge of this nature.

In *Fry* v. *State*, 309 Ark. 316, 829 S.W.2d 415 (1992), involving rape of two minors by their stepfather, we said:

> By statute and case law it is established that generally the time a crime is alleged to have occurred is not of critical significance unless the date is material to the offense. Arkansas Code Ann. § 16-85-405(d) (1987); *Bonds* v. *State*, 296 Ark. 1, 751 S.W.2d 339 (1988); *Kirkham* v. *City of North Little Rock*, 227 Ark. 789, 301 S.W.2d 559 (1957). That is particularly true with sexual crimes against children and infants.

In *Yates* v. *State*, 301 Ark. 424, 785 S.W.2d 119 (1990), another case involving rape of a minor, we said "Any discrepancies in the testimony concerning the date of the offense were for the jury to resolve." See also Ark. Code Ann. § 16-85-405(a)(2)(d) (1987); *Burris* v. *State*, 291 Ark. 157, 722 S.W.2d 858 (1987).

The victim in this case gave a full and detailed accounting of the appellant's actions which is sufficient to support the verdict.

Finding no error, we affirm the judgment.

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