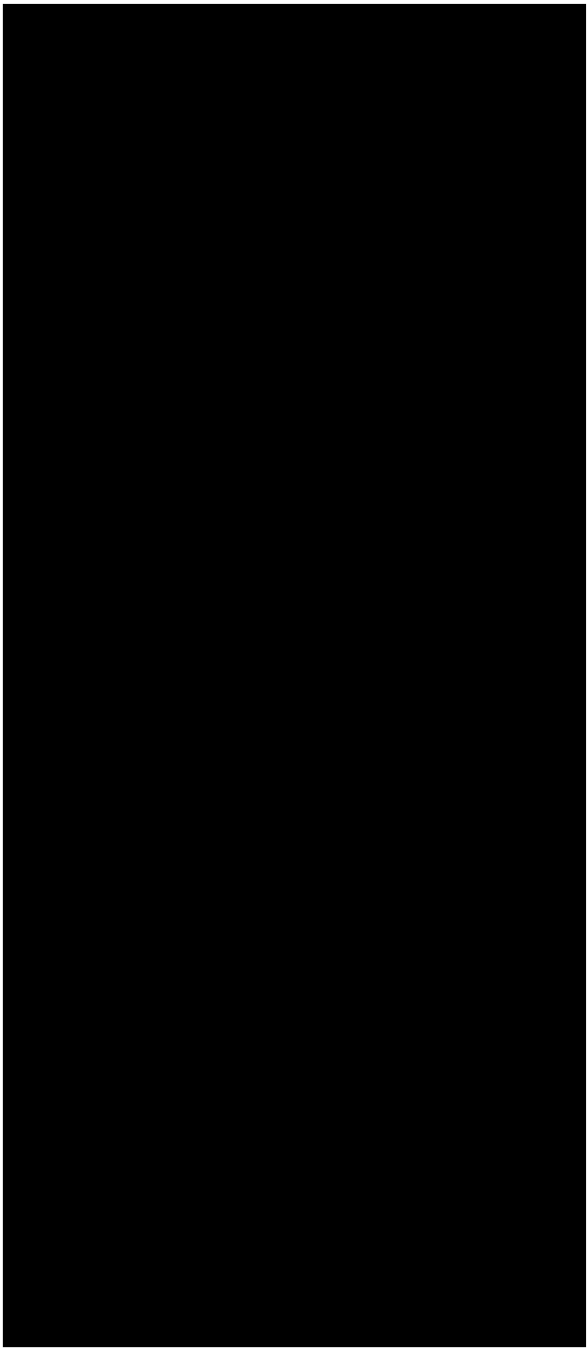
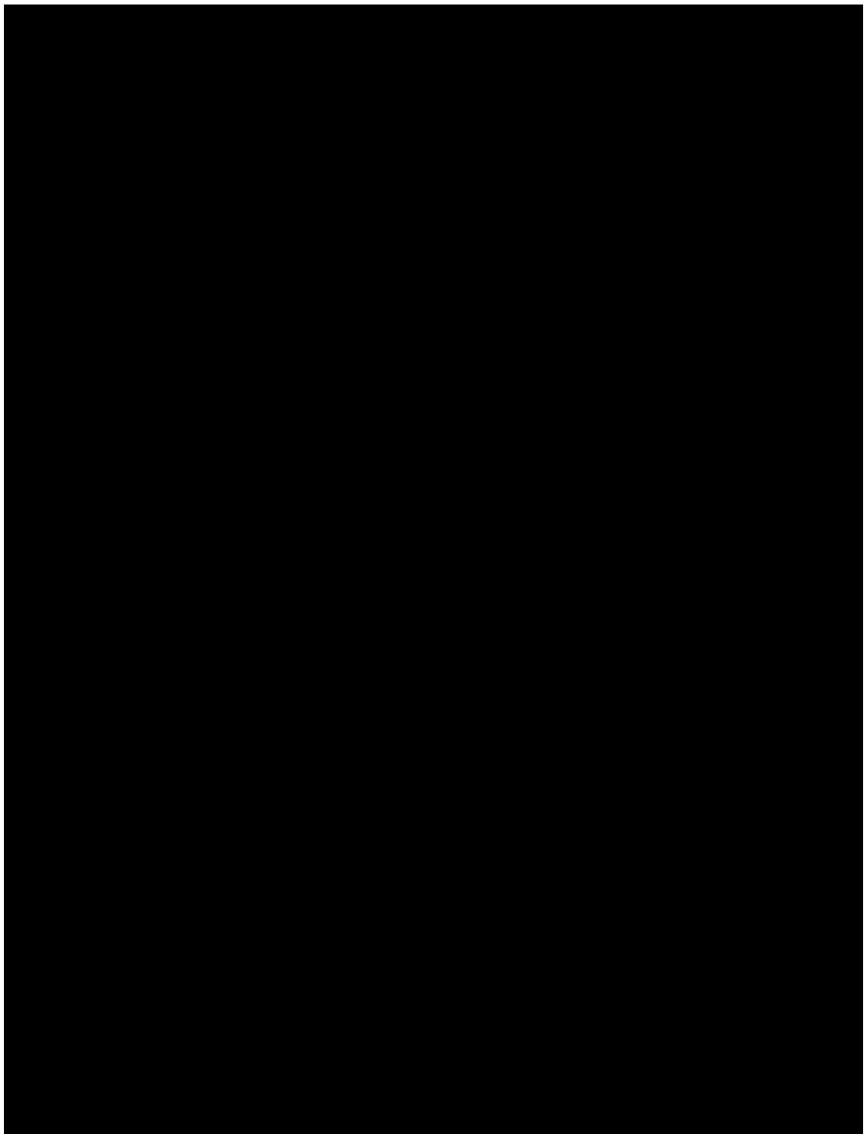
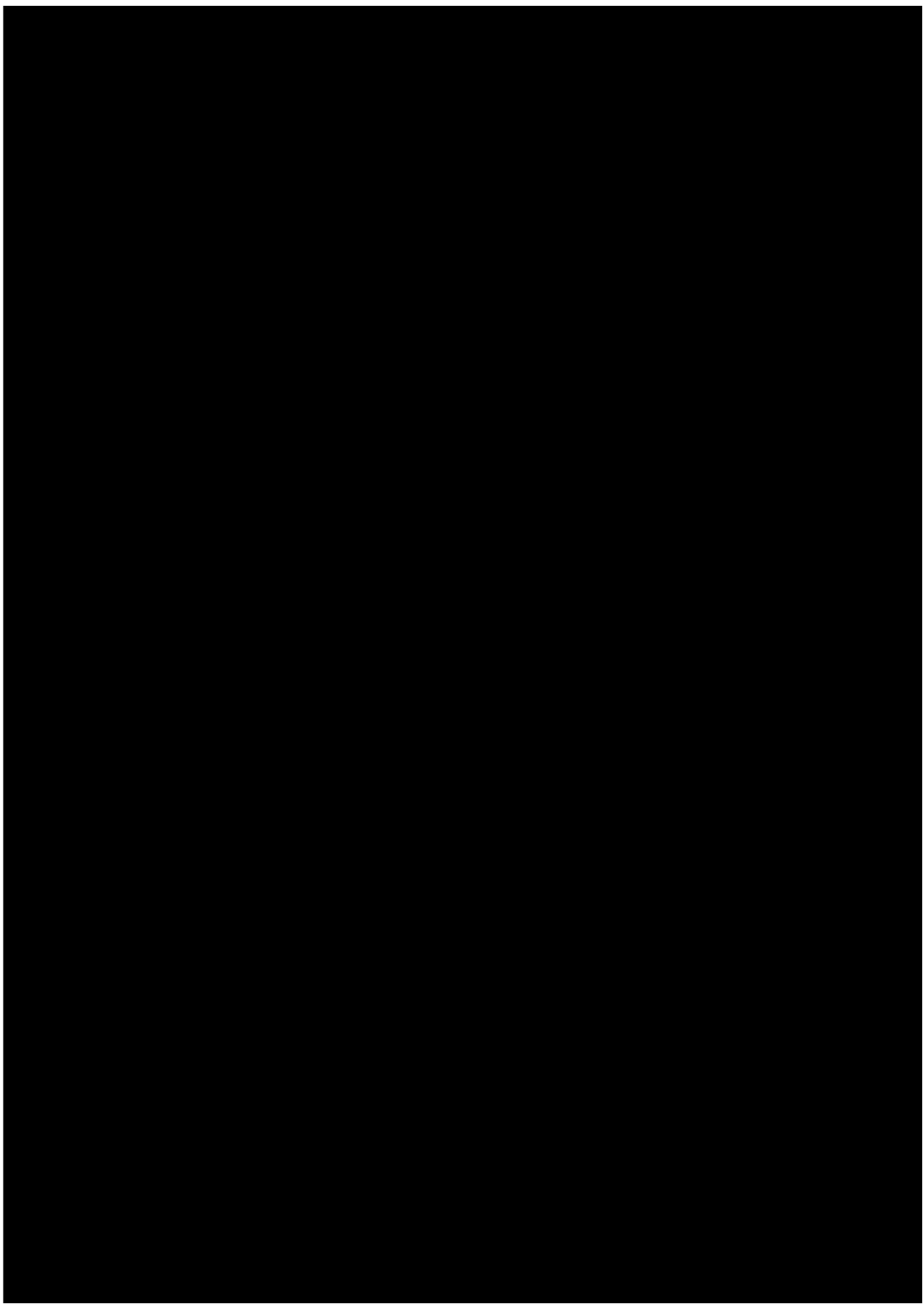
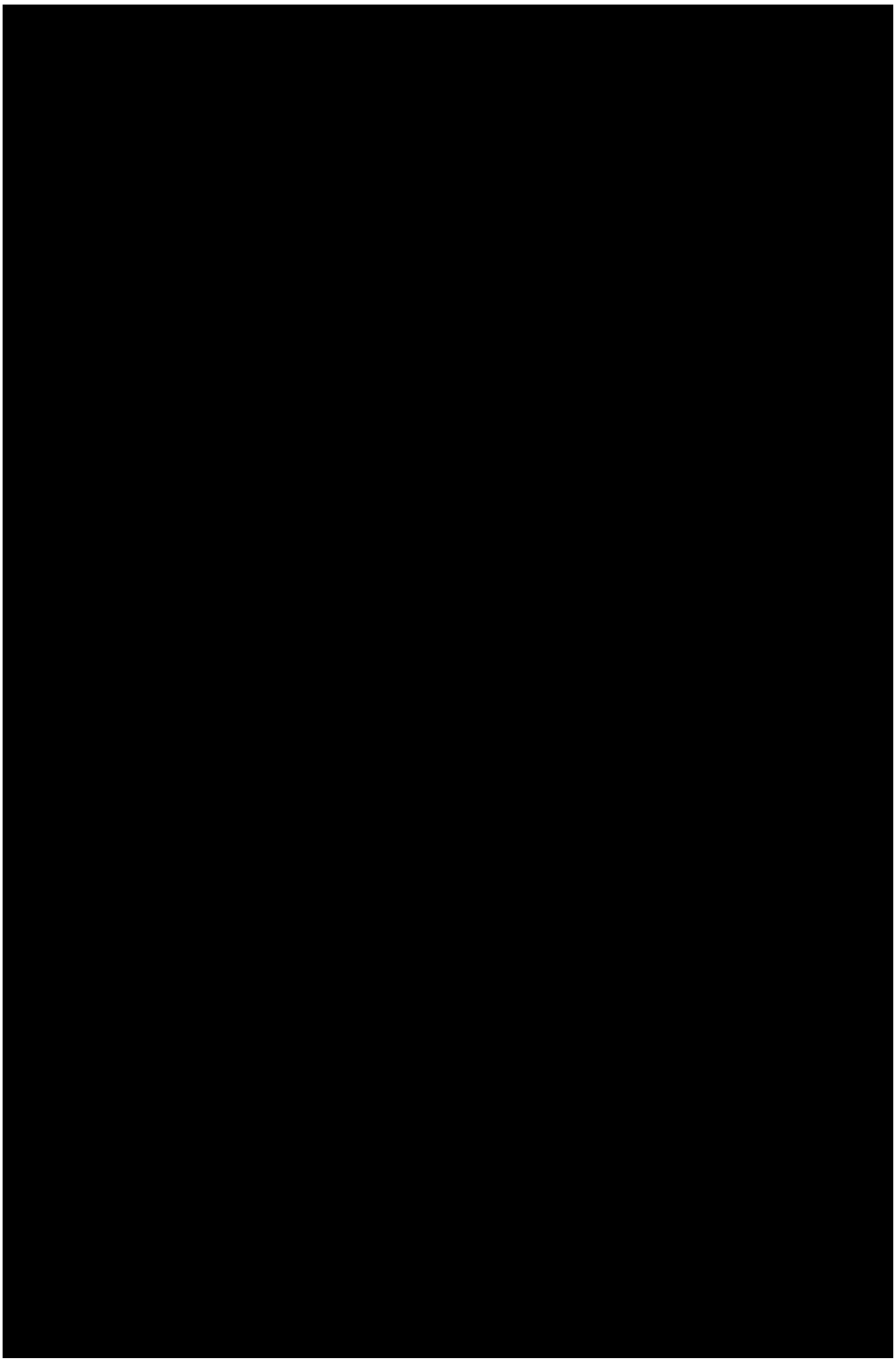
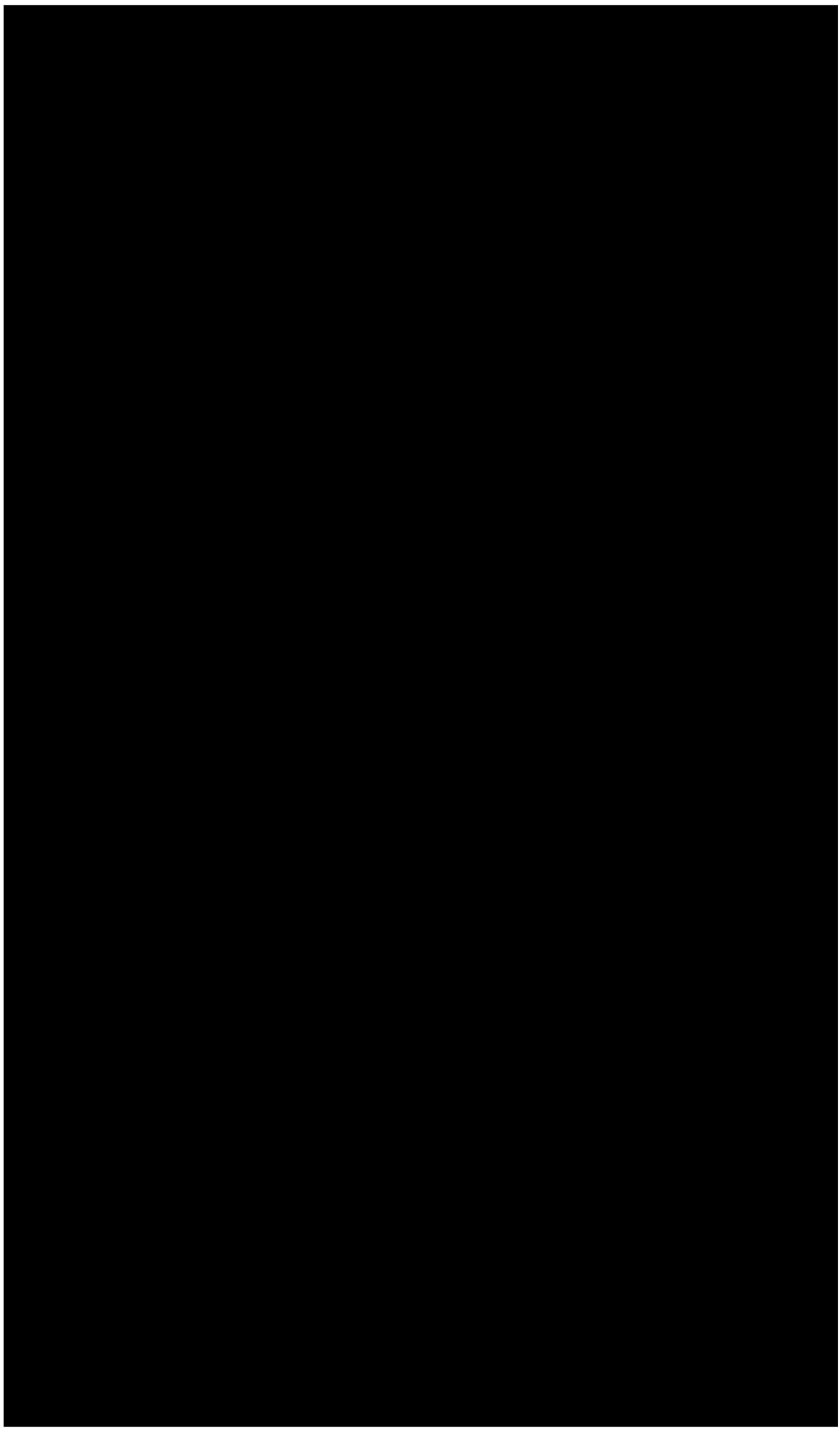
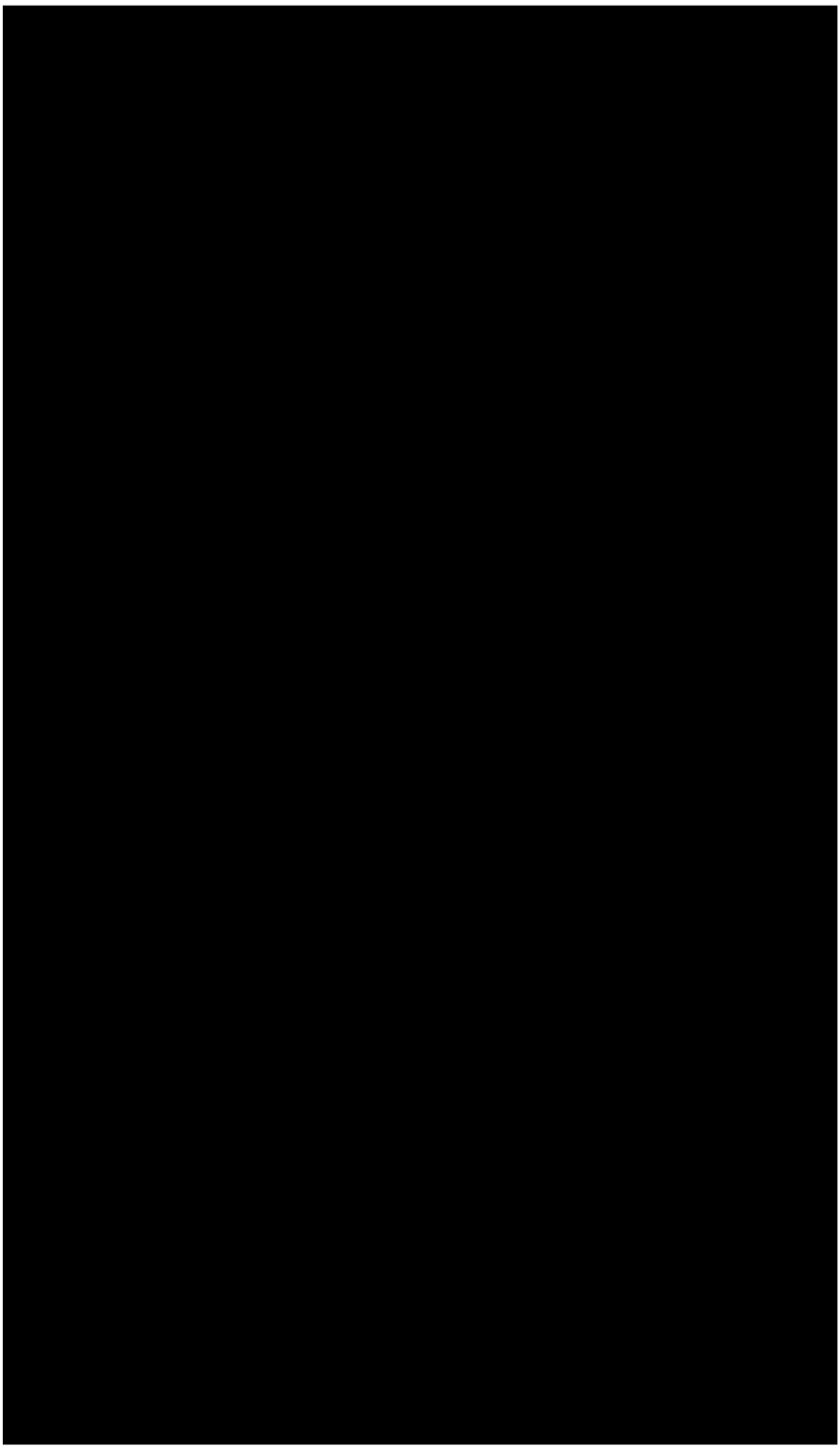


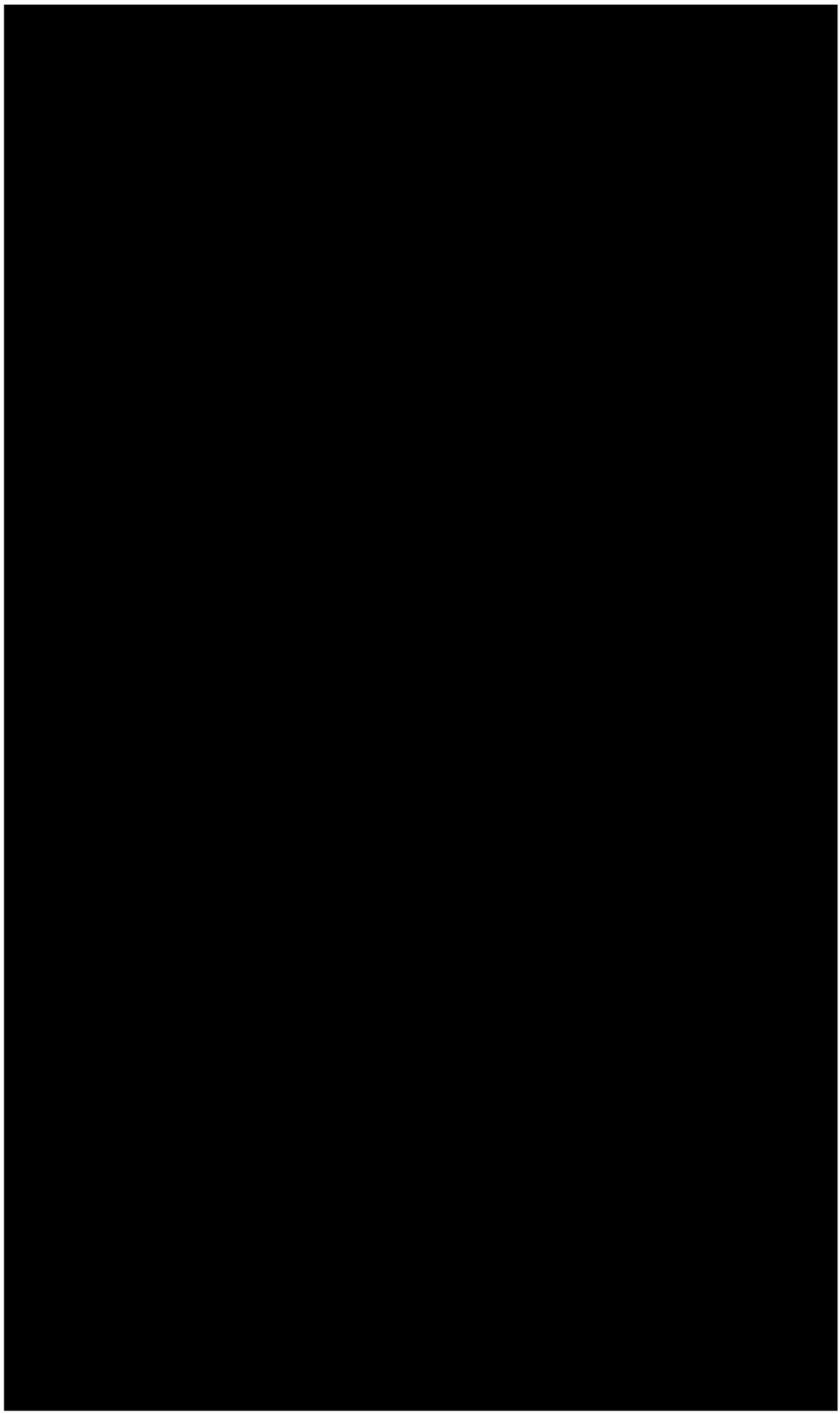


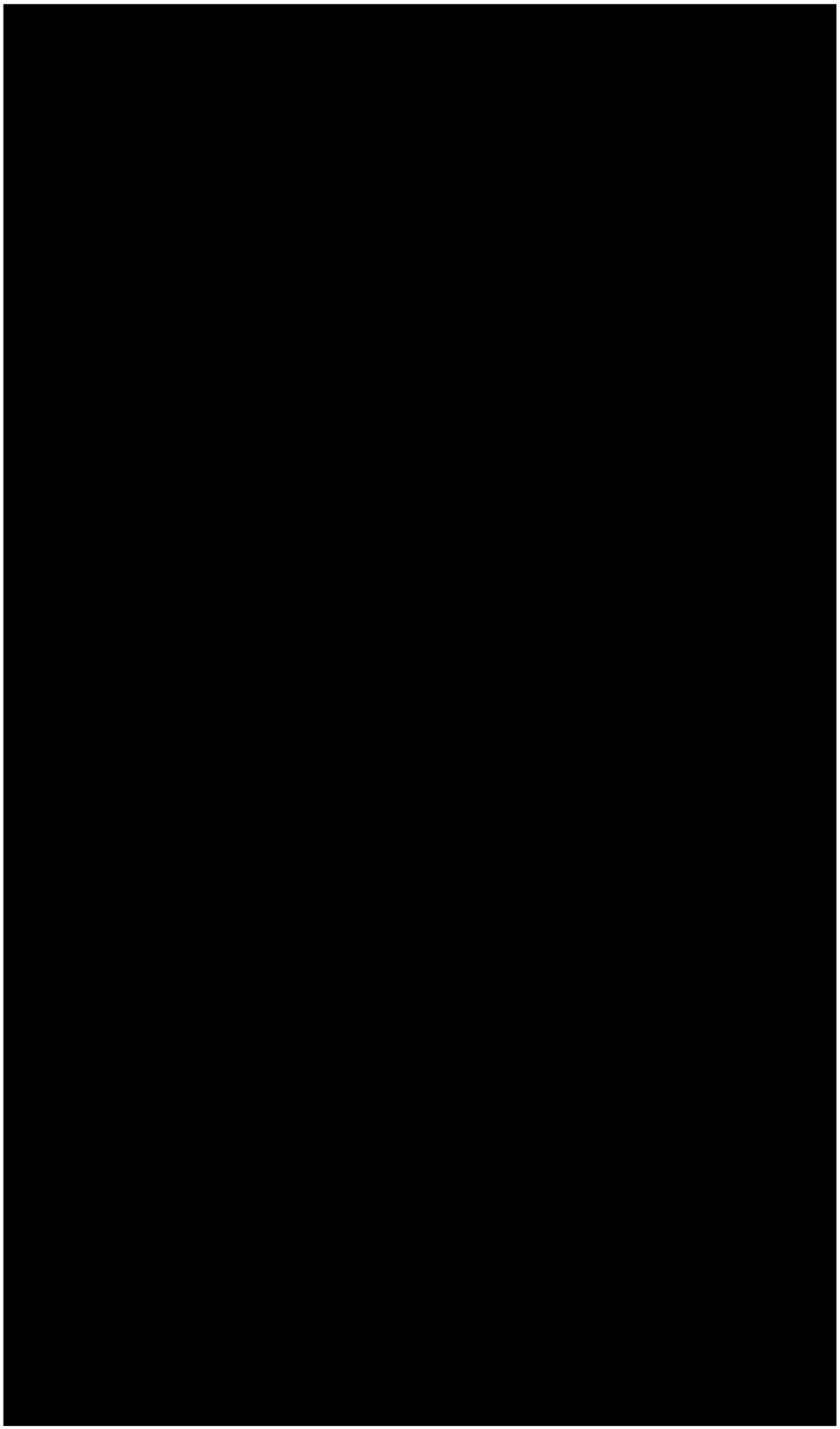


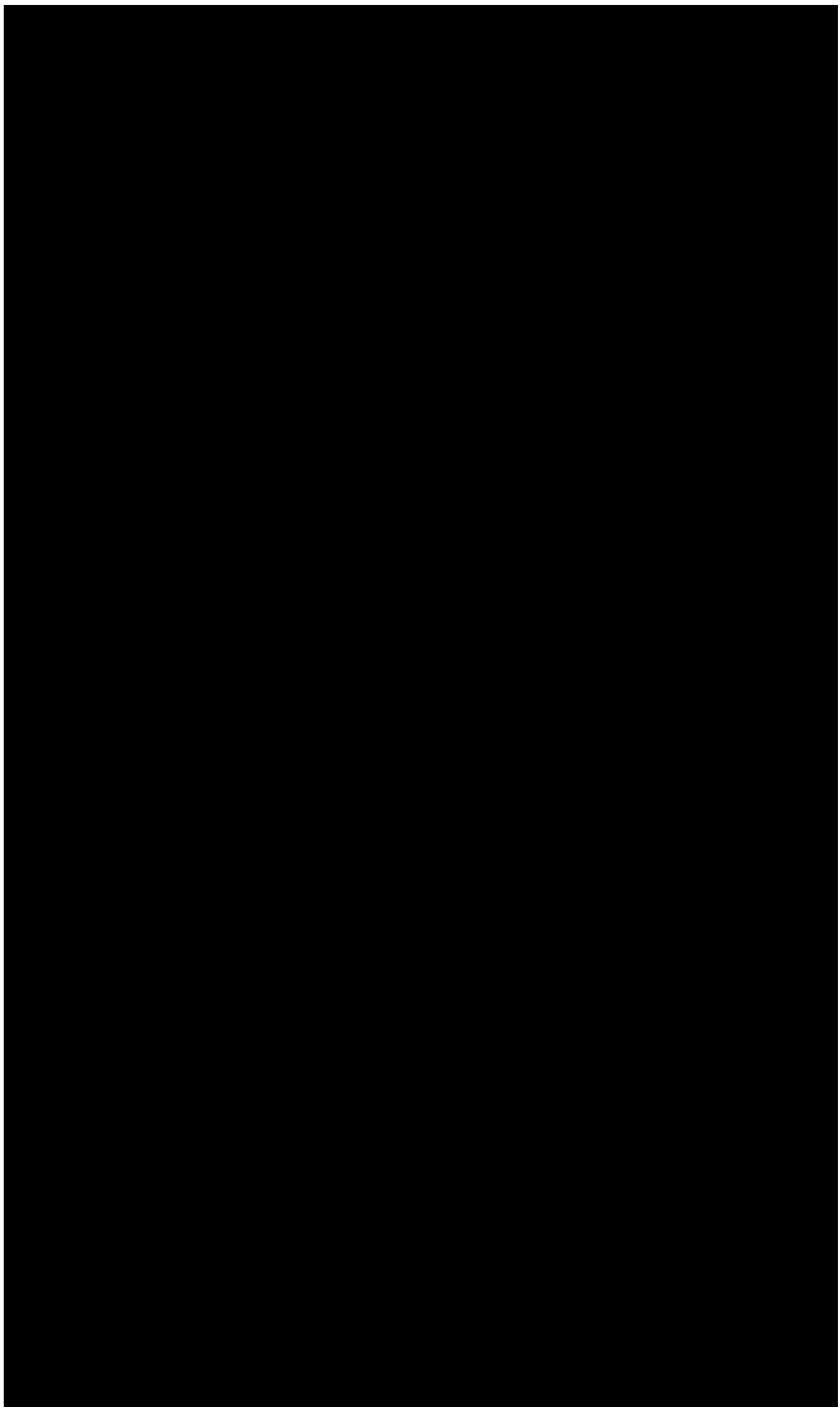


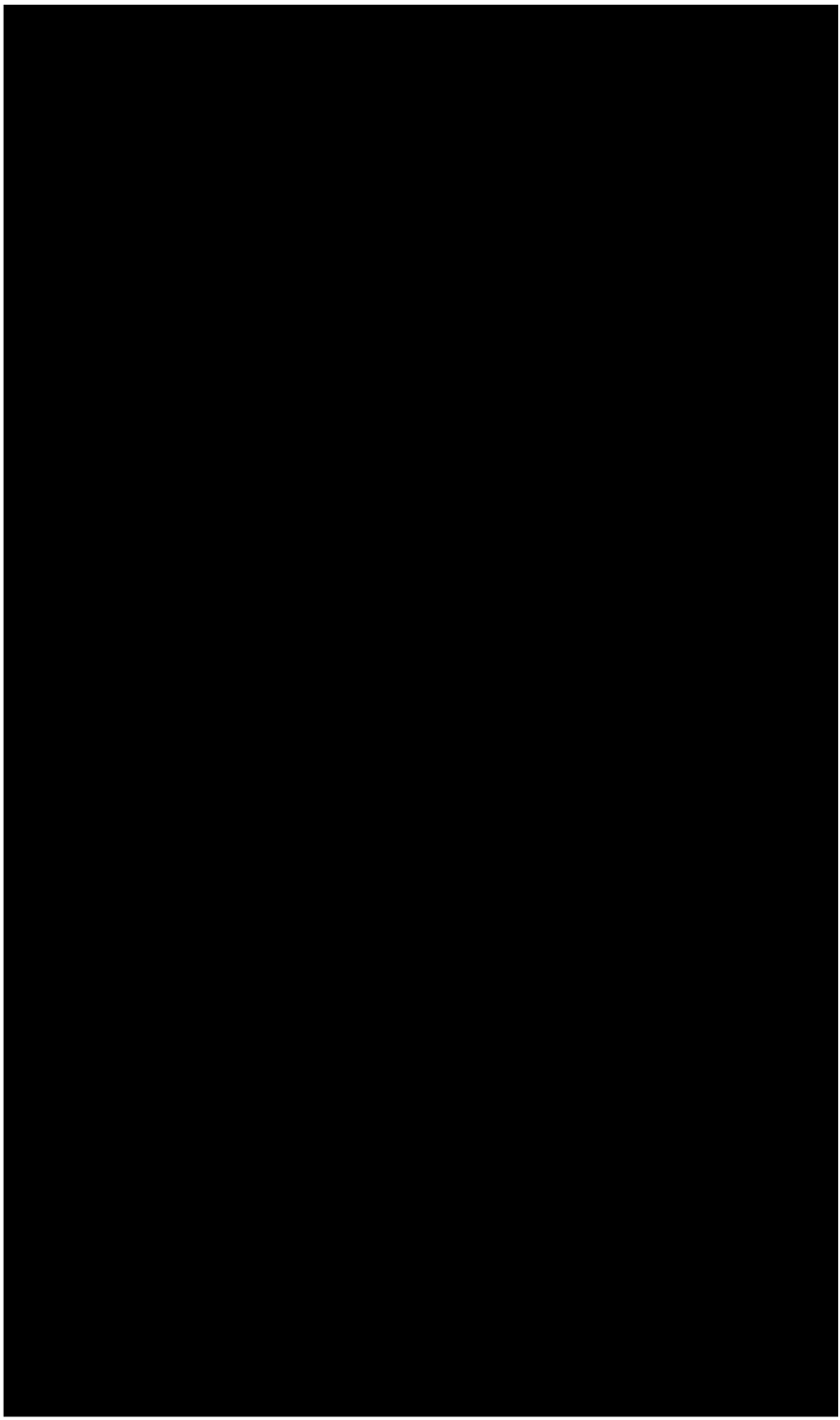


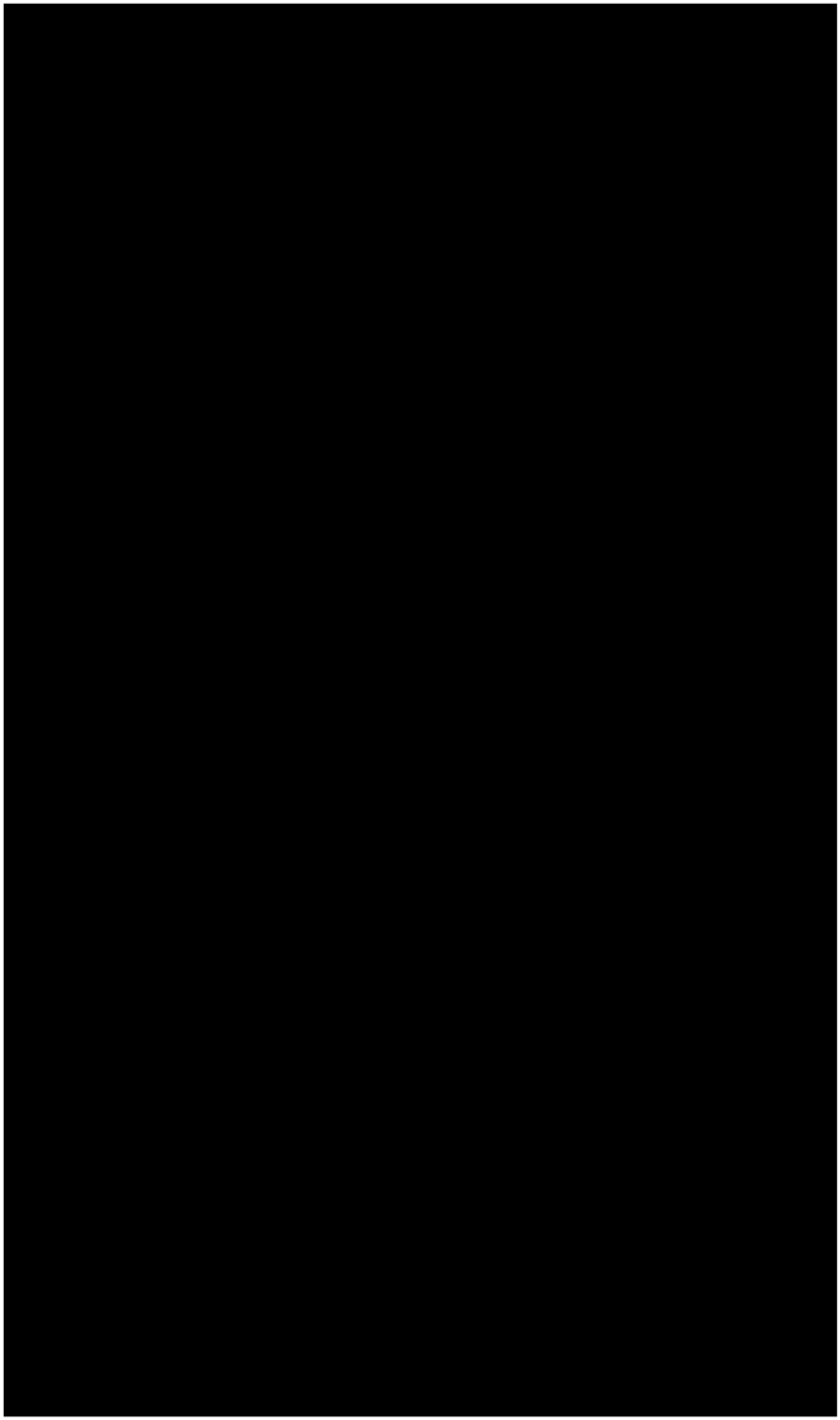


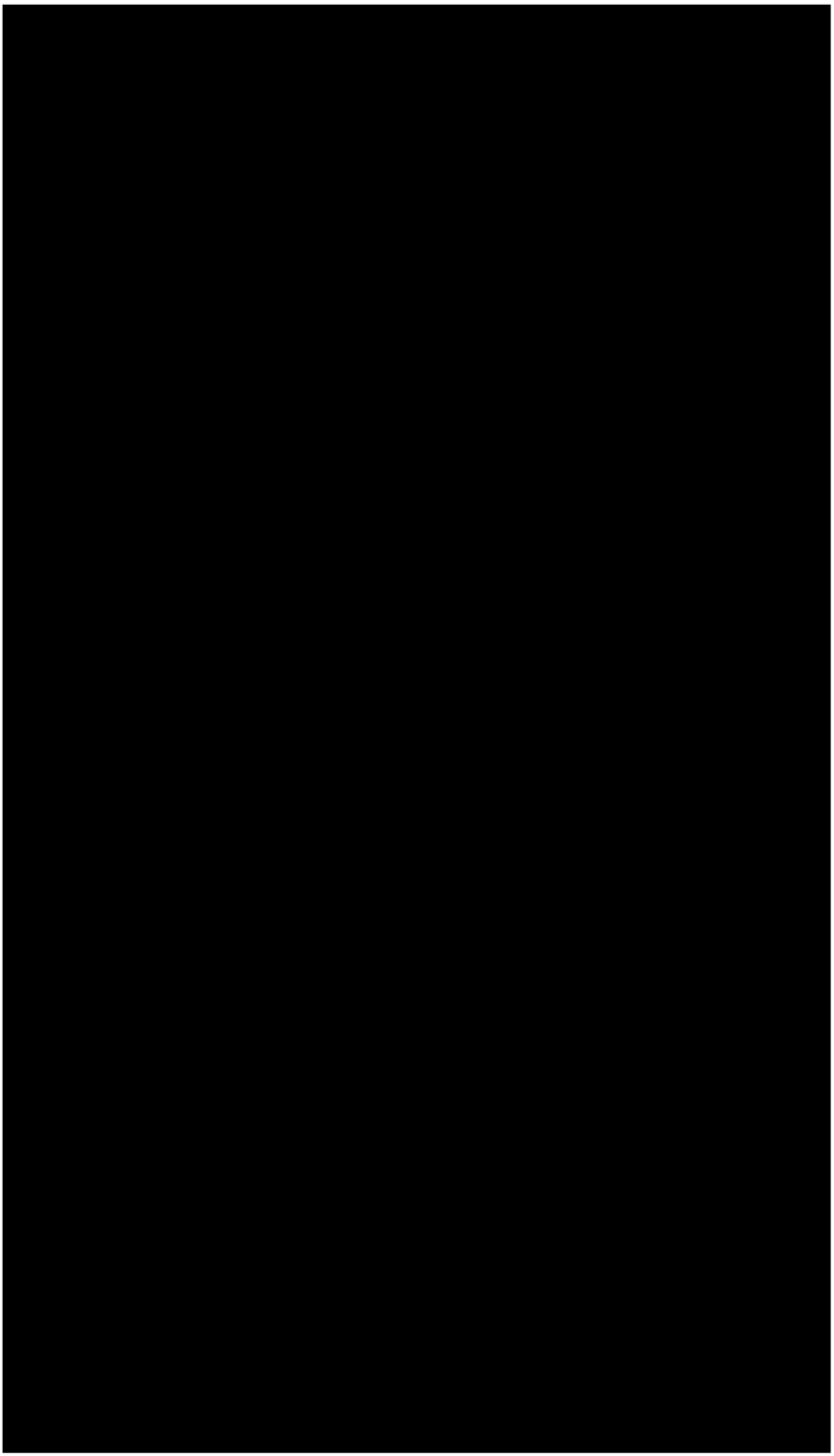


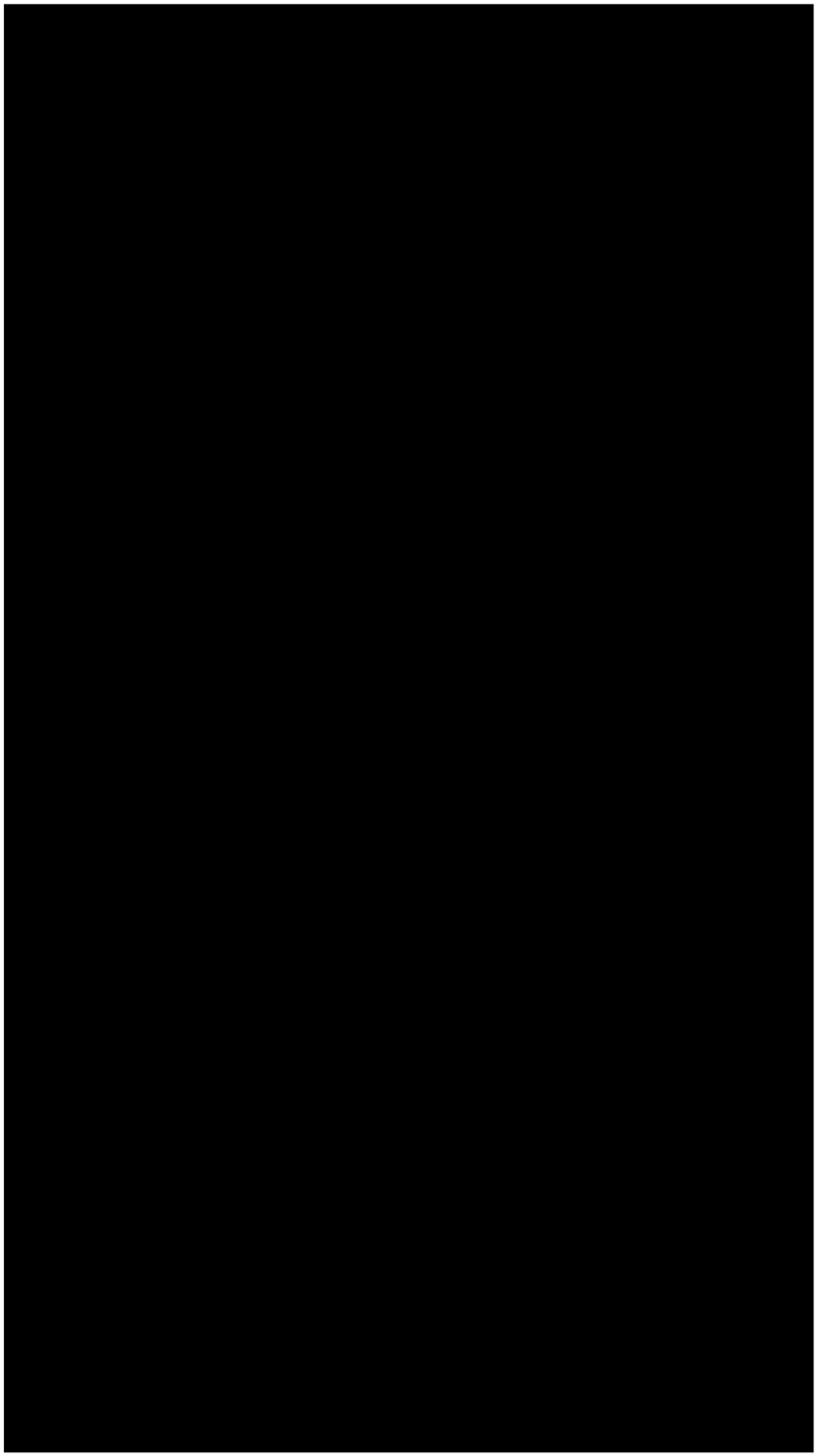


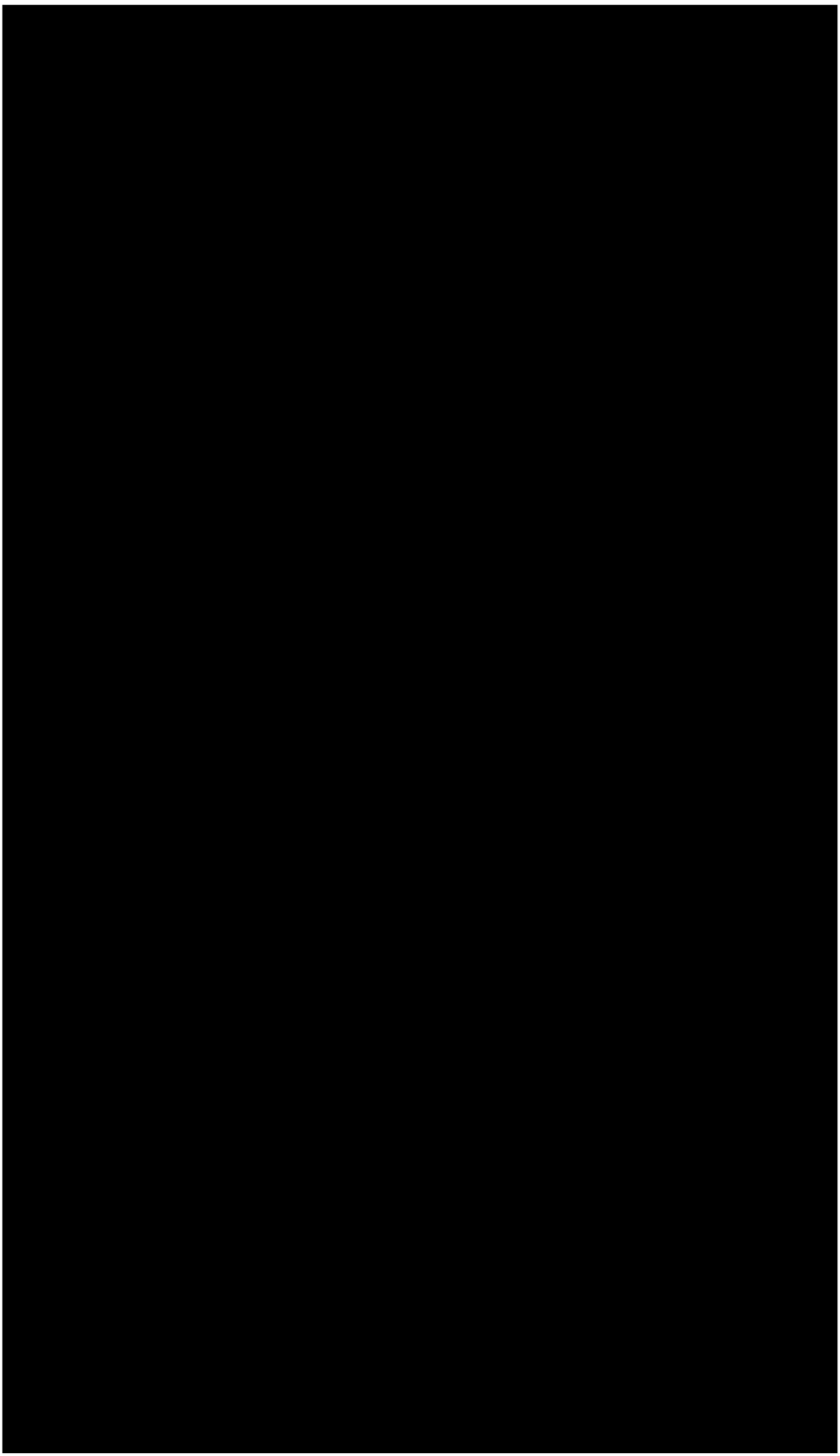


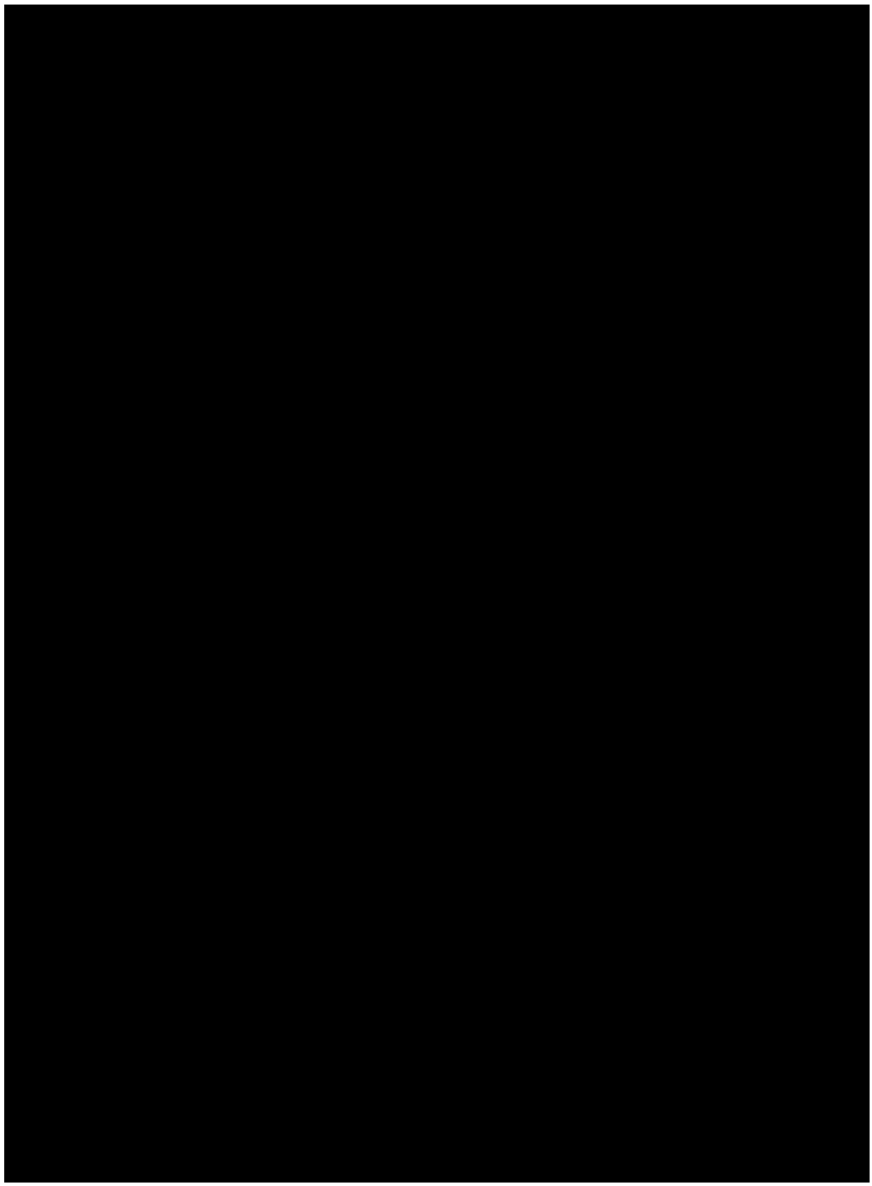


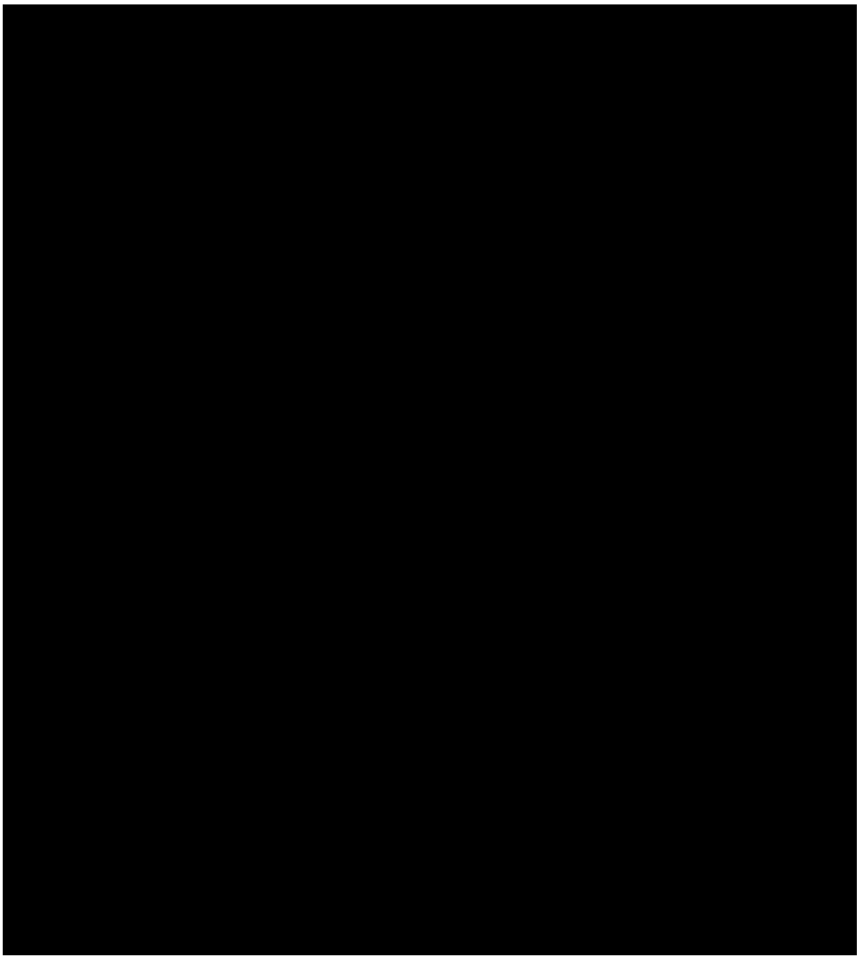












[redacted]

GENERAL ELECTRIC SUPPLY COMPANY *v.* The DOWNTOWN CHURCH OF CHRIST, Stuart Construction Co., Inc., La-Van Electric, Inc., and American State Insurance Company

CA 87-331 746 S.W.2d 386

Court of Appeals of Arkansas
Division I
Opinion delivered March 16, 1988

[redacted]

[redacted]

Robert C. Lowry, for appellant.

Bob Leslie for appellees Stuart Construction Co., Inc., and American State Ins. Co.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from White County Circuit Court. Appellant, General Electric Supply Company, appeals the court's failure to award judgment against appellees, Stuart Construction Company, Inc. (hereinafter Stuart) and American States Insurance Company (hereinafter American) and its failure to award costs, penalty, interest and attorney's fees against American. We affirm in part, reverse in part, and remand.

Appellee Stuart was the prime contractor for The Downtown Church of Christ. Appellee American executed a performance and payment bond with Stuart as principal. Appellee La-Van Electric, Inc. (hereinafter La-Van) was a subcontractor to Stuart and received materials to use in the job from appellant. Appellant failed to receive payment and initiated this action. The action was voluntarily dismissed against The Downtown Church of Christ prior to trial. At trial, the court awarded judgment against appellee La-Van in the amount of $7,035.84. The court found in favor of appellees Stuart and American and dismissed the action against them. It is this finding of non-liability from which appellant appeals.

For reversal, appellant alleges that the court erroneously refused to grant judgment against Stuart and American and failed to award costs, penalty, attorney's fees and interest against American. We agree with part of its contentions.

In its point for reversal and in one sentence in its brief, appellant contends that the court erred in finding for appellee, Stuart. However, it fails to state any argument for reversal. Where an assignment of error is unsupported by convincing argument or citation of legal authority, the appellate court does not consider it on appeal unless it is apparent without further research that it is well taken. *Anderson* v. *Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). For this reason, we affirm as to appellee Stuart.

Appellant also contends that the trial court erred in failing to award judgment against American under the bond.

Findings of fact by a trial judge will not be set aside by the appellate court unless clearly erroneous. *Ark. Blue Cross & Blue Shield* v. *Fudge*, 12 Ark. App. 11, 669 S.W.2d 914 (1984).

With regard to American, the trial court stated in its findings of fact and conclusions of law that the general rule of law was that a surety's liability on a bond is limited to that of the principal. The court noted that an exception to that general rule exists where a direct cause of action can be maintained against the bonding company without making the principal a party. The court further stated that appellant could not have maintained a separate action in this case because (1) this did not involve a public construction, which would have precluded appellant from pursuing a statutory lien for labor and materials, and (2) appellant did not file a lien with the circuit clerk as prescribed by Arkansas Statutes Annotated § 51-631 (Supp. 1985). The court found that no exception existed to the general rule that a surety's liability cannot exceed that of its principal. Because the principal (Stuart) was found to have no liability, the court also found American not liable. We find this portion of the court's findings clearly erroneous.

Arkansas Statutes Annotated § 51-633 (Repl. 1971) is applicable in the present case and states:

> No contract in any sum exceeding $1,000 providing for the repair, alteration, or erection of any building, structure or improvement shall be entered into by any church, religious organization, charitable institution or by any agency of the foregoing, unless the contractor shall furnish to the party letting the contract a bond in a sum equal to the amount of the contract.

The bonding of a church construction job is mandatory under the statute. Arkansas Statutes Annotated § 51-635 (Repl. 1971) requires that the bond "be conditioned that the contractor shall faithfully perform his contract, and shall pay all indebtedness for labor and materials furnished or performed in the repair, alteration or erection." The statutes further provide that the bond shall be filed and that *any* person to whom there is due any sum for labor or material furnished may bring an action on the bond for recovery of the indebtedness. Ark. Stat. Ann. § 51-631. Therefore, if the bond complies with the statutory requirements, appellant could have maintained a separate and

direct cause of action against American, contrary to the trial court's finding.

[redacted] The bond, titled "Arkansas Statutory Performance and Payment Bond," was issued by American, as surety, to Stuart, as principal, and in favor of The Downtown Church of Christ, as obligee. The language of the bond states in essence that if Stuart faithfully performs under the construction contract and pays all persons who have contracts directly with it for labor or materials the surety's obligation becomes null and void. This language differs from the statutory condition only in its attempt to limit liability to those who contract directly with Stuart. The surety on a bond is presumed to know that the bond is executed as though the terms of the statute were a part thereof. *Reiff* v. *Redfield School Bd.*, 126 Ark. 474, 191 S.W. 16 (1916). Neither party argues that this language prevents the bond from being construed as a statutory bond, and we agree, especially in light of *Sweester Constr. Co.* v. *Newman Bros., Inc.*, 236 Ark. 939, 371 S.W.2d 515 (1963), which stated that a person who furnishes material to a subcontractor is in privity with the prime contractor and has recourse to a prime contractor's bond for the payment of his account. *Id.* at 943-44, 371 S.W.2d at 517-18. Therefore, even if American limited its liability to those who contract with Stuart, appellant had sufficient privity with Stuart to have recourse against American.

[redacted] Another requirement under the statutes is that the bond be filed in the office of the clerk of the circuit court in the county in which the property is situated. Ark. Stat. Ann. § 51-631. The same statute provides that if the bond is not filed, all persons furnishing material or performing labor shall have a lien upon the property for the unpaid amount of the claim. Appellee asserts that the bond was not filed. The court, at least impliedly, found that to be true since it noted that no lien had been filed under the section and the section provides for a lien only in the absence of filing the bond. Appellant contends in its brief that it is entitled to recover regardless of whether the bond was statutory or not and cites cases allowing recovery where the bond was unfiled, never challenging the bond's treatment as unfiled. However, our limited review shows that the bond was introduced into evidence with a certificate showing that it was filed of record on September 10, 1981, with the White County Circuit Clerk and

Recorder. We know of no reason to treat the bond as unfiled.

The bond in issue fully complies with the conditions and requirements of the statutes governing construction bonds for religious or charitable organizations. We find the trial court's findings that appellant was not entitled to bring a separate action on the bond clearly erroneous. Arkansas Statutes Annotated § 51-631 clearly gives appellant a direct action on the statutory bond and it was entitled to have judgment entered against American as a matter of law.

Finally, appellant argues that the court erred in failing to awards costs including attorney's fees, 12% statutory damages, and interest against American pursuant to Arkansas Statutes Annotated § 66-3238 (Repl. 1980). The statute states:

> In all cases where loss occurs and the cargo, fire, marine, casualty, fidelity, *surety . . . insurance company* . . . liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such person, firm, corporation, and/or association shall be liable to pay the holder of such policy or his assigns, in addition to the amount of such loss, twelve percent (12%) damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss. . . . [Emphasis added].

This statute was applied to a surety on a contractor's bond in *Ray Ross Constr. Co., Inc.* v. *Raney*, 266 Ark. 606, 587 S.W.2d 46 (1979). In *Raney*, the supreme court affirmed an award of attorney's fees, 12% penalty, and interest to a subcontractor who recovered a verdict against the prime contractor and surety in the dollar amount for which he prayed. We see no material difference between *Raney* and the case at bar. Although in *Raney*, the party seeking to recover the penalty, interest and fees was a subcontractor rather than a materialman and judgment had also been entered against the principal on the bond, the particular fact situation had no bearing on the statute's applicability to a surety on a contractor's bond. The only question in *Raney* was whether the surety actually contested the claim and failed to pay it after demand. The court held that it had done so.

Because of our disposition on the issue of American's

liability, appellant has been awarded judgment in the amount for which it prayed as is required to invoke the statute. American offered no argument against allowing the penalty and attorney's fees and we are aware of none.

We therefore reverse and remand, directing the trial court to enter judgment against La-Van and American jointly and severally and to award appellant sums due to it under Arkansas Statutes Annotated § 66-3238.

Affirmed in part, reversed in part, and remanded.

CRACRAFT and JENNINGS, JJ., agree.

Carolyn KNAUS *v.* Lawrence Ralph RELYEA, Administrator, et al.

CA 87-274 746 S.W.2d 389

Court of Appeals of Arkansas
Division I
Opinion delivered March 16, 1988

[redacted]

The McMath Law Firm, P.A., by: *Eileen Harrison*, for appellant.

The Niblock Law Firm, by: *Katherine C. Gray*, for appellee.

JAMES R. COOPER, Judge. The appellant, Carolyn Knaus, petitioned the Carroll County probate court seeking an order finding that she had entered into a valid common law marriage with the deceased Mark Relyea in Colorado and requested that the court enter an order recognizing the marriage. After a hearing, the probate judge found that the appellant had failed to establish that she was the lawful surviving spouse of Mark Relyea. From that decision, comes this appeal.

The appellant argues four points for reversal: that the court erred when it found that the appellant failed to establish a present agreement between the appellant and Mark Relyea to become husband and wife; that the court erred in finding that the appellant did not establish a mutual and open assumption of the marital relationship; that the court erred in finding that plans for a future wedding ceremony were contrary to a present agreement to become husband and wife; and, that the court erred in finding that representations made to Mark Relyea's parents, the appellees, were inconsistent with a present agreement to be husband and wife. We affirm.

In probate cases, we review the record *de novo*, but we will not reverse the probate judge's decision unless it is clearly erroneous or against a preponderance of the evidence, giving due regard to his opportunity to determine the credibility of the witnesses. *Chrisos* v. *Egleston*, 7 Ark. 82, 664 S.W.2d 22 (1983); ARCP Rule 52(a). Common law marriages are not permitted in Arkansas, but the State will recognize marriages contracted in another state which are valid by the laws of that state. *Walker* v. *Yarbrough*, 257 Ark. 300, 516 S.W.2d 390 (1974); Ark. Stat. Ann. § 55-110 (Repl. 1971) [Ark. Code Ann. § 9-11-107 (1987)]. One seeking to prove the existence of a valid common law marriage in another state must do so by a preponderance of the evidence. *Allen* v. *Wallis*, 279 Ark. 149, 650 S.W.2d 225 (1983).

The appellant began living with Mark Relyea in Colorado on November 19, 1982. According to the appellant, while they lived in Colorado they performed "informal ceremonies" in which they pledged their love for one another and their intent to remain together forever. They represented themselves to their friends in Colorado as life mates and spouses.

They decided to purchase land in Arkansas, and build a

home near Eureka Springs. In the autumn of 1983, they purchased land in Arkansas. The property was conveyed by deed to Carolyn Knaus, "a single person." They then moved to Louisiana.

Entered into evidence were letters written by the appellant and Mark Relyea while they were living in Louisiana, in which they addressed each other as "husband" and "wife." According to the appellant, they reaffirmed their promise to be together always and they exchanged rings. In April 1984 they returned to Arkansas to permanently settle.

While in Arkansas, they continued to represent to others that they were life mates and, on two occasions, Mark Relyea referred to the appellant as his wife. They opened a joint savings account in Eureka Springs, with rights of survivorship.

In the summer of 1984, Mark and the appellant announced to the appellees that they were planning to get married in the autumn of 1985. The appellant and Mark Relyea went to visit the appellees in their home in New York. During the visit the appellant and Mark occupied separate bedrooms, and told the appellees that, although they were living together, they were not having sexual relations.

Mark Relyea died in an accident at work on March 23, 1985. Following his death, the appellant wrote a newspaper article in which she stated that she and Mark were to be married. Approximately two months later, the appellant wrote a letter to the appellees requesting that they recognize her as Mark's common law wife and asking that they share any proceeds from a pending wrongful death suit with her. Also entered into evidence was the death certificate of Mark Relyea, which indicated that he was not married.

After hearing all the testimony, the probate judge wrote a letter to the parties which stated his reasons for finding that a common law marriage did not exist. The judge found that the acceptance of the deed by the appellant in which she was designated a single person, the declarations of the appellant and Mark Relyea to friends and family that they were going to be married in the fall of 1985, and the publication in the newspaper of the article by the appellant which stated that they were going to be married negated a present consent to be husband and wife.

The appellant first argues that the trial court erred in finding

that there was no present agreement between the appellant and Mark Relyea to become husband and wife. We disagree.

[redacted] According to Colorado law, in order to establish a common law marriage there must be mutual consent or agreement of the parties to be husband and wife followed by a mutual and open assumption of a marital relationship. *People* v. *Lucero*, ___ Colo. ___, 747 P.2d 660 (1987). The contract alone is not sufficient unless it is followed by its consummation, that is, by cohabitation as husband and wife. *Id.; Taylor* v. *Taylor*, 10 Colo. App. 303, 50 P. 1049 (1897). In *Lucero*, the Colorado Supreme Court stated:

> Although language in some of our cases could be read as suggesting that mutual consent or agreement is the only essential element of a common law marriage, we have almost uniformly required that such consent or agreement be manifested by conduct that gives evidence of the mutual understanding of the parties. [cites omitted] We affirm today that such conduct in a form of mutual public acknowledgment of the marital relationship is not only important evidence of the existence of mutual agreement but is essential to the establishment of a common marriage . . . adding the requirement of open marital cohabitation gives assurance that some objective evidence of the relationship will have to be introduced in every case to establish that the parties did consider themselves husband and wife. [cite omitted]

747 S.W.2d at 663-4. In the case at bar, there simply is not enough "objective evidence" to hold that by a preponderance of the evidence a present agreement existed between the appellant and Mark Relyea to be husband and wife.

[redacted] The appellant testified about the informal ceremonies that she and Mark participated in while living in Colorado. She stated that they exchanged mutual promises to remain together for life, and that their "souls were one." However, many of the couple's friends and acquaintances testified, by deposition, that they never heard Mark and the appellant refer to one another as husband and wife. Although we agree with the appellant's assertion that those terms are not conclusive, the appellant herself testified that they avoided using those terms because their

relationship was non-traditional and "they make men unequal," and that while she understood the legal term marriage, neither she or Mark would use the terms married, husband or wife in public. Further, cohabitation alone is not sufficient to establish a common law marriage. See *Pickett* v. *Pickett*, 114 Colo. 59, 161 P.2d 520 (1945); *Walker* v. *Yarbrough, supra.* The appellant simply has not established that there was mutual agreement between herself and Mark Relyea to be married. *See Lucero, supra.*

The appellant next argues that the trial court erred in finding that the appellant had failed to establish a mutual and open assumption of the marital relationship. We disagree.

All of the testimony from friends and acquaintances testified that the appellant and Mark used the terms "life mate" and "spouse" when referring to each other. They also testified that the appellant and Mark acted like a married couple, and that they viewed them as husband and wife. However, the writings introduced into evidence that were written by the appellant and Mark while they resided in Colorado do not use the terms "husband" and "wife," but in the notes and cards which were written while the couple lived in Louisiana, Mark and the appellant did use the terms "husband" and "wife." Furthermore, the appellant and Mark told his parents that they were engaged to be married, and that although they lived together, they did not engage in sexual relations. Shortly after Mark's death, the appellant wrote a letter to the newspaper about Mark in which she stated that they were to be married. The appellant's name appeared on the deed as a single person, and Mark's death certificate indicated that he was single.

The evidence in this case is conflicting, and it was for the probate judge to determine where the credibility of the witnesses lay. *Chrisos* v. *Egleston*, 7 Ark. App. 82, 644 S.W.2d 326 (1983). In a close case the trial court is in a better position than the appellate court to evaluate the weight of the witnesses' testimony. *Arkansas State Highway Commission* v. *Troutman*, 240 Ark. 424, 399 S.W.2d 686 (1966).

The appellant next argues that the trial court erred in finding that plans for a future ceremony were contrary to a present agreement between the appellant and Mark Relyea to be hus-

band and wife. We disagree.

Although the Colorado courts have held that future plans of a formal ceremony would not negate a present agreement to be husband and wife, there is nothing in Colorado law or Arkansas law which prevents considering such future plans as evidence of what the intent of the parties was. In the cases relied on by the appellant the evidence of a common law marriage was virtually conclusive. *Moffat Coal Co.* v. *Industrial Commission*, 108 Colo. 388, 118 P.2d 769 (1941), was a workers' compensation case in which the appellant, Marie Todd, and her two minor children were attempting to get death benefits after her common law husband died. In that case, Marie Todd used her husband's last name, they had two children who also bore the last name of Todd, the parties had charge accounts in which Marie Todd was given unrestricted use, and the decedent, Pete Todd listed Marie Todd as his wife on employment and insurance forms. The court said, "there is nothing inconsistent in fixing the status per *verba de praesenti* and agreeing that the marriage then constituted shall be publicly solemnized at a future day." 118 P.2d at 772.

In the case at bar, the evidence is not as overwhelming in support of a common law marriage, and therefore, it was not error for the probate judge to consider the future marriage plans.

The appellant's last argument concerns the representations the appellant and Mark made to his parents. According to the appellant, the couple kept the true status of their relationship a secret because they knew Mr. and Mrs. Relyea would not approve and they did not want to hurt the Relyeas. This fact alone, in Colorado courts, probably would not negate a present intent to be married in the face of overwhelming evidence. *See Employers Mutual Insurance Co.* v. *Morgulaski*, 69 Colo. 223, 193 P. 725 (1920). However, we cannot say that it was error for the trial court to consider these facts in this case where the evidence was not as clear.

Affirmed.

COULSON and JENNINGS, JJ., agree.

Oneta Irene PAUL *v.* Glendon C. BAILEY

CA 87-363 746 S.W.2d 63

Court of Appeals of Arkansas
Division I
Opinion delivered March 16, 1988

Everett O. Martindale, for appellant.

Fred E. Briner, for appellee.

JAMES R. COOPER, Judge. The appellant, Oneta Irene Paul, appeals from an order of the Saline County Probate Court finding funds in her possession to be an asset of the estate of Ethel Bailey and directing her to deliver these funds to the appellee, Glendon Bailey, administrator of Ms. Bailey's estate.

This dispute arose over the ownership of approximately $40,000.00 in a bank account at Savers Federal Savings & Loan following the death of Ethel Bailey, who was the mother of both parties and another daughter. For many years, the savings account in question had been carried in the name of the decedent,

her deceased husband and the appellant. On December 6, 1983, the decedent placed the money in question in a new account in the names of Ethel Bailey, Oneta Irene Paul, and the appellee's wife, Bessie Bailey. On December 12, 1983, Ethel Bailey executed a new will which provided that her estate be divided equally among her three children; her prior will had left everything to the appellant. Ethel Bailey died on November 20, 1985, and five days later, the appellant withdrew approximately $40,000.00 from this account. The appellee petitioned the probate court to declare the funds in question to be an asset of the estate or to impose a constructive trust on the funds. After a hearing, the probate court found that the amount withdrawn from the account by the appellant was an asset of the estate and ordered the appellant to turn the money over to the appellee as administrator of the estate.

On appeal, the appellant argues that the trial court erred in imposing a constructive trust upon the proceeds of the savings account. The appellee, however, asserts that the trial court did not impose a constructive trust upon the funds in question but simply determined that they amounted to an asset of the estate and ordered their return. We agree with the appellee and affirm.

The probate court has jurisdiction to determine the ownership of property as between personal representatives claiming for the estates and heirs or beneficiaries claiming adversely to the estates. *Deal* v. *Huddleston*, 288 Ark. 96, 702 S.W.2d 404 (1986). *See also Snow* v. *Martensen*, 255 Ark. 1049, 505 S.W.2d 20 (1974). We review probate proceedings *de novo* on the record, and it is well settled that the probate judge's decision will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Dale* v. *Franklin*, 22 Ark. App. 98, 733 S.W.2d 747 (1987).

In the case at bar, the appellee testified that the money in the savings account came from the sale of his mother's farm and represented his parents' life savings; that his mother placed his wife's name upon the account so that she could take care of his mother's business; and that his mother had told him that she wanted everything she had to be divided equally among her three children. The appellee's wife also testified that the decedent had stated that she wanted everything to be divided equally among

her children. The appellant, however, testified that her name had been on her parents' bank account since the early 1970's because she had taken care of them from 1960 to 1980 and her mother had therefore wanted her to have the funds in the account. The appellant admitted that she did not write checks on this account. According to the appellant, her mother had told her that Bessie Bailey's name had been added to the account simply because it was "their" (the appellee's and his wife's) idea and because she did not want any trouble. Betty Cathel, the parties' sister, testified that the appellant had taken care of their parents for the past twenty-five years and that the appellant deserved everything.

Based upon our review of the conflicting evidence, we cannot say that the probate court's finding that the funds from the savings account are an asset of the estate is clearly erroneous.

Affirmed.

COULSON and JENNINGS, JJ., agree.

Marie CROFT, et al. *v.* James W. CLARK, Administrator of the Estate of Walter Clark, Deceased

CA 87-383 748 S.W.2d 149

Court of Appeals of Arkansas
Division I
Opinion delivered March 23, 1988

[redacted]

J. Larry Allen; and *Jones & Petty*, for appellants.

Phillip H. Shirron, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Grant County Probate Court. Appellants appeal from an order allowing attorney's fees to be assessed against the assets of the decedent's estate in the amount of $5,625 in a district court action in which the administrator was a defendant individually and in his representative capacity. We reverse and remand.

Prior to the decedent's death, appellee's name was placed on a bank account and several certificates of deposit with the decedent's name. Appellee's son and his wife also received a deed from the decedent to decedent's homestead. Appellants, heirs of Walter Clark, sued appellee in federal district court personally and in his representative capacity alleging that the decedent was incompetent at the time the transactions were made. Appellee petitioned the court for authority to hire an attorney, and the petition was granted.

The court sustained the allegations of mental incompetency. Title to the homestead and one of the certificates of deposit was vested in the estate. Title to the remainder of the certificates was vested in Marie Croft who had been on the accounts with decedent, her brother, long before appellee's name was added and prior to the decedent's incompetency. Appellee and his son were divested of all property in dispute.

Appellee submitted a statement for attorney's fees incurred in defense of the federal court action and the court ordered the fees to be paid from the assets of the decedent's estate. From that order comes this appeal.

For reversal, appellant contends that the probate court had

no jurisdiction to award attorney's fees to be paid from assets of the estate for services rendered for the benefit of the administrator and his son. Appellant argues that the appellee never made any claim on behalf of the estate, and in fact was an adversary of the estate in the federal court action because appellee's position of defending the decedent's competency benefited only the appellee and his son.

It has long been recognized that probate courts can authorize the administrator to employ counsel in the necessary protection of the estate in his hands and may allow fees for such services rendered the administrator to protect and preserve the estate. Ark. Stat. Ann. § 62-2208(d) (Supp. 1985); *Paget* v. *Brogan*, 67 Ark. 522, 55 S.W. 938 (1900). *Paget* also recognized that the court has no jurisdiction to award fees for services rendered to an individual beneficiary. *Id.* at 525, 55 S.W. at 939-40. Had appellee succeeded in defending the decedent's competency, he and his son would be the only beneficiaries of the transactions in question. The estate stood to gain nothing. It is difficult to understand how such defense was necessary to protect and preserve the assets of the estate.

In *In re Estate of Torian* v. *Smith*, 263 Ark. 304, 564 S.W.2d 521, *cert. denied*, 439 U.S. 883 (1978), the reduction of the attorney's fees was upheld where the bulk of the services was performed on behalf of the executor in his individual capacity and the action was found to be in derogation of the interests of the estate. *See also In re Jenkins Estate*, 245 Iowa 939, 65 N.W.2d 92 (1954). Likewise, because appellee's position was in derogation of the interests of the estate as a whole, the trial court abused its discretion in ordering the attorney's fees to be paid from the assets of the estate. We therefore reverse the order of the trial court ordering that appellee's attorney's fees be paid from the assets of the decedent's estate and remand for the court to enter an order consistent with this opinion.

Reversed and remanded.

CRACRAFT and JENNINGS, JJ., agree.

Edward Gene KAISER *v.* STATE of Arkansas

CA 87-281 746 S.W.2d 559[1]

Court of Appeals of Arkansas

En Banc

Opinion delivered March 23, 1988

[Rehearing denied April 27, 1988.[2]]

[1] [Reporter's Note: Judge Cracraft's dissenting opinion is printed at 753 S.W.2d 870.]

[2] Corbin, C.J., Cracraft and Cooper, JJ., would grant rehearing.

[redacted]

Burris & Berry, for appellant.

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

BETH GLADDEN COULSON, Judge. Appellant, Edward Gene Kaiser, appeals an order of the Circuit Court of Randolph County requiring forfeiture of $10,000 and a .44-caliber magnum pistol confiscated when law enforcement officers stopped appellant's

car in a drug-trafficking investigation. Appellant contends that the search and seizure was unlawful, and that the evidence was insufficient to connect his property to unlawful activity. We disagree and affirm the forfeiture order.

On June 5, 1986, Randolph County Sheriff Steve Shults met with officers of the Missouri Highway Patrol and the Arkansas State Police at Pocahontas. The Missouri officers had received information from a confidential informant that a car transporting up to 50 pounds of marijuana and up to $25,000 in cash would be passing through the area. Sheriff Shults was told to watch for a 1979 Lincoln Town Car, gray or silver, with a Missouri license, KLN 436. The Missouri officers considered the informant very reliable. They also warned that the driver of the car was expected to be carrying a .44-caliber pistol, and that he had been arrested previously for assaulting a law enforcement officer.

About twenty-four hours later, the sheriff received a radio call to his patrol car that the Lincoln Town Car had been spotted and was heading in his direction. The car passed by, and the sheriff pulled behind it. He did not see any traffic violations or erratic driving, but the car matched the description and bore the Missouri license, KLN 436. The sheriff pulled the car over, and other police units converged on the scene, including some officers with a dog trained to detect drugs. The sheriff asked the Town Car's driver, appellant, to step out of the car, frisked him, and found a film canister in appellant's pocket. On opening the canister, the sheriff found what he believed was marijuana. The dog was brought to the car, and after the dog indicated that drugs were present in the passenger compartment and the trunk, the officers searched the car. They found a partly-burned marijuana cigarette in the passenger compartment. In the trunk they found bits of vegetable matter that they believed was marijuana residue. At that point, appellant was arrested for misdemeanor possession of a controlled substance. The pistol, the $10,000 in cash, and a set of cotton scales also were found in the trunk. On June 19, 1986, appellant pleaded guilty in municipal court to the possession charge.

The forfeiture proceedings were held on March 11, 1987, and appellant testified that he had not been transporting drugs. He said that he was returning to Missouri from Odessa, Texas,

where he had gone to shop for a truck, and that the $10,000 was for the truck purchase. He produced statements from two accounts—a withdrawal on March 6, 1986, and a transfer on April 8, 1986—that he said accounted for $9,000 of the cash found in his trunk. Appellant testified that the scales were an antique he bought on his return trip, and he introduced a roadside vendor's receipt for the purchase. Appellant also testified that he had been given some marijuana shortly before he travelled to Texas, and that was the reason marijuana was found in his car when he was stopped. Appellant's testimony about the purpose of his trip was corroborated by his wife and by a man who was a passenger in the car when it was stopped.

The state's case was based on the testimony of the sheriff and two Arkansas State Police officers who were at the scene of the stop, the seized items, and appellant's plea of guilty to misdemeanor possession. At the end of the state's case, appellant moved to dismiss the forfeiture petition on three grounds: (1) no probable cause had existed to stop and search the car, (2) the officers should have obtained a search warrant or appellant's consent, and (3) the evidence was insufficient to require forfeiture under Ark. Code Ann. § 5-64-505 (1987) [Ark. Stat. Ann. § 82-2629 (Supp. 1985).] The circuit judge found that the officers had reasonable suspicion to stop appellant's car, and given the reactions of the drug-detecting dog and the totality of the circumstances, the officers had probable cause to search the car without a warrant. The trial court also found that appellant had failed to rebut the presumption that money and paraphernalia are forfeitable when found in close proximity to forfeitable controlled substances or paraphernalia. From the circuit judge's decision, this appeal arises.

Crucial to appellant's case is whether the initial stop of his car falls within the web of exceptions to the warrant and probable cause requirements of the fourth amendment stemming from *Terry* v. *Ohio*, 392 U.S. 1 (1968). Recently, in *Miller* v. *State*, 21 Ark. App. 10, 727 S.W.2d 393 (1987), this court reiterated the principle that the fourth amendment protection against "unreasonable searches and seizures" extends to persons driving down the streets. It has been held, however, as we observed in *Miller*, that consistent with *Terry, supra*, police may stop persons on the street or in their vehicles absent a warrant or

probable cause under limited circumstances. One of those limited circumstances involves the investigatory stop. *Miller, supra.* Appellant argues incorrectly that this case is controlled by *Little Rock Police Department* v. *One 1977 Lincoln Continental and Fred B. Sands*, 265 Ark. 512, 580 S.W.2d 451 (1979), a case involving the proper basis for probable cause, not involving the basis for an investigatory stop. A law enforcement officer may make an investigatory stop based on reasonable suspicion that a person is committing, or about to commit (1) a felony, or (2) a misdemeanor involving danger to the public or damage to property. A.R.Cr.P. 3.1, and *Miller, supra.* In determining the reasonableness of the officer's suspicion, A.R.Cr.P. Rule 2.1 provides the following definition:

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

The most common basis for an investigatory stop seems to be when, as in *Terry, supra*, and *Miller, supra*, a patrolling officer observes suspicious conduct. However, the United States Supreme Court has held that a stop may be based on information received through police channels. *United States* v. *Hensley*, 496 U.S. 221 (1985). In *Hensley*, the Court stated:

> In an era when criminal suspects are increasingly mobile and increasingly likely to flee across jurisdictional boundaries, this rule is a matter of common sense. . .

When an informant is the source of the information that results in one law enforcement agency requesting another agency to stop a suspect, the officers who originally dealt with the informant must have reasonable suspicion to stop the suspect. *Hensley, supra.* The question of the reasonableness of a stop based on information received from an informant was reached in *Adams* v. *Williams*, 407 U.S. 143 (1972). In that case, a police officer stopped a suspected drug dealer on the basis of an informant's tip and the stop was proper in part because the information given by the informant was verifiable by the officer's observations. In the instant case, the stop of appellant was based on information

gained from an informant. Appellant's vehicle appeared in the area within the predicted period of time, matched the description given, and bore the predicted license plates. Those details were sufficient indicia of the informant's reliability to create a reasonable suspicion, permitting an investigatory stop of appellant's vehicle.

Appellant also argues that the officers had twenty-four hours to obtain a warrant and should have done so. But, as we have held elsewhere, investigatory stops may be conducted without a warrant. *Miller, supra.* Furthermore, an investigatory stop has been upheld that occurred several days after one law enforcement agency sent a bulletin asking another agency to stop a suspect. *Hensley, supra.* We conclude that appellant's vehicle was subjected to a proper investigatory stop. We also emphasize the limited nature of such stops. This policy consideration appears in A.R.Cr.P. 3.1, which states in part that:

> An officer acting under this rule may require the person to remain . . . in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

In appellant's case the progression of events following the lawful stop led to probable cause for searching appellant's car and for his arrest. First, the sheriff was justified in asking appellant to step out of the car. Concerns for the safety of law enforcement officers permit an officer to require a suspect to step out of a vehicle when there are reports that the suspect is armed and dangerous. *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). Similar concerns permit a pat down, or frisk, of a suspect, *Terry, supra.* Although it may have been improper for the sheriff to have opened the film canister he took from appellant's pocket, that does not affect the search of the car, or the arrest. The exclusionary rule has been held not to apply when probable cause is developed from an independent source. *Segura* v. *United States*, 468 U.S. 796 (1984). Independent grounds existed for searching appellant's car under the totality of the circumstances—including the reaction of the trained dog and the information gained from the informant. When the search resulted in discovery of a partly

burned marijuana cigarette and apparent marijuana residue, the sheriff had probable cause to arrest appellant.

[redacted] Appellant's final point for reversal is that the evidence was insufficient to require forfeiture under Ark. Code Ann. § 5-64-505 (1987) [Ark. Stat. Ann. § 82-2629 (Supp. 1985)]. To prevail the state must demonstrate that the money was "in close proximity," that is, "very near" forfeitable controlled substances or forfeitable drug manufacturing or distributing paraphernalia. *Limon* v. *State*, 285 Ark. 166, 685 S.W.2d 515 (1985). The burden of proof is a preponderance of the evidence, and the trial judge's findings will not be set aside unless clearly erroneous. *Limon, supra.* Given the evidence, particularly the scales, apparent marijuana residue in the trunk, and marijuana in the passenger compartment, we affirm the order that appellant forfeit the money found in the trunk of the car. For the same reasons, we affirm the judgment of the trial court that the pistol, ammunition, and other items associated with the pistol were used in transportation of drugs and were forfeitable.

Affirmed.

CORBIN, C.J. and COOPER and CRACRAFT, JJ., dissent.

GEORGE K. CRACRAFT, Judge, dissenting. I agree with both points of Judge Cooper's dissenting opinion but wish to elaborate on the first. In this case, none of the officers testifying at the trial had any independent knowledge giving rise to a reasonable suspicion that the appellant was engaged in criminal activity at the time he was stopped. All were acting in total reliance on the assertion of the Missouri State Police that they had obtained knowledge from an informant giving rise to such a suspicion. The Arkansas officers never questioned that assertion and their actions were based entirely upon it.

I agree with the majority that the officers actually making a stop are not required to have independent knowledge giving rise to a personal suspicion but may rely on suspicions of a fellow officer or another agency which are based on personal knowledge. Where I depart from the majority is their assumption that there was established in this case an articulable reason for the Missouri officers' original suspicion. *United States* v. *Hensley*, 469 U.S. 221 (1985), does hold that one agency may rely on those

reasonable suspicions possessed by another agency, but it does not dispense with the requirement that there be a reasonable basis for the suspicion of the issuing agency. The Court makes that clear in the following language:

> Assuming the police make a *Terry* stop in objective reliance on a flyer or bulletin, we hold that the evidence uncovered in the course of the stop is admissible if the police who *issued* the flyer or bulletin possessed a reasonable suspicion justifying a stop, *United States* v. *Robinson, supra*, and if the stop that in fact occurred was not significantly more intrusive than would have been permitted the issuing department.

Hensley, 469 U.S. at 233 (emphasis in original). In *Hensley*, the agency issuing the flyer proved a basis for its suspicion by offering testimony from an officer who interviewed the informant. The Court stated:

> On the strength of the evidence, the district court concluded that the wealth of detail concerning the robbery revealed by the informant, coupled with her admission of a tangential participation in the robbery established that the informant was sufficiently reliable and credible "to arouse a reasonable suspicion of criminal activity by [Hensley] and to constitute the specific and articulable facts needed to underly a stop."

Hensley, 469 U.S. at 233—234 (citation omitted).

Here, however, we have no testimony of anyone purporting to have talked to the informant or any other information which would establish that the information obtained from the informant was sufficient to arouse the reasonable suspicion of criminal activity needed to underly a stop. There must be some evidence from some person as to precisely what was said by the informant. Only in that way can the trial court make the initial determination that there was the required specific, particularized, and articulable reasons for the suspicion on which the officers purported to act.

CORBIN, C.J., and COOPER, J., join in this dissent.

JAMES R. COOPER, Judge, dissenting. I dissent because I

believe the State failed to demonstrate that the information received by the police officers who stopped the appellant's vehicle provided them with a reasonable basis for suspecting that the appellant was committing a felony or a misdemeanor involving danger to the public or damage to property. The United States Supreme Court addressed the propriety of an investigatory stop based on information received through police channels in *United States* v. *Hensley*, 469 U.S. 221 (1985). *Hensley* involved a *Terry* investigatory stop made on less than probable cause by one police department, in reliance upon a "wanted flyer" issued by another police department, a situation analogous to that presented in the case at bar. The Supreme Court held that, where police make a *Terry* stop in objective reliance on a flyer or bulletin, "the evidence uncovered in the course of the stop is admissible if the police who *issued* the flyer or bulletin possessed a reasonable suspicion justifying a stop. . . ." 469 U.S. at 233 (emphasis in the original).

The majority holds that the investigatory stop in this case was proper because the informant's detailed description of the appellant's vehicle, as related to the Missouri state troopers, was verified by the observations of the Arkansas police who made the stop. It is important to remember, however, that those observations did not, of themselves, give the Arkansas policemen cause to suspect the appellant of criminal activity. I submit that, under the circumstances of this case and under the rule enunciated in *Hensley*, the observations of the Arkansas police have no bearing on the propriety of the investigatory stop: instead, the inquiry should focus on whether the police *issuing* the information, i.e., the Missouri police, possessed a reasonable suspicion justifying a stop at the time the information was provided to the Arkansas police. *See* 469 U.S. at 232.

On the facts of this case, the question of whether the Missouri police had a reasonable suspicion to justify an investigatory stop turns on the reliability of the informant's tip. The *Hensley* Court agreed with the trial court's determination, based on testimony supplied by the police officer who interviewed the informant in that case, that the "informant was sufficiently reliable and credible 'to arouse a reasonable suspicion of criminal activity by [Hensley] and to constitute the specific and articulable facts needed to underly a stop.' " 469 U.S. at 233-34. In the

case at bar, however, evidence of the informant's reliability and credibility is virtually absent. The Missouri police officer who interviewed the informant did not testify, and evidence of the informant's reliability is limited to the testimony of Sheriff Steve Shults of Randolph County, Arkansas, to the effect that he did not know the Missouri troopers, that he did not inquire as to their source of information, and that he did not pursue the matter further after being told that the Missouri troopers had a confidential informant they believed to be very reliable. This testimony is inadequate to support a judicial determination that the Missouri police could reasonably suspect that the appellant was engaged in criminal activity justifying an investigatory stop. I would reverse.

Further, even if there existed reasonable cause to stop the appellant, in the absence of reasonable cause to believe that the appellant was engaged in the manufacturing, distribution, delivery or purchase of marijuana, there is no statutory basis for the forfeiture of either the handgun or the money found in the appellant's trunk. Arkansas Statutes Annotated § 82-2629(a)(6) (Supp. 1985) [Ark. Code Ann. § 5-64-505(a)(6) (1987)] establishes a rebuttable presumption that money found in close proximity to forfeitable controlled substances or forfeitable drug distributing paraphernalia is forfeitable as money used or intended for use in facilitating a violation of the Controlled Substances Act. I submit that the trial court erred in finding the handgun to be drug distributing paraphernalia; although the appellant admittedly had a small quantity of marijuana in his possession, there was no other evidence to support a finding that the handgun was intended for use in "delivering, importing, or exporting any controlled substance . . ." Ark. Stat. Ann. § 82-2629(a)(2) (Supp. 1985).

Nor do I think that the proximity of the money to a minute quantity of marijuana should constitute grounds for forfeiture in the absence of evidence that the money was used or intended for use in a drug transaction. Excluding the informant's tip, of unknown reliability, the forfeiture in the case at bar is based only on the presence of a scattering of a grass-like substance in the appellant's trunk. Even assuming, *arguendo*, that the evidence supports a finding that this substance was marijuana, the mere possession of a small quantity of a controlled substance, insufficient to give rise to a presumption of intent to deliver, should not,

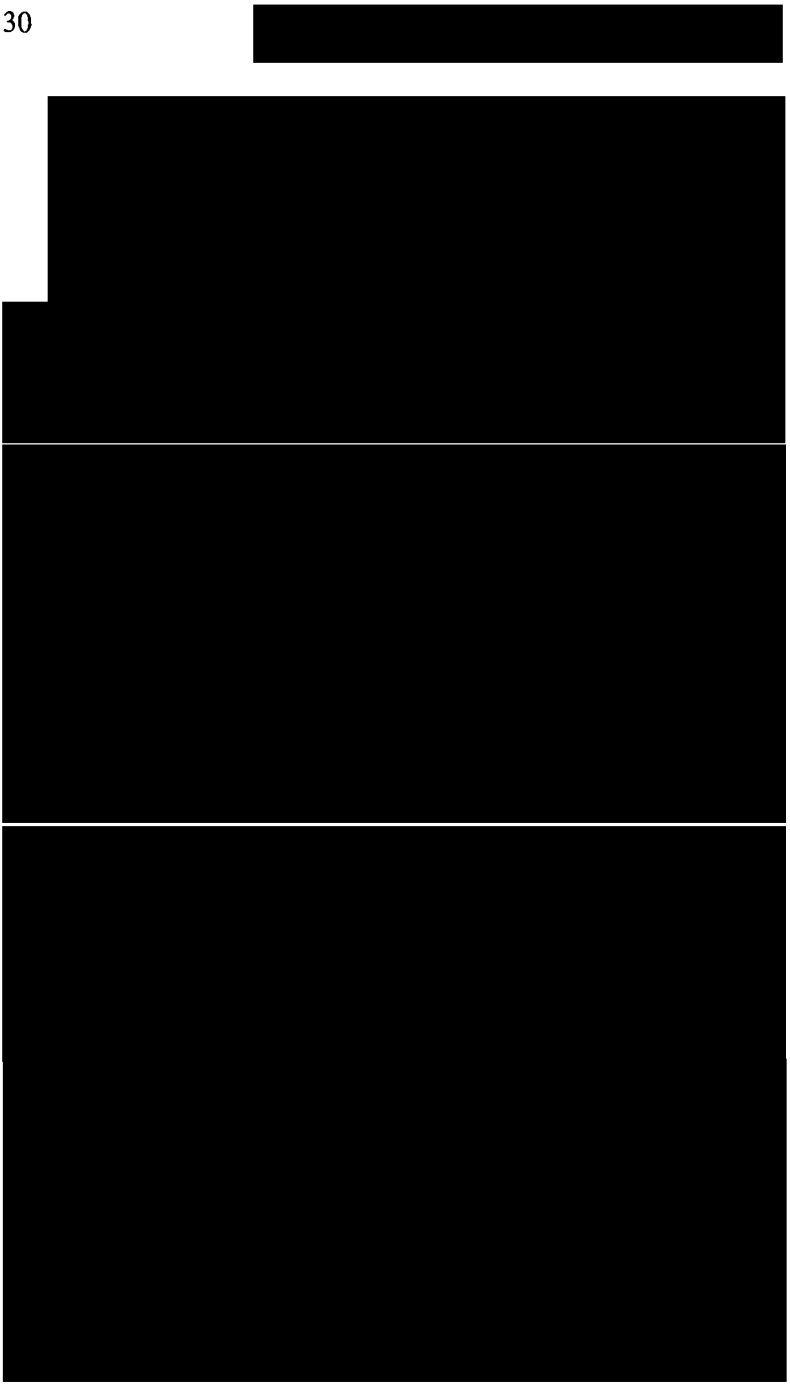
of itself, provide a basis for forfeiture under § 82-2629. Although mere possession is sufficient ground for forfeiture of controlled substances under the statute, other types of property, not intrinsically contraband, are generally forfeitable only after a finding that they were used or intended for use in the drug trade; i.e., the production or distribution of controlled substances. *See* Ark. Stat. Ann. § 82-2629(a)(2), (4), (6), (7). In the absence of a quantity of marijuana sufficient to support such a finding or other evidence of involvement in drug trafficking, neither the handgun nor the money should be forfeited. *See State* v. *One Certain Conveyance*, 288 N.W.2d 336 (Iowa 1980).

CORBIN, C.J., and CRACRAFT, J., join in this dissent.

William Lee WINTERS *v.* Brenda WINTERS, Guardian of the Estate of William Lee Winters

CA 87-267 747 S.W.2d 583

Court of Appeals of Arkansas
Division I
Opinion delivered March 30, 1988



Howard & Howard, by: *William B. Howard*, for appellant.

Randall W. Ishmael, for appellee.

GEORGE K. CRACRAFT, Judge. This is an appeal and cross-appeal from an order of the Craighead County Probate Court settling the final accounting of a guardian. We find no error and affirm.

Appellant, William Lee Winters, and appellee, Brenda Winters are husband and wife. They are also the parents of three children, who at all times pertinent to this action resided in the family residence in Jonesboro, Arkansas. In 1979, the appellant was accidentally injured by electrical shock, which affected his brain and memory to such an extent that he was unable to continue his practice of medicine. He then became entitled to receive approximately $6500.00 per month in accidental disability benefits, in addition to workers' compensation, social security, and income from substantial investments made during his years in the practice of medicine. The disability insurers insisted that payment be made only to a guardian of appellant's estate. On proper lay and medical proof, the probate court found appellant to be incompetent and appointed appellee his guardian.

For the years 1979-80 through 1982-83, the appellee filed annual accountings, copies of which were served on the appellant. In each of those years, the accountings were confirmed by the court without objection from appellant. From our examination of

these documents, it appears that the value of the estate was enhanced considerably during each of those years.

During January of 1984, marital problems arose causing a separation of the parties. Appellee and the children remained in the family residence and the appellant resided elsewhere. In May of 1984, the appellant petitioned the court for termination of the guardianship, restoration of his competency, and a final accounting by the guardian.

The court first held a hearing on the petition for restoration of competency at which a board-certified psychiatrist testified that he had first seen the appellant as early as 1982 and at that time found him to be fully competent to manage his property and care for himself. At that hearing, the appellant testified that for the "past two or three years" he had been in control of his estate even though he had a guardian. He stated that he became more and more involved with the management of his estate and that, as early as December of 1981, he assumed "the total function of the household and start[ed] directing funds at that point in time." He stated that from that time on he made the major financial decisions for "what is now still legally my present family." On this evidence, the probate court terminated the guardianship, restored appellant's competency, and directed the filing of a final accounting to which appellant filed a number of exceptions.[1] After a hearing, the probate court confirmed the account in its entirety, except as to a credit claimed by appellee for gifts to the minor children in the amount of $9000.00. Appellant appeals from the allowance of claims for credits of gifts to a church and other charities in the amount of $3,021.78, house repairs and remodeling in the amount of $12,250.00, cash for family expenses of $5,200.00, miscellaneous household and personal expenses of $5,075.37, and losses of $56,871.35 resulting from trading in securities.

At the hearing on the exceptions, the appellee agreed that the appellant had never been incapacitated, had conducted his own business affairs, and, in fact, had made all major financial

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[1] Although appellant filed exceptions to the earlier accounts at the same time, the probate court ruled that they had become final under Ark. Stat. Ann. §§ 57-642, 62-2808, and 62-2810 (Repl. 1971). This appeal involves only the exceptions to the final accounting.

decisions during the term of her guardianship. She stated that she had never taken charge of the assets and had done only what he directed her to do during that period. Appellee stated with regard to the gifts to the church and other charities that those gifts had been made primarily to the Southwest Church of Christ. She stated she obtained no court order for those donations but had discussed the gifts with the appellant before they were made and that he had approved, authorized, and directed them. The record reflects that in previous accounting years the court had approved her gifts to the church in larger sums, without objection by the appellant. Appellee testified that they had been making plans for the remodeling of the home for several years prior to their separation, and appellant had taken a part in the development of those plans and had authorized them. Appellee stated that, although a major portion of the repairs were undertaken after the separation, she discussed it with the appellant and he told her to continue with the remodeling because it was the home in which his family would reside.

Appellee stated with regard to the $5,200.00 listed as "cash for family expenses" that she had assumed she was to take care of the family under the guardianship as had always been done in the past. She stated that the same was true of the items claimed as miscellaneous household and personal expenses. These sums were expended as living expenses for herself and the children as well as the appellant. She stated that she continued to make those expenditures after the appellant moved out of the house, but only at his direction. She also testified that the transaction which resulted in the loss of $56,000.00 in mutual fund certificates in Forty-Four Wall Street Pension and Profit Sharing plans was actually conducted by the appellant and that she had nothing to do with that transaction.

Although the appellant denied that he had given any instructions to appellee with regard to expenditures or investments either before or after the separation, the trial court expressly found:

> Here there is a Guardian-Ward relationship, they are married; the ward is legally responsible for support and maintenance of his Guardian and their three minor children; . . . the Ward had the ability to manage his property

> and care for himself; that from 1982 on, *including the account period in question, the Ward did the major part of the financial decisions and solvency of his family*; the Ward opened and closed bank accounts, made deposits, wrote checks, transferred funds, conferred with his guardian on transactions and, in part, directed deposits, expenditures and trading. The Ward, in managing his property, forged his Guardian's name on more than one occasion.
>
> In short, as he testified, during the accounting period in question, Dr. Winters was conducting business affairs and taking care, to a considerable extent, of his estate, even though he technically had a Guardian. All consistent with Dr. Price's testimony and Dr. Winters' testimony that during this period Dr. Winters had the ability to manage his property and care for himself.

(Emphasis added). On these findings, the court overruled all exceptions except the $9000.00 gift to the children and otherwise approved and confirmed the final accounting. The court further found that all other exceptions to the final accounting had been answered to the court's satisfaction "or the Court finds that the ward is estopped by his actions from raising them at this time."

Although probate cases are reviewed *de novo* on the record, we will not reverse the finding of the probate judge unless clearly erroneous. Ark. R. Civ. P. 52(a). At all times pertinent to this appeal, Ark. Stat. Ann. § 57-624(b) (Repl. 1971) provided that the law of trusts should apply to the duties and liabilities of the guardian of an estate. We agree that a trustee is held to a high standard of conduct in acting for the beneficiary and, in any instance where his interest conflicts with that of his beneficiary, is prohibited from taking advantage of his position to gain any benefit for himself at the expense of his beneficiary. However, the rule to apply to the facts as the probate court found them is recited in 90 C.J.S. *Trusts* § 429 (1955) (cited with approval in *Hunt* v. *Hunt*, 202 Ark. 130, 149 S.W.2d 932 (1941)) as follows:

> A cestui que trust, or one claiming to be such, who is competent to act for himself may be estopped, or waive his right, to enforce a trust in his favor by words or acts on his part which, expressly or by implication, show an intention to abandon, or not to rely upon or assert, such trust, as by

> acquiescing, with knowledge of all the material facts, in the alleged trustee's acts in dealing with, or disposing of, the property in a manner inconsistent with the existence or continuation of a trust, or by consenting to such an application or investment of the trust funds or property as to show an intention to abandon his right thereto. [Footnotes omitted.]

With regard to the claimed loss on investments, the rule is stated in 90 C.J.S. *Trusts* § 332 (1955), as follows: "A competent beneficiary who with full knowledge of his rights consents to, or acquiesces in, an improper investment by the trustee, cannot complain thereof or recover from the trustee for loss or depreciation in value of that investment." The probate court here found that the appellant had not only acquiesced in, but directed and participated in those actions of his guardian of which he now complains. We cannot conclude that this finding is clearly against a preponderance of the evidence.

Nor do we find merit in appellant's argument that the 1979 order of the probate court declaring appellant incompetent should dictate an opposite result. It is well established that a determination of incompetency at one point in time is only prima facie evidence that such incompetency continued thereafter. The presumption may be rebutted by proof to the contrary, and a person may establish that the actions of that person at a subsequent time were those of a fully competent person capable of transacting business in his own behalf. *Lester* v. *Pilkington*, 225 Ark. 349, 282 S.W.2d 590 (1955); *Brown* v. *State*, 219 Ark. 647, 243 S.W.2d 603 (1951); *Dew* v. *Requa*, 218 Ark. 911, 239 S.W.2d 603 (1951); *Eagle* v. *Peterson*, 136 Ark. 72, 206 S.W.55 (1918).

The appellant finally contends that the court should not have allowed the appellee's attorney a fee for defending the action. Arkansas Statutes Annotated § 57-861 (Supp. 1985) provides that the guardian may employ legal counsel in connection with the discharge of his duties, that the court shall fix the attorney's fee which will be allowed as an item of expense in the administration, and that, if the court finds the guardian has failed to discharge his duties, it may deny him any compensation whatsoever or reduce the compensation which would otherwise be

allowed. The appellant argues that this section does not authorize allowance of fees in favor of a guardian required to defend his actions as guardian and his accounting but offers no citation of authority or sound argument why it should not be applicable in cases where, as here, a guardian successfully defends a lengthy accounting for sums in excess of $500,000.00. The trial court is permitted to take into consideration any failures on the part of the guardian in the allowance of fees, and there is no indication in this case that it did not. The record in this case consists of five volumes, with over eight hundred pages of typewritten material and at least fifty pages of multi-item exhibits. The probate court was in a position to assess the value of counsel's service to the estate and to properly determine the amount of fees to which counsel should be entitled. We find no error.

On cross-appeal, appellee argues that the probate court erred in not allowing her gift of $9000.00 to the parties' children. Appellee admitted that she had no authorization from the appellant to make that payment in the accounting period 1983-84, and the appellant specifically denied having given any. The probate court concluded that that payment was unauthorized and unratified. We cannot conclude that this finding is clearly against the preponderance of the evidence.

Affirmed.

CORBIN, C.J., and JENNINGS, J., agree.

David DICKERSON *v.* STATE of Arkansas

CA CR 87-163 747 S.W.2d 122

Court of Appeals of Arkansas
Division II
Opinion delivered March 30, 1988

[redacted]

Henry & Mooney, by: *John R. Henry*, for appellant.

Steve Clark, Att'y Gen., by: *C. Kent Jolliff*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant, David Dickerson, was convicted of a fourth DWI offense, sentenced to two years in the Arkansas Department of Correction, fined $1,000.00, and his driver's license was revoked. On appeal to this court, he contends the trial court erred in allowing the introduction into evidence of a certified copy of a prior DWI conviction from the Marked Tree Municipal Court.

The Omnibus DWI Act, Ark. Stat. Ann. § 75-2501 et seq., contains the provision that:

> [A]ny person who pleads guilty, nolo contendere, or is found guilty of violating Section 3 of this Act [operating a vehicle while intoxicated or while having a blood alcohol content of 0.10%] for the fourth or subsequent offense occurring within three (3) years of the first offense shall be guilty of a felony punishable by imprisonment for at least one (1) year but no more than six (6) years.

Ark. Stat. Ann. § 75-2504(b)(3) (Supp. 1985).

In order to prove that the present conviction was appellant's fourth DWI conviction within a three-year period, the state introduced certified copies of two convictions from the West Memphis Municipal Court; the first dated February 17, 1984, and the second dated January 24, 1986. In addition, the conviction from the Marked Tree Municipal Court, dated April 17, 1986, was introduced. The charge was stated, "D.W.I. 2nd

Offense" and, after a typewritten date of 4-17-86, contained the stamped statement: "Defendant arraigned—Defendant advised of pending charges and penalty. Defendant advised of right to legal counsel—Defendant knowingly waived right to an attorney." After both sentences, the handwritten initials "BD" appear. Following that, in typewritten form, are the statements: "4-17-86: Defendant entered a Plea of Guilty to D.W.I. 2nd and was screened by D.W.I. Counsellor"; "4-17-86: Defendant was assessed fine and cost of $760.00, was ordered to complete Alcohol Treatment Education Program, defendant's driving privelege [sic] suspended for one year, and defendant was sentenced to 30 days in jail to be suspended upon the condition that he attend one AA Meeting per week for one year and during good behavior." Both of these sentences were hand initialed "BD".

Appellant contends that, because he pleaded guilty to the charge in the Marked Tree Municipal Court without benefit of counsel, it is highly unlikely that anyone counseled him that one more conviction for DWI would cause him to be sent to prison, and, he argues, "basic fundamental fairness" requires that the record contain some affirmative indication that the court fully advised him as to the enhancement aspects of the Marked Tree conviction before it could be used for that purpose.

The state recognizes that waiver of counsel may not be presumed from a silent record, *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984), but cites *Williford* v. *State*, 284 Ark. 449, 683 S.W.2d 228 (1985), where the court stated:

> Sixth, it is argued that the proof of one of Williford's three prior convictions for DWI does not show that he waived the right to counsel. The record consists of a photocopy of a municipal court docket sheet, which recites that Williford "waived right to atty." It is insisted that the judge's purported signature is not legible. Many persons' signatures are not legible, but that alone does not invalidate them. Here the clerk of the court certified that the photocopy of the docket sheet was an accurate record of the proceedings. No effort was made to show that the judge did not actually sign the docket sheet.

284 Ark. at 452. *See also Miller* v. *State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986), where this court affirmed the use of an issued

ticket, containing the notation that appellant was convicted, to enhance a sentence.

However, the appellant cites *State* v. *Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984), where it was held that an uncounseled misdemeanor conviction may not be used under an enhancement statute to convert a subsequent misdemeanor into a felony punishable by a prison term, and appellant argues that this rule should be extended to cover the present situation. In other words, the appellant asks us to hold that without some indication in the record to show that the trial court fully advised the defendant in that regard, an uncounseled DWI conviction may not be allowed to enhance the sentence in any subsequent DWI conviction.

The appellant, however, does not cite any authority that requires the trial court to make the explanation suggested. Our Rules of Criminal Procedure do not make this requirement. Rule 24.4 deals with the advice the trial court must make to the defendant before accepting a guilty plea, but it does not mention the advice suggested by appellant. Except for the case of *State* v. *Brown, supra*, the only authority cited by appellant is a case note in 38 Ark. L. Rev. 688 (1985), discussing the *State* v. *Brown* case. That note cites *People* v. *Sirianni*, 89 A.D.2d 775, 453 N.Y.S.2d 485 (1982), and sets out the following quote from that case.

> Whether dealing with a plea of guilty or with a waiver of the right to counsel, we should not impose upon the court the unrealistic burden of informing a defendant of all possible future contingencies . . . . It is enough that the defendant be fully informed of the punishment for the crime he has already committed; it need not be anticipated that he will again disobey the law and commit additional crimes.

Also, in the case of *Southern* v. *State*, 284 Ark. 572, 683 S.W.2d 933 (1985), the Arkansas Supreme Court said:

> Prior convictions may not be considered for the purposes of the sentencing enhancement portions of the act unless the record shows the accused had counsel in the trials leading to the prior convictions *or that the right to counsel was waived* [emphasis supplied].

284 Ark. at 573.

[redacted]

The record in the instant case shows that the appellant waived the right to counsel at the time he pleaded guilty to the DWI charge in the Marked Tree Municipal Court. We do not think the record had to also show that the judge advised appellant as to the consequences of a subsequent conviction for the same charge before the Marked Tree conviction could be introduced into evidence in the subsequent case. We realize the conviction was marked "D.W.I. 2nd Offense," but we do not regard that as significant. It was, in fact, the appellant's third DWI conviction within three years and appellant knew how many times he had been convicted of that offense.

Affirmed.

COOPER and COULSON, JJ., agree.

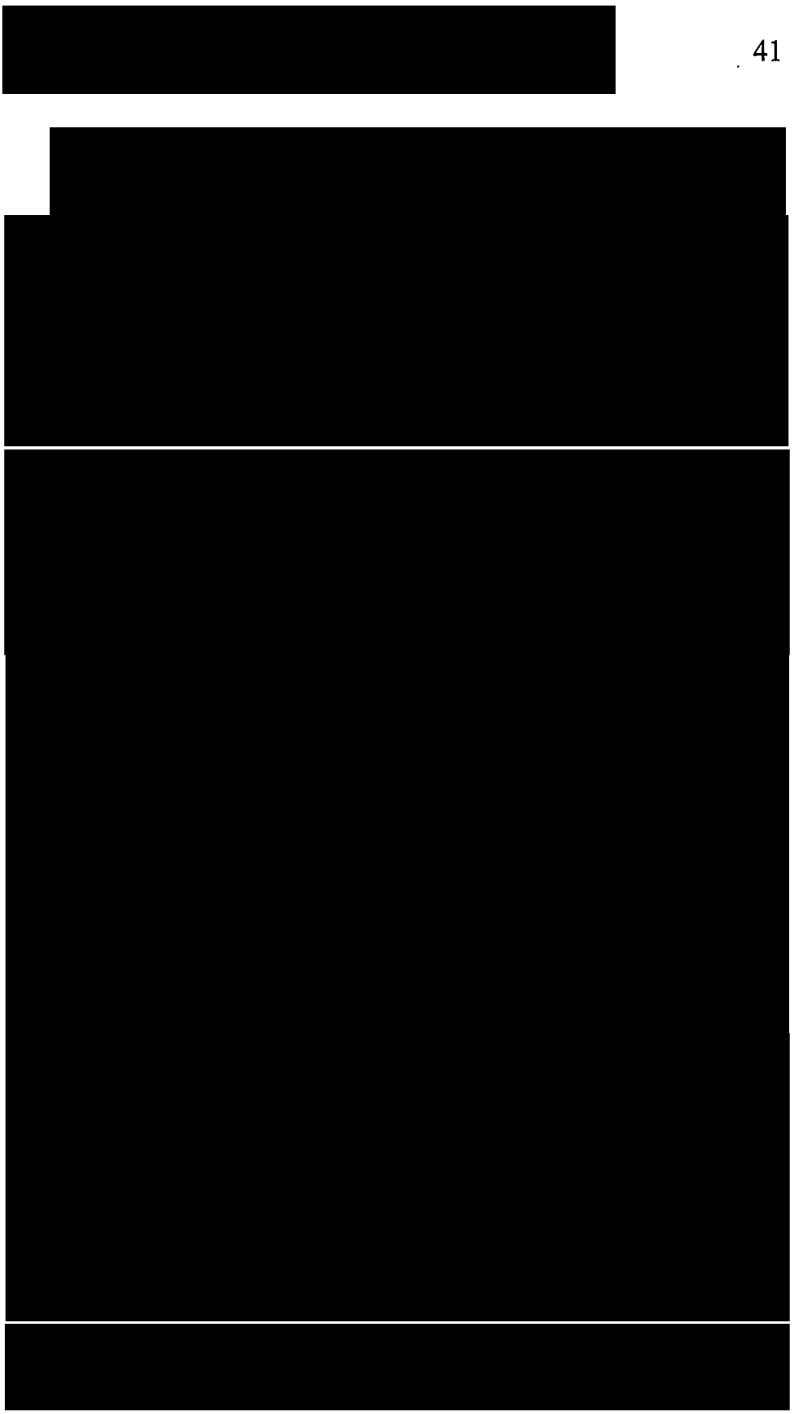
[redacted]

Lawrence L. AYRES, Employee *v.* HISTORIC PRESERVATION ASSOCIATES, Employer, and Liberty Mutual Insurance Company, Insurance Carrier

CA 87-350 747 S.W.2d 587

Court of Appeals of Arkansas
Division I
Opinion delivered March 30, 1988
[Rehearing denied April 27, 1988.]

[redacted]



Lewis D. Jones and *Kenneth S. Hixson*, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, for appellees.

BETH GLADDEN COULSON, Judge. Appellant, Lawrence L. Ayres, raises five points for reversal of a decision by the Arkansas Workers' Compensation Commission. We agree that the Commission erred in denying appellant compensation for a hernia he suffered while employed by appellee Historic Preservation Associates, and we accordingly reverse the order and remand the matter to the Commission for further proceedings not inconsistent with this opinion.

The record reveals that appellant is an archeologist who, at the time of his injury, was working for appellee Historic Preservation Associates, a private archeological contractor headquartered in Fayetteville, Arkansas. The firm performs archeological surveys on federal projects to ascertain the existence of sites of prehistoric importance. On Thursday, May 22, 1986, appellant was working at the Hunter Dawson State Historic Site in New Madrid, Missouri, where his team had been digging test pits and trenches for over a week. At about 2:00 p.m., appellant was assisting in the closing and cleaning of the site, pulling steel fence posts out of the ground, when he felt what he described in his testimony as a "sharp, severe pain" in the umbilical area. Suspecting a hernia, he immediately stopped working and reported the sensation to his site supervisor, Richard Kandare, who directed him not to engage in any more hard work. After a fifteen or twenty minute pause appellant began picking up small pieces of plastic and writing notes on the project—the only labor he performed for the rest of the afternoon. Kandare made a notation in his logbook that "Larry [Ayres] mentioned getting a hernia."

The following day, Friday, May 23, 1986, appellant and his team returned to Fayetteville in the company truck. During the seven and one-half hour trip, appellant reported the incident to his employer, Timothy C. Klinger, who subsequently instructed Kandare to limit appellant's work activity to very light duties entailing no lifting. Appellant informed Klinger that he would contact his own physician for treatment. Over the weekend, appellant and his wife worked, as usual, as "part-time parents" at a boys' home in Rogers and returned to Fayetteville on Sunday afternoon. Because Monday, May 26, 1986, was observed as Memorial Day, appellant waited until Tuesday to call his physician, Dr. Dale Clemons, for an appointment. Dr. Clemons saw him on the morning of Wednesday, May 28, 1986, and diagnosed his condition as an umbilical hernia.

Appellee Historic Preservation Associates denied appellant's claim for compensation, contending that he had failed to comply with the requirements of § 13(e) of the Arkansas Workers' Compensation Law, Ark. Code Ann. § 11-9-523(a) (1987) [Ark. Stat. Ann. § 81-1313(e) (Repl. 1976)]. That section provides that:

> (a) In all cases of claims for hernia, it shall be shown to the satisfaction of the commission:
>
> (1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;
>
> (2) That there was severe pain in the hernial region;
>
> (3) That the pain caused the employee to cease work immediately;
>
> (4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter;
>
> (5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.

Appellee's objections to appellant's claim were grounded specifically on subsections 2, 3, and 5. An administrative law judge found that appellant had sustained a compensable hernia, but, in

an opinion filed on July 2, 1987, the Workers' Compensation Commission reversed the law judge's decision on the basis that appellant had failed to satisfy the provisions of § 13(e). From that decision, this appeal arises.

It is the duty of this court to review the evidence in the light most favorable to the decision of the Workers' Compensation Commission and to uphold that decision if it is supported by substantial evidence. *Perry* v. *Leisure Lodges, Inc.*, 19 Ark. App. 143, 718 S.W.2d 114 (1986). Having fulfilled our responsibility to review the evidence in the light most favorable to the Commission's decision, we are nonetheless persuaded that the order in question was not supported by substantial evidence. The facts in this case are not in dispute. At issue, instead, are the legal effects of the facts, which are within our province as an appellate court.

In his first argument for reversal, appellant contends that the Commission failed to afford him a liberal construction of § 13(e) of the Workers' Compensation Law, misreading the technical requirements of the statute. Those requirements are designed to make an award of compensation for a hernia dependent on the manner in which the hernia occurred rather than on its mere existence and to separate congenital or pre-existing hernias from those resulting from trauma or effort at work. *King* v. *Puryear Wood Products*, 254 Ark. 452, 494 S.W.2d 123 (1973). It is, however, of primary importance to carry out the humane purpose of the Workers' Compensation Law. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). That the Commission failed to do so in the present case is evident in its application of the requirements of § 13(e). Because appellant's first point is simply a broader statement of arguments more fully developed in his second, third, and fourth points, we will address the question of the Commission's failure to afford appellant the benefit of a liberal construction of § 13(e) as we discuss the more specific issues raised.

Appellant's second point for reversal is that the Commission erred in failing to find that the physical distress suffered by appellant "following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence." Ark. Code Ann. § 11-9-523(a)(5) (1987), from which the quoted language was taken, is

prefaced by the requirement that the "physical distress" caused by a hernia "shall be shown to the satisfaction of the commission." This phrase, which applies to each of the five subsections of § 13(e), refers, of course, to the Commission's own standard of review, which imposes upon that body the duty of making its findings in accordance with a preponderance of the evidence. *See McCoy* v. *Preston Logging*, 21 Ark. App. 68, 728 S.W.2d 520 (1987).

In *Brim* v. *Mid-Ark. Truck Stop*, 6 Ark. App. 119, 639 S.W.2d 75 (1982), this court reversed a Commission decision denying benefits to a claimant who sustained a hernia on July 28, 1980, and did not see a physician until September 2, 1980—thirty-six days later. Explaining subsection (5), we said:

> The statute does not require a claimant to prove that he was actually attended by a physician within 72 hours after the injury. The statutory requirement is met if the evidence shows that within 72 hours after the injury the claimant's condition was such that he sought and needed the services of a physician. *Prince Poultry Co.* v. *Stevens*, 235 Ark. 1034, 363 S.W.2d 929 (1963); *Ammons* v. *Meuwly Machine Works*, 266 Ark. 851, 587 S.W.2d 590 (Ark. App. 1979).
>
> . . .
>
> In *Prince Poultry Co.* v. *Stevens, supra*, the Arkansas Supreme Court cited with approval the interpretation given the word "required" by the Supreme Court of Mississippi in *Lindsey* v. *Ingalls Shipbuilding Corporation*, 68 So.2d 872, which was as follows:
>
> To demand or exact as necessary or appropriate; hence to warrant; to need; call for.

6 Ark. App. at 121-122, 693 S.W.2d at 76. The only condition for satisfaction of the statutory requirement under *Brim*, then, was that a claimant "required" the services of a physician within seventy-two hours of the occurrence of the injury.

Subsequently, this court, in *Osceola Foods, Inc.* v. *Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985), affirmed the award of benefits to a claimant seeking compensation for a hernia. We

cited *Brim* and held specifically that "The diagnosis of a hernia would confirm the need of the services of a physician which is all that section requires." 14 Ark. App. at 103, 685 S.W.2d at 818.

In the present case, appellant immediately reported what he believed to be a hernia to his site supervisor, Richard Kandare, who noted the incident in his log book. On the next day, he reported the hernia to Timothy Klinger, the owner and operator of appellee Historic Preservation Associates, immediately upon his return to the home office. Due to the holiday weekend, appellant did not make arrangements to see his physician until Tuesday. The doctor was unable to examine appellant until the next day, Wednesday, but was able, upon examination, to diagnose appellant's condition as an umbilical hernia and informed appellant that surgery would be required. These facts not only establish by a preponderance of the evidence that appellant complied with the requirement of Ark. Code Ann. § 11-9-523(a)(5) (1987), but necessarily lead us to the conviction the Commission's conclusion in this regard is not supported by substantial evidence. The diagnosis confirmed the need of a physician's services. *See Osceola Foods, Inc.* v. *Andrew, supra.*

For his third point for reversal, appellant contends that the Commission erred in failing to find that he had ceased work immediately as required by Ark. Code Ann. § 11-9-523(a)(3) (1987). The difficulty for the Commission appears to have been the fact that appellant resumed work, although light duty, shortly after reporting the hernia to the site supervisor. The record shows, however, that appellant immediately stopped the heavy lifting that caused the pain and reported to Richard Kandare. After fifteen or twenty minutes, appellant returned to work, at the direction of his supervisor, but only to pick up paper and plastic and to make notes on the project.

This court dealt with the question of immediate cessation of work in *Osceola Foods, Inc.* v. *Andrew, supra*, where, in strikingly similar circumstances, the claimant had stopped working for fifteen or twenty minutes and then continued working for the rest of the day and until noon on the following day. We stated:

> Appellants argue that so short a pause in his work is not sufficient to meet the third statutory requirement of immediate cessation and that to hold otherwise would

> defeat the purpose of the requirement. We agree that due to possible uncertainty in determining which of several causes may have produced a hernia this requirement, among others, was made because a dramatic demonstration of the causal connection between the work strain and the hernia leaves little doubt as to cause and effect. However, we do not agree that such causal connection can be dramatically manifested only by an instantaneous and continual cessation of work. Nor should the causal connection be determined by mathematical formulas or measured by minutes or hours. It should be based on evidence which satisfies the finder of fact that the cessation from work became necessary soon enough after the trauma to establish that there was a causal connection under the circumstances of the case.

14 Ark. App. at 99-100; 685 S.W.2d at 816. Again, the record indicates compliance with the statutory requirement on appellant's part, and we are unable to see how the Commission's conclusion on this point could be said to have been supported by substantial evidence.

Appellant argues in his fourth point for reversal that the Commission erred in failing to find that he suffered "severe pain in the hernial region" as required by Ark. Code Ann. § 11-9-523(a)(2) (1987). In a statement made to appellee Liberty Mutual Insurance Company's adjuster, appellant described his pain as "sudden" rather than "severe," a word choice the Commission apparently deemed significant. We do not put semantics before substance; it is clear that the Commission's reading of appellant's description of his pain as something less than severe is not supported by substantial evidence.

Appellant's fifth, and final, point for reversal is argued in the alternative. Appellant asserts that the Commission erred in failing to find that appellee had a separate and affirmative duty to provide reasonable medical expenses. Because we find the Commission's decision is not supported by substantial evidence, it is unnecessary for us to address this issue.

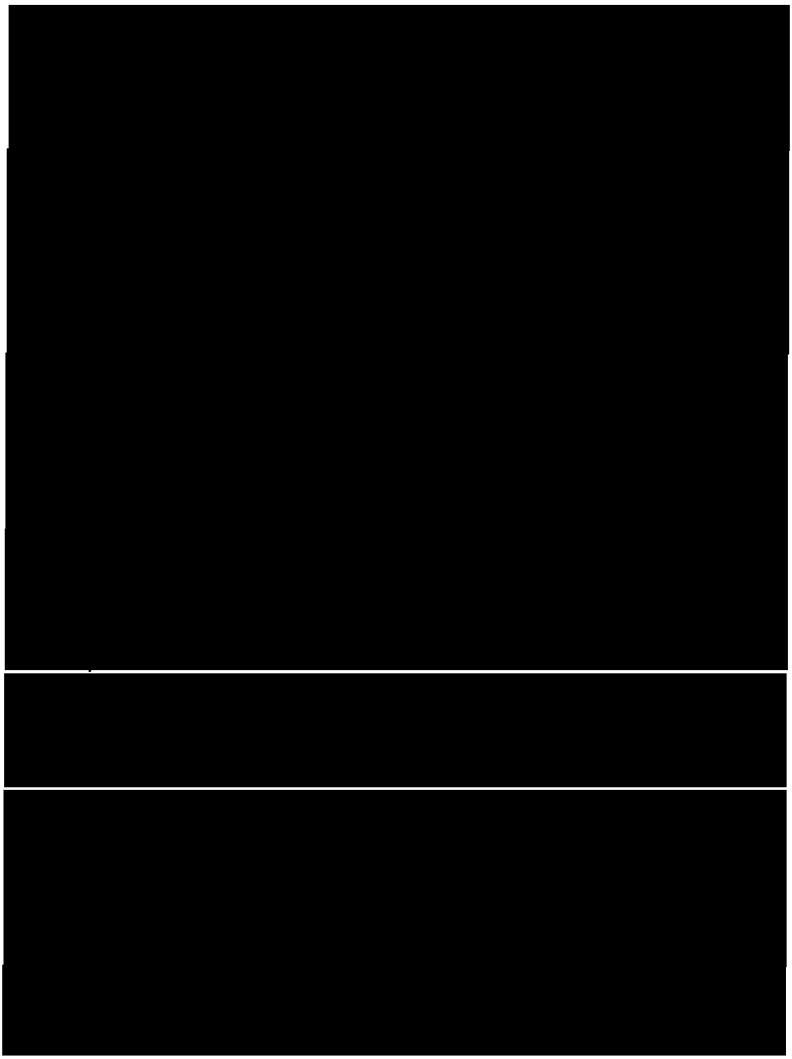
Reversed and remanded.

JENNINGS and COOPER, JJ., agree.

Angela Diane McCRAW *v.* STATE of Arkansas

CA CR 87-187 748 S.W.2d 36

Court of Appeals of Arkansas
Division I
Opinion delivered April 13, 1988
[Rehearing denied May 11, 1988.]



[redacted]

Anchor and Rosenzweig, by: *Jeff Rosenzweig*, for appellant.

Steve Clark, Att'y Gen., by: *R.B. Friedlander*, Solicitor General, for appellee.

DONALD L. CORBIN, Chief Judge. This case comes to us from Pulaski County Circuit Court, First Division. Appellant, Angela Diane McCraw, appeals her conviction of intimidating a witness, a violation of Arkansas Statutes Annotated § 41-2609 (Repl. 1977). We affirm.

On September 2, 1986, a felony information was filed charging appellant and James Eddy McCraw with intimidating a witness. The State alleged that on or about July 9, 1986, the appellant and James McCraw did unlawfully, feloniously, threaten LaDonna Peek and Lester Wood, persons they believed may be called as witnesses in a criminal proceeding against Rick McCraw and James McCraw, with the purpose of influencing their testimony and/or intimidating them to avoid legal process summoning them to testify. The appellant pled not guilty. A jury trial being waived, appellant was tried before the court on March 23, 1987. Appellant was found not guilty of intimidating Peek, who did not testify at trial and guilty of intimidating Woods, who did testify. Appellant was sentenced to ten (10) years with imposition of sentence suspended for all but ninety (90) days in the Pulaski County Jail, conditioned upon compliance with written rules of conduct. The written rules required that appellant "shall not be found drunk, drinking, frequenting Third Step Country, any other bar or tavern after eight o'clock in the evening (8:00 P.M.) for a period of ten years. And any other violation of the law will result in your immediate arrest and be sentenced to the penitentiary for ten (10) years."

For reversal, appellant argues the conviction should be

reversed because (1) it is based upon an inaccurate recollection of evidence by the trial court and (2) even an accurate recollection of the testimony is legally insufficient to sustain the judgment.

The Arkansas Supreme Court's decision in *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), requires that, where the sufficiency of the evidence is challenged on appeal of a criminal conviction, we must review the sufficiency of the evidence prior to consideration of trial errors. Upon this basis, we will address appellant's second point for reversal first.

Appellant argues that the evidence was insufficient to sustain the court's judgment of guilty of intimidating a witness in violation of Arkansas Statutes Annotated § 41-2609, which provides in pertinent part:

> (1) A person commits the offense of intimidating a witness if he threatens a witness or a person he believes may be called as a witness with the purpose of:
>
> (a) influencing the testimony of that person; or
>
> (b) inducing that person to avoid legal process summoning him to testify;

To satisfy this statute, the State had to prove that appellant threatened Wood. Arkansas Statutes Annotated § 41-2601(6) (Repl. 1977) defines threat as a menace, however communicated, to use physical force against any person; or harm substantially any person with respect to his property, health, safety, business, calling, career, financial condition, reputation, or personal relationship.

Viewed in the light most favorable to appellee, the evidence in the present case reveals that the State called one witness, Lester Wood, who was previously subpoenaed to testify in a criminal proceeding against Rick and James McCraw, brothers of appellant. Wood testified that he received a call from James McCraw threatening to kill him if he testified in the proceeding against the McCraw brothers. Wood then testified that a few days later, appellant came to his uncle's trailer where he was staying and asked the whereabouts of Peek. The testimony elicited from Wood by the prosecutor regarding the alleged intimidation by appellant is as follows:

Q. We're simply here to determine what, if anything, Angie did, so just stick with what she did. Angie said what?

A. That she was after LaDonna Peek, that she was gonna whip her butt.

Q. Those are her exact words or the best you remember?

A. The exact I can remember.

Q. And what did you say?

A. Well, then she said if I—she exactly repeated what James told me sooner, you know, earlier, that if I testified that they was gonna come after me.

Wood also testified that "in a way" he felt like something could have been done to him.

[redacted] Appellant agreed that she went to the trailer; however, she testified that her purpose there was to visit Connie, a girl living at the trailer with appellant's uncle. Appellant testified that as she was leaving, Wood told her that his sister wanted to see her the next day and she replied that she had to work and could not come over. Appellant's testimony revealed that this was the extent of her conversation with Wood. When the testimony is conflicting, as in this case, it is the trial court's responsibility to resolve conflicts in the evidence and to determine the credibility of the witnesses. *Smith* v. *State*, 9 Ark. App. 55, 652 S.W.2d 641 (1983). The trial judge had the right to accept such portions of the testimony as he believed to be true and reject those he believed to be false. *Wrather* v. *State*, 1 Ark. App. 155, 613 S.W.2d 601 (1981). The trial court in the case at bar apparently disbelieved appellant's explanation of the conversation she had with Wood.

[redacted] In our review of criminal convictions by a court sitting without a jury, we view the evidence and all permissive inferences to be drawn from it in the light most favorable to the State. *Holmes* v. *State*, 15 Ark. App. 163, 690 S.W.2d 738 (1985). The trial court's verdict will be affirmed if supported by substantial evidence. *Jones* v. *State*, 20 Ark. App. 1, 722 S.W.2d 871 (1987). In this case, there was substantial evidence to enable the court to find appellant guilty of intimidating Wood with a threat of physical force or substantial harm if he testified in the

criminal proceedings against her brothers.

Secondly, appellant argues the trial court based its conviction upon an inaccurate recollection of evidence. We disagree. Appellant bases this argument upon the premise that the court inaccurately recalled Wood's testimony regarding appellant's alleged statement "they was gonna come after me" as being "we'll be coming after you." The above statement was made by the court while discussing his rationale for denying a directed verdict. The evidence generally reveals that the court was well aware of the facts surrounding Wood's testimony, and that his recollection of the statement as "we'll be coming after you" was his general interpretation of the evidence presented and not the technical distinction upon which he based his decision. We cannot say the court's interpretation was clearly erroneous.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

G.W. CLARK *v.* FIRST NATIONAL BANK of Mena

CA 87-380 748 S.W.2d 42

Court of Appeals of Arkansas
Division I
Opinion delivered April 13, 1988

[redacted]

Jerry Ryan, for appellant.

Orvin W. Foster, for appellee.

GEORGE K. CRACRAFT, Judge. G. W. Clark appeals from an order of the circuit court granting a deficiency judgment against him under the Uniform Commercial Code. He contends that the trial court erred in not dismissing the complaint because he had not received reasonable notice from the secured party of the resale of repossessed collateral. We find no error and affirm.

In 1985, the appellant entered into security agreements with the appellee with regard to the unpaid balance due on two Kenworth trucks. He subsequently became in default on the notes secured by those agreements, and, on September 13, 1985, the appellee mailed to appellant's address a certified letter with return receipt requested, notifying him that, if the indebtedness had not been paid in full, within ten days from the date of that letter, the trucks would be sold to satisfy the debt. After the expiration of ten days, the appellee resold the trucks at a price which was less than the balance due on the secured notes and filed suit for a deficiency judgment in the amount of $23,398.58 against the appellant.

Appellee's vice president testified that the notice had been sent to the appellant by certified mail with return receipt

requested, and that a return receipt had been received signed by appellant's wife. Appellant testified that after the note was in default he was in communication with the bank with regard to a possible settlement under which someone else might assume the indebtedness. He stated that he was informed that the trucks had been repossessed, but that he heard nothing else from the appellee until after the resale had taken place. He testified that his wife had signed for the letter but that he did not read it because he had thought everything was settled.

Appellant does not contend that the notice mailed to his home was inadequate. He argues only that it was received by his wife and he never saw it. We do not agree that under these facts appellee failed to meet the requirements of Ark. Stat. Ann. § 85-9-504(3) (Supp. 1985). That section provides that disposition of the collateral may be made at public or private sale in a commercially reasonable manner, after reasonable notice of the time and place of the sale if public, or the time after which a private sale or any other intended disposition will be made, is *sent* by the secured party to the debtor.

Arkansas Statutes Annotated § 85-1-201(38) (Supp. 1985) provides as follows:

> "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

Section 85-1-201(26) (Repl. 1985) provides that one receives a notice when it either comes to his attention or is duly delivered at the place of business through which the contract was made or at any other place held out by him as a place for receipt of such communications. Here, the evidence establishes that the notice was sent by mailing it with proper postage affixed and was received by appellant's wife. There is no evidence that the place at which she received it was not the place at which such communications might have been received.

The appellant contends that reversal is mandated by our opinion in *Mooney* v. *Grant County Bank*, 18 Ark. App. 224, 711 S.W.2d 841 (1986). This case is clearly distinguishable. In *Mooney*, the letter was not "sent" to the debtor but addressed to the debtor's spouse, who was not a party to the security agreement. We held in *Mooney* that the requirements of § 85-1-201(38) were not complied with when the notice was sent to the wrong person. Here, the notice was sent to the appellant and received at his usual place of abode.

Affirmed.

CORBIN, C.J., and JENNINGS, J., agree.

Mike Anthony KIDD *v.* STATE of Arkansas

CA CR 87-140 748 S.W.2d 38

Court of Appeals of Arkansas
Division II
Opinion delivered April 13, 1988

[redacted]

[redacted]

Greene Law Offices, by: *Robert E. Adcock*, for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Mike Anthony Kidd was convicted of aggravated robbery and theft of property for which, being a habitual criminal, he was sentenced to a term of twenty years in the Arkansas Department of Correction. He contends that the trial court erred in refusing to grant a mistrial when the prosecuting attorney used peremptory challenges to exclude blacks from the jury and in allowing testimony to be introduced that appellant used an alias when asked by the police to identify himself. We find no error and affirm.

During jury selection, the prosecuting attorney excused all three black members of the panel by peremptory challenge. After the jury was selected, the appellant moved for a mistrial contending that the exclusion of all black jurors was the result of purposeful discrimination, in violation of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution as declared in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987). The trial court at first interpreted the motion as one contending that there had been a systematic exclusion of black jurors which would require testimony as to how jury pools had been selected over an extended period. When this was clarified to challenge the selection of this particular jury, the trial court conducted a hearing to determine the basis for the challenges and determined that they had been exercised for reasons unconnected with race. Appellant was then tried and convicted by a jury composed entirely of white persons. The correctness of the court's ruling on appellant's motion is the first issue presented by this appeal.

In *Batson*, the United States Supreme Court held that, although no one has a constitutional right to have a petit jury composed in whole or in part of persons of his own race, he does have a right to be tried by a jury whose members have been

selected on non-discriminatory criteria. It held that the equal protection guarantees of the United States Constitution protect a criminal defendant from trial by a jury from which members of his race have been excluded on account of their race. The Arkansas Supreme Court followed *Batson* in its decision in *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987).

The Court determined in *Batson* that it had placed a "crippling burden" on the appellant in *Swain* v. *Alabama*, 380 U.S. 202 (1965), and declared that a criminal defendant need only show facts giving rise to an inference of discriminatory purpose in the exercise of peremptory challenges removing black potential jurors in order to make a prima facie showing of unconstitutional discrimination. Once such a prima facie showing has been made to the satisfaction of the trial court, the burden shifts to the State to establish an adequate, neutral explanation for those exclusions. This explanation need not arise to the level which would justify a strike for cause and the challenge may be made "for any reason at all" so long as the reason relates to the case then being tried and the prosecutor's view concerning its outcome. 476 U.S. at 89. It is only discriminatory and constitutionally prohibited when the prosecutor's challenge is based "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at 89. The Court also made it clear that the prosecutor may not rebut the prima facie case by merely asserting that because of race this particular juror would not be impartial, or by merely denying that he had a discriminatory motive. He must "demonstrate that 'permissible *racially neutral* selection criteria and procedures have produced the monochromatic result.' " 476 U.S. at 94 (emphasis added) (citation omitted). The trial court then has the duty to determine whether the State has rebutted the defendant's prima facie case of purposeful discrimination. The Supreme Court stated that " 'a finding of intentional discrimination is a finding of fact' " and that, "[s]ince the trial court's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." 476 U.S. at 98 n. 21 (citation omitted). *See also United States* v. *Cloyd*, 819 F.2d 836 (8th Cir. 1987); *United States* v. *Love*, 815 F.2d 53 (8th Cir. 1987); *United States* v.

Woods, 812 F.2d 1483 (4th Cir. 1987); *United States* v. *Davis*, 809 F.2d 1194 (6th Cir. 1987); *United States* v. *Mathews*, 803 F.2d 325 (7th Cir. 1986).

Here, of the first twelve jurors called for qualification, two were excused for cause and seven were excused through peremptory challenges. The record is not clear as to how many of these challenges were exercised by the State, but it does reflect that the State peremptorily struck at least three jurors—one white woman and two black women. Nine more jurors were called and five were thereafter peremptorily excused. Of the two peremptory challenges utilized by the State, one was a black person and the other was white. Appellant apparently exercised a total of seven peremptory challenges.

As all three of the prospective black jurors on the panel had been stricken by the State, the court conducted a hearing, calling upon the prosecutor to explain the bases for those strikes and show that they were not motivated by discrimination against blacks as a group. The prosecuting attorney testified as follows:

> Beginning with, I believe, Tina Dickerson who was juror number 15 seated in the fourth chair. I noted on it at the time that I got through with my questioning of the entire panel, is that Ms. Dickerson sat with her arms folded, and when I asked specific questions in reference to fairness and prejudice, race, be it consideration or age, or any other thing, a number of jurors were nodding. She did not. She stood there like this (indicating), just straight ahead. Okay. And I believe some other questions that finally came down to, and this will be the same as, I believe, Ms. Henson. Is that both of them—.
>
> * * *
>
> It was juror number 39 whoever it was. Both of them at that point in time, they showed no reaction at all. No nodding, nothing. Just a straight ahead look on that question about fairness to both the State and the Defense. And without making a big, long, drawn-out speech and expression of the voir dire selection process, a lot of this is subjective. It had nothing to do with race. It's just that my gut feeling was that those people, for whatever reason, that

they didn't want to be a part and didn't speak up to it, or that they maybe did have an attitude. The State's entitled to a fair trial. And I struck them on that basis.

* * *

Now, we're on to Earline Irving. She flat out scowled at me and wouldn't respond to two questions with a yes or no. She had a—Her mouth, in fact, turned down. And she sat there the entire time just looking at me with that scowl. And that was my basis for juror number 5 Earline Irving, seated in the ninth chair.

* * *

And I did not, in this case nor I do on a systematic basis, strike because of race. As an example would be the fact that this is the second trial on this matter within a week, and last week there was a black that I could've struck but did not. To again show corroboration that this was based on my feelings towards the juror as an individual, not just because she's white or black. Further, I would note on this that I also struck juror number one, white female, by the name of Mary Price. My opinion of her was simply because her background is that she was too liberal, and if she did convict, she may not consider the full range of punishment.

[redacted] Here, the prosecutor averred that he had not peremptorily excused the potential jurors on the assumption that, because of their race, they could not fairly decide the issues. He stated that he had done so because of inattentiveness during *voir dire*, failure to respond to questions as to the ability to fairly determine the issue without regard to race or age of the defendant, and perceived hostility toward the prosecution—reasons strikingly similar to those upheld in *United States* v. *Mathews*, 803 F.2d 325 (7th Cir. 1986). The trial court's determination that the challenges were made for racially neutral reasons was a permissible finding under *Batson*. Giving due deference to the trial court's presence during *voir dire* and its superior position to judge the credibility of the prosecutor's statements, we cannot conclude that the findings are clearly erroneous.

[redacted] Appellant argues that we should expand the construc-

tion of this Fourteenth Amendment prohibition beyond the holding in *Batson* and declare that the prosecutor's reasons for the strikes must rise above the level of racial neutrality and constitute "good cause." We could not do so even if we were so inclined. This was not the holding in *Batson* nor the construction placed on it by those federal courts which have since applied this Fourteenth Amendment prohibition. Although a state court may interpret its own constitutional prohibitions more restrictively against the prosecution than its federal counterparts have under federal constitutional standards, it cannot impress a greater restriction as a matter of *federal constitutional law* when the Supreme Court of the United States has specifically refrained from doing so. *Oregon* v. *Haas*, 420 U.S. 714 (1975). *See also Fare* v. *Michael C.*, 439 U.S. 1311 (1978). Here, the appellant makes no argument under the Arkansas Constitution or other Arkansas law but relies solely on the United States Constitution, the Supreme Court's decision in *Batson*, and the Arkansas Supreme Court's decision in *Ward*, which merely applied *Batson*.

Appellant next argues that the trial court erred in permitting a police officer to testify that, upon apprehension, appellant identified himself using an alias. He contends that admission of this evidence violated Ark. R. Evid. 404(b) because it could only have been offered to show bad character and was designed to impeach him before his character was placed in issue. We disagree.

The evidence discloses that the appellant and three other persons entered a convenience store and committed acts which the appellant does not dispute constitute aggravated robbery. They took two young women, dragged them by their hair from the front of the store to the rear, locked them in a ladies' room, and warned them not to come out unless they wanted to be killed. After a high-speed chase the police apprehended and arrested the four robbers, one of whom was identified as this appellant. They were taken to the police station and asked to identify themselves. All four gave fictitious names, with appellant giving the name of a person who had died in an automobile accident several weeks before. The appellant argues that the trial court should not have permitted the testimony that he used an alias.

Rule 404(b) provides as follows:

> 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.

Here, the testimony about which appellant complains was obviously introduced as circumstantial evidence of guilt, much in the same way evidence of flight from the scene of a crime is,[1] and not to prove that the appellant was of bad character in order to show that he acted in conformity therewith on this occasion. The use of a false name after the commission of a crime is commonly accepted as being relevant on the issue of consciousness of guilt. *See e.g., United States* v. *Boyle*, 675 F.2d 430 (1st Cir. 1982). In this regard, E. Cleary, *McCormick on Evidence* § 271(c), at 803 (3rd ed. 1984) provides:

> "The wicked flee when no man pursueth." Many acts of a defendant after the crime seeking to escape the toils of the law are uncritically received as admissions by conduct, constituting circumstantial evidence of consciousness of guilt and hence of the fact of guilt itself. In this class are flight from the scene or from one's usual haunts after the crime, *assuming a false name*, shaving off a beard, resisting arrest, attempting to bribe arresting officers, forfeiture of bond by failure to appear, escapes or attempted escapes from confinement, and attempts of the accused to take his own life.

(Emphasis added) (footnotes omitted).

Furthermore, with specific reference to Rule 404(b), the same text states that one application of the rule that evidence of other bad acts is admissible for certain purposes "permits proof of criminal acts of the accused that constitute admissions by conduct designed to obstruct justice or avoid punishment for a crime." *Id.* § 190, at 562 (footnotes omitted). From our review of

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[1] *See, e.g., Mason* v. *State*, 285 Ark. 479, 688 S.W.2d 299 (1985); *Ashley* v. *State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987).

this record, we cannot conclude that the trial court erred in permitting evidence that the appellant gave a false name to the police upon his apprehension.

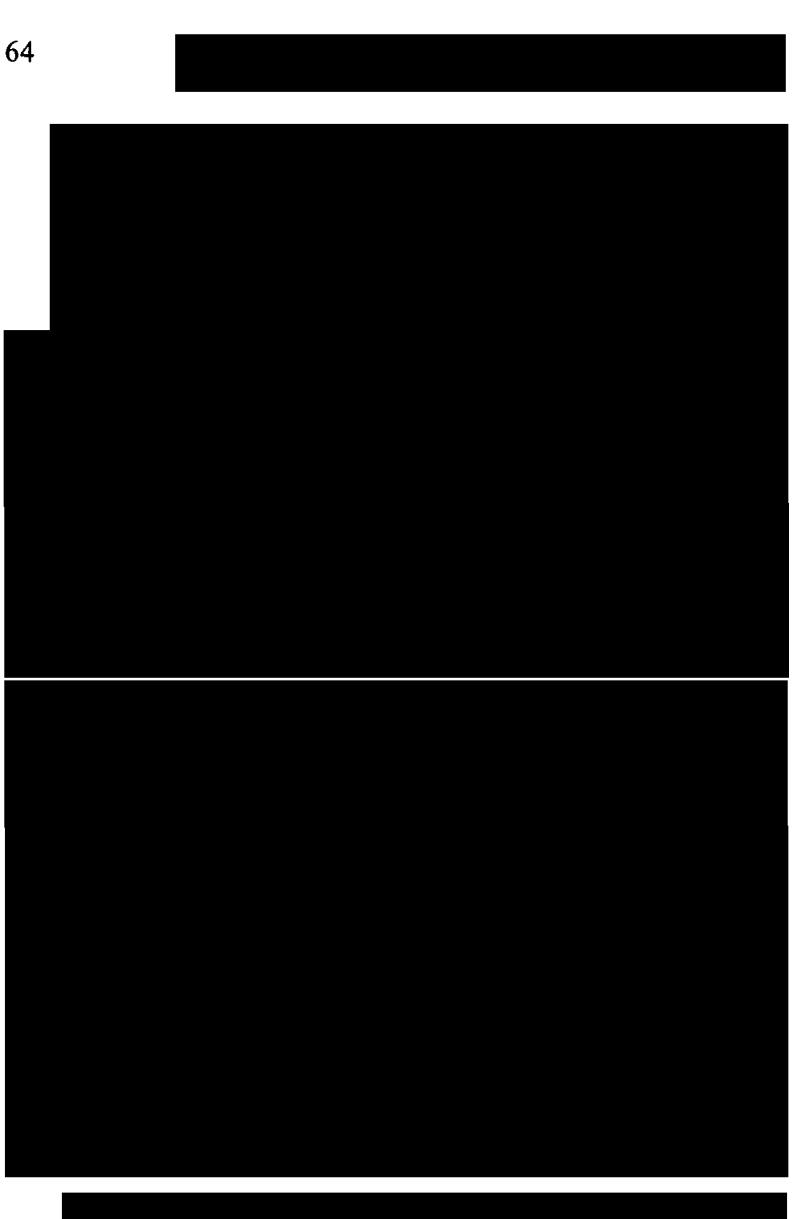
Affirmed.

CORBIN, C.J., and MAYFIELD, J., agree.

Don HYMAN *v.* FARMLAND FEED MILL

CA 87-388 748 S.W.2d 151

Court of Appeals of Arkansas
Division II
Opinion delivered April 20, 1988



Walker and Morris, by: *Eddie H. Walker, Jr.*, for appellant.

Bethell, Callaway, Robertson & Beasley, by: *John R. Beasley*, for appellee.

JAMES R. COOPER, Judge. In a prior proceeding, the appel-

lant in this workers' compensation case was determined to be suffering from a compensable occupational disease, bronchial asthma. On October 25, 1985, a further hearing was held to address the appellant's contention that he was entitled to permanent disability benefits, and, in an opinion dated September 9, 1986, the administrative law judge found the appellant to be permanently and totally disabled, and apportioned fifty percent of his disability to pre-existing asthma and ten percent to his cigarette smoking habit. These findings were adopted by the Workers' Compensation Commission in an opinion filed July 8, 1987. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in apportioning his disability because his asthma was not disabling prior to his employment with the appellee. On cross-appeal, the appellee contends that the Commission's finding of permanent and total disability is not supported by substantial evidence. We affirm.

The record shows that the appellant was employed by the appellee, Farmland Feed Mill, since the mid-1960's. His work brought him into contact with grain dust. There was evidence that the appellant had suffered from bronchial asthma prior to his employment with the appellee, and that he had smoked cigarettes for twenty-eight years before discontinuing the habit, on the advice of his physician, in March 1981. The appellant's treating physician, Dr. Stewart, opined that the appellant was 100% disabled for work in a very dusty environment such as the feed mill, 80% to 100% disabled for physically active work involving changes in temperature or humidity, and 30% to 40% disabled for extremely sedentary jobs. The appellant was also examined by Dr. Nichols, who attributed 50% of his impairment to pre-existing asthma, 40% to his work environment, and 10% to his cigarette smoking habit.

[redacted] The appellant argues that the Commission erred in apportioning his disability because his pre-existing asthma was not disabling prior to his employment with Farmland Feed Mill. The apportionment rule applicable to occupational diseases is set out in Ark. Stat. Ann. § 81-1314(a)(3) (Repl. 1977) [Ark. Code Ann. § 11-9-601(c) (1987)]:

> Where an occupational disease is aggravated by any other

> disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as a causative factor, bears to all the causes of such disability or death. . . .

We do not agree with the appellant's contention that apportionment was improper because his asthma was not disabling prior to his employment with the appellee. The noncompensable disease or infirmity need not be independently producing disability before and after the development of the occupational disease in order for it to be apportionable under Ark. Stat. Ann. § 81-1314(a)(3). *Jenkins* v. *Halstead Industries*, 17 Ark. App. 197, 706 S.W.2d 191 (1986). Nor do we think that any valid distinction may be drawn between *Jenkins* and the case at bar based on the fact that Jenkins's non-compensable breathing impairment was caused by cigarette smoking, and the appellant's was allegedly the result of a genetic predisposition. The appellant testified that he suffered from asthma prior to his employment with the appellee. We think that the record contains substantial evidence to support the Commission's finding that the appellant's occupational disease was contributed to by a non-compensable disease or infirmity, and hold that apportionment was proper.

We next address the appellee's contention, advanced on cross-appeal, that the Commission erred in finding the appellant to be permanently and totally disabled. The appellee argues that the appellant should not be considered permanently and totally disabled because his asthma attacks are episodic rather than continuous, and that the Commission erred in finding that the appellant fell into the odd lot category of workers. We disagree. "Total disability" does not require a finding that the employee is utterly helpless, and an employee who is injured to the extent that he can perform only services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist may be classified as totally disabled. *Johnson* v. *Research-Cottrell*, 15 Ark. App. 48, 689 S.W.2d 8 (1985). Moreover,

> [i]f the evidence of degree of obvious physical impairment, coupled with other facts such as claimant's mental capacity, education, training, or age, places claimant *prima facie* in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant.

Id. (quoting A. Larson, *Workmen's Compensation Law* § 57.61 (1983)).

The appellee contends that substantial evidence does not support the Commission's finding that the appellant falls into the odd-lot category of workers. In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings, and we must affirm if there is any substantial evidence to support them. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). Even if the Commission's findings appear to be against the preponderance of the evidence, we will affirm if reasonable minds could reach the conclusion arrived at by the Commission. *Barrett* v. *Arkansas Rehabilitation Services*, 10 Ark. App. 102, 661 S.W.2d 439 (1983). We will reverse the decision of the Commission only when we are convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Snow* v. *Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985). Although, as the appellee correctly states, there was evidence that the appellant regularly engaged in square-dancing, we do not agree that this fact alone should preclude a finding that he falls into the odd-lot category. The Commission may consider the claimant's age, education, and training in determining whether he falls into the odd-lot category, *see Johnson* v. *Research-Cottrell, supra*, and here there was evidence that the appellant was a fifty-one year old high school dropout, skilled only as a maintenance mechanic. Moreover, there was evidence that the appellant was required to take daily medication which made him drowsy and rendered it dangerous for him to operate vehicles or machinery. Given this evidence, we cannot say that reasonable minds could not conclude that the appellant fell within the odd-lot category, and we hold that the Commission's finding of permanent and total disability was supported by substantial evidence.

[redacted]

Affirmed.

COULSON and MAYFIELD, JJ., agree.

[redacted]

Billy Ray SHELTON and Sarah Shelton v. Hugh KELLER, Hugh Keller III and Patsy Keller

CA 87-378 748 S.W.2d 153

Court of Appeals of Arkansas
Division I
Opinion delivered April 20, 1988

[redacted]

Mitchell, Williams, Selig & Tucker, by: *Mike Wilson*, for appellants.

William Reed, for appellees.

JOHN E. JENNINGS, Judge. This was a suit for specific performance of a land sale contract, in which appellants agreed to buy from the appellees 295 acres of land in Lonoke County. After a hearing the trial court found that the contract was valid and enforceable and that the appellees breached it. The court declined to award specific performance, however, because the appellants failed to prove that the lands were "unique." We agree with the appellants' argument that, under the law, such proof is not required and that the court erred in refusing to grant specific performance.

It is generally true that in order to obtain a decree of specific performance of a contract for the sale of personal property, it must be shown that the property is "unique." Ark. Stat. Ann. § 85-2-716 (Add. 1961); 81 C.J.S. *Specific Performance* § 82 (1977). This rule has no application to real property because the law regards land as unique. *See Dickinson* v. *McKenzie*, 197 Ark. 746, 126 S.W.2d 95 (1939); D. Dobbs, *Handbook on the Law of Remedies*, § 12.10 (1973); 81 C.J.S. *Specific Performance* § 76 (1977).

Appellees correctly point out that chancery has some latitude of discretion in granting or withholding specific performance depending on the equities of the particular case. *See Langston* v. *Langston*, 3 Ark. App. 286, 625 S.W.2d 554 (1981). But in the case at bar the court did not decline to grant specific performance because of the equities. The court's judgment was based upon a failure of proof, when such proof is not required by the law.

The case is remanded to the chancellor with directions to enter a decree of specific performance.

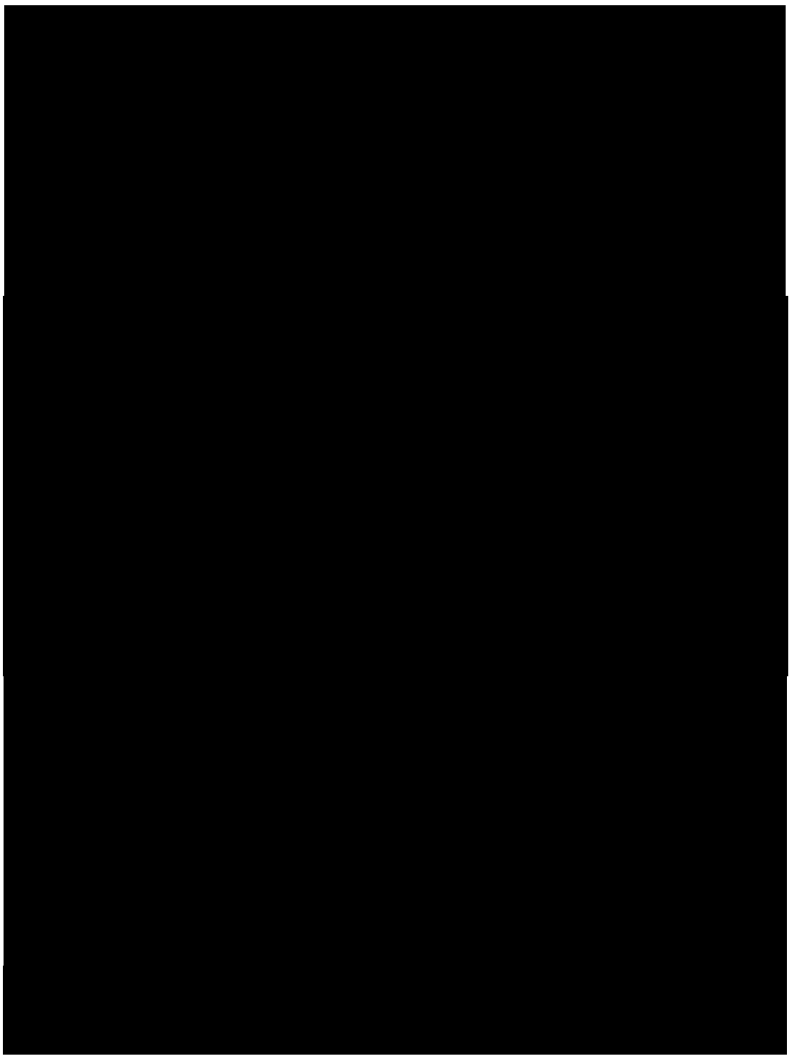
Reversed and remanded.

CORBIN, C.J., and CRACRAFT, J., agree.

Frank Frederick PENNINGTON *v.* STATE of Arkansas

CA CR 87-91 749 S.W.2d 680

Court of Appeals of Arkansas
En Banc
Opinion delivered April 27, 1988



[redacted]

Donald R. Huffman, Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *David B. Eberhard*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Frank Frederick Pennington appeals from his conviction of sexual abuse in the first degree for which, being a habitual criminal, he was sentenced to fifteen years in the Arkansas Department of Correction. He argues that the trial court erred in allowing two witnesses to testify concerning hearsay statements made by the prosecutrix. We reverse and remand for a new trial.

The victim in this case is appellant's six-year-old daughter, who had been removed from the care and custody of her natural parents two years before the crime was committed. Under proper court order, the parents were granted limited visitation with the child. After the child returned from a visit with her parents, her foster mother noticed that her vaginal area was inflamed and raw, and she questioned her about it. The child was hesitant to answer but finally stated that her younger brother had done it to her. When the foster mother expressed her disbelief that a boy so young could have done so, the child stated that her natural mother had abused her. The foster mother did not believe that accusation either because she felt the relationship between the child and her mother was such that the child would never have permitted her mother to do this to her. Despite the foster mother's doubts, the child's accusation of the mother was repeated to two doctors who examined her during the period immediately following the discovery. It was not until six days later that the victim, in response to inquiries of a school counselor, stated that the appellant had sexually abused her while she was visiting in the home. The victim never thereafter departed from the statement that her father was the one who abused her and so testified in detail at the trial.

The appellant does not argue that the jury could not believe the child's testimony in light of her prior inconsistent statements with regard to the assault. He argues only that the trial court erred in permitting the foster mother to testify that after the visit with the counselor the child told her that the appellant had abused her and in permitting the school counselor to repeat what the child told her with regard to the appellant's sexual abuse of her at their conference. He argues that the trial court erred in admitting that testimony as prior consistent statements under Ark. R. Evid. 801(d)(1)(ii), which provides in pertinent part that a prior statement by a witness is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . .

We agree that it was error to admit that testimony.

[redacted] The foster mother testified before the child was called as a witness. At the time these hearsay statements were admitted, it was not known whether they were consistent or inconsistent with any statement the child might make at the trial. Although the counselor testified after the child, her testimony was no more admissible under Rule 801(d)(1)(ii) than that of the foster mother. The theory underlying this rule is that evidence which counteracts a suggestion that the witness has changed his story in response to some threat, scheme, bribe, or other motive for fabrication, by showing that his story was the same prior to the external pressure being applied, is highly relevant in shedding light on the witness's credibility at trial. However, "[e]vidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force 'for the simple reason that mere repetition does not imply veracity.' " 4 J. Weinstein and M. Berger, *Weinstein's Evidence*, ¶ 801(d)(1)(B)[01], at 801-150—151 (1987) (quoting *United States* v. *McPartlin*, 595 F.2d 1321, 1351 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979)). *See also Brown* v. *State*, 262 Ark. 298, 956 S.W.2d 418 (1977).

The State relies on evidence brought out during appellant's cross-examination of the foster mother that she had repeatedly

told the child that she did not believe her, and that the child seemed to be hurt by this and was relieved after she made the statement to the counselor. It argues that appellant was, by this cross-examination, suggesting that the child was motivated into changing of her story by a desire to please the foster mother. Even if that be true, it was shown that the victim had the same motive for fabrication when she made the statement to the counselor as she had when she testified in this case. Under these circumstances, the rule could have no application:

> [I]f the attacker has charged bias, interest, corrupt influence, contrivance to falsify, or want of capacity to observe or remember, the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made *before* the source of the bias, interest, influence or incapacity originated.

E. Cleary, *McCormick on Evidence* § 49, at 118 (3d ed. 1984) (emphasis added). *See also Rock* v. *State*, 288 Ark. 566, 708 S.W.2d 78 (1986); *Brown* v. *State, supra.*

[redacted] The State additionally argues that the court was right for the wrong reason, contending that the testimony of both the foster mother and the counselor was admissible under Ark. R. Evid. 803(25)(A), which permits statements made by a child under ten years of age concerning sexual offenses to be admitted, provided the court finds, in a hearing conducted outside the presence of the jury, that the statement offered possesses a reasonable likelihood of trustworthiness using certain elicited criteria. We disagree. This rule could have no application here because the court was not asked to, and did not, hold a hearing outside the jury's presence to determine whether the evidence was reasonably trustworthy, the State did not give notice of its intent to offer the statement, and the jury was not instructed as to the manner in which it should determine the weight and credit to be given to the statement, all of which are required by that rule.

[redacted] Nor do we agree that the statement could have been properly admitted as an excited utterance under Ark. R. Evid. 803(2), which permits the admission of statements relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition. Here, the statement was not made until six days after the event

occurred. We agree with the State that a number of cases in sister states have permitted excited utterances in certain circumstances after an extended period of time up to and including a week. We further agree that the admissibility of such a declaration is not to be measured by any precise number of minutes, hours, or days, but requires that the declarant is still under the stress and excitement caused by the traumatic occurrence. *Tackett* v. *State*, 12 Ark. App. 57, 670 S.W.2d 824 (1984). However, there was no evidence here that the child was under the stress and emotional excitement caused by the assault upon her at the time she talked to the counselor.

The State finally argues that any error in admitting these extrajudicial statements attributable to the victim was harmless because the victim was subject to cross-examination about them. We disagree. Here, the minor victim's testimony was essential to conviction, as she was the only witness to the acts for which appellant was tried. The evidence corroborating her statement that she had been abused by her father was extremely slight. We cannot conclude that permitting the jury to hear inadmissible evidence bolstering the victim's testimony did not prejudicially affect a substantial right of the appellant. *See Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980).

Reversed and remanded.

CORBIN, C.J., dissents.

DONALD L. CORBIN, Chief Judge, dissenting. I agree with the majority that the statements were inadmissible as prior inconsistent statements. However, I do not believe that their admission prejudicially affected a substantial right of the appellant under the facts and circumstances of this case.

Underlying this dissent is my basic belief that prosecution for child abuse deserves a different approach and treatment legally than do the other criminal offenses. Reported cases of child abuse increased 223% nationally since 1976 and child abuse related deaths have increased 23% between 1985 and 1986. Many states have enacted legislation to protect children and provide for this differential treatment. Arkansas, to a limited extent, did so when it enacted Act 405 of 1985. The act added to the list of hearsay exceptions a statement made by a child under

10 years of age concerning an act or offense against the child involving sexual offenses if the court finds that the statement offered possesses a reasonable likelihood of trustworthiness. Arkansas Rules of Evidence Rule 803(25)(A) recognizes the need for allowing hearsay statements of children to be admitted under certain circumstances. It acknowledges the need to put all of the evidence before the jury and let them determine what credit the child's testimony is to be given.

Although the procedural requirements of 803(25)(A) were not met, cross-examination about the prior hearsay statement provided adequate safeguards of the defendant's rights in this particular case. The underlying reason for excluding hearsay is inability to confront the declarant, and such reasoning fails here. Had the judge, after a hearing conducted outside of the jury's presence, admitted the statements under 803(25)(A), it would have been extremely difficult for the majority to find that the trial judge abused his discretion.

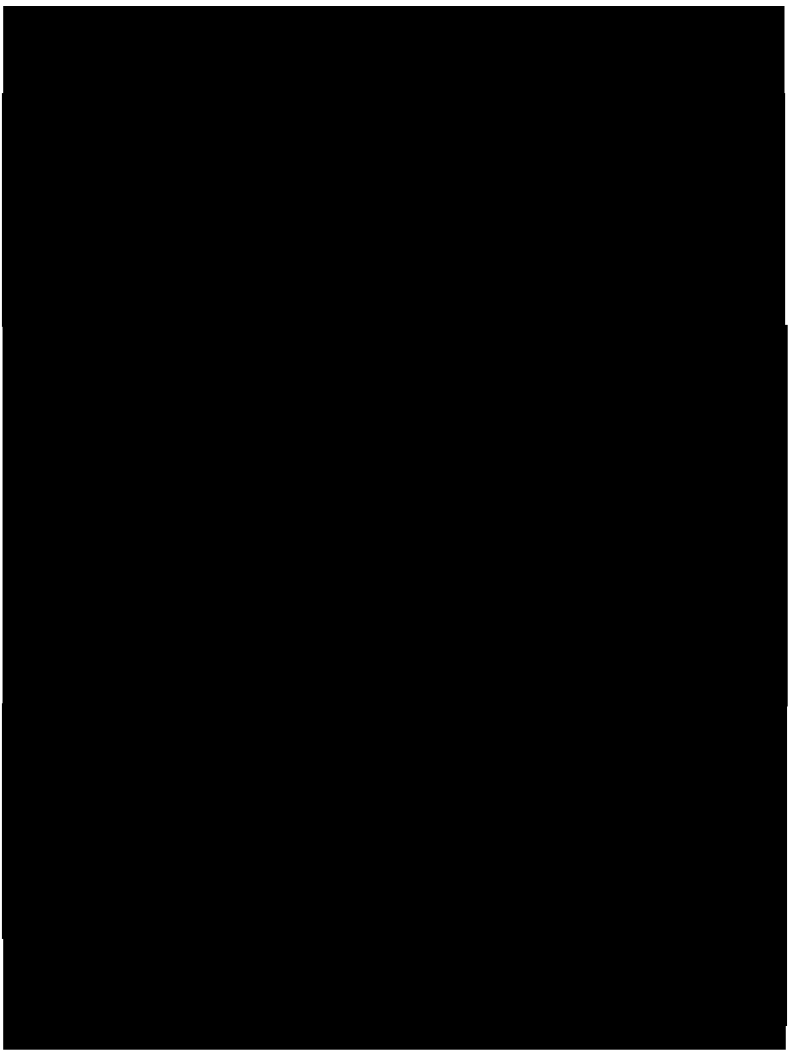
I fail to see how a substantial right of the appellant's was prejudiced by admission of the statement under one exception when the same statement was admissible, in the judge's discretion, under another exception.

For this reason I believe the statements made to the foster mother and counselor were properly admitted. In cases of sexual abuse of children, because of fear, embarrassment, punishment etc., the child may avoid naming the perpetrator or give inconsistent accounts. Because of the sensitive nature of these cases, the jury should be allowed to hear all evidence probative of the truth and be allowed to decide for themselves, as they did in this case, if the child's testimony is credible. The legislature mandated such special treatment by addition of the hearsay exception, and such treatment is appropriate here. We must strive to protect the interest of our children.

Humberto Ulloa JIMENEZ *v.* STATE of Arkansas

CA CR 87-56 749 S.W.2d 331

Court of Appeals of Arkansas
Division II
Opinion delivered April 27, 1988



[redacted]

Pruitt & Hodnett, by: *Roger T. Jeremiah*, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with aggravated robbery, a violation of Ark. Stat. Ann. § 41-2102 (Supp. 1985) [Ark. Code Ann. § 5-12-103 (1987)]. He was convicted of that charge after a jury trial, and was sentenced to fifteen years in the Arkansas Department of

Correction. From that conviction comes this appeal.

For reversal, the appellant contends that the trial court erred in refusing to dismiss the case because he was too intoxicated to form the purposeful intent necessary to commit the offense; that the testimony of the accomplice was not sufficiently corroborated; and that the trial court should have declared a mistrial when two witnesses made statements that implicated the appellant in other robberies. We find no error and affirm.

The record shows that on December 16, 1985, Rafael Gonzales entered a liquor store in Ft. Smith, Arkansas. He asked one of the owners, Donna Deem, for money. Ms. Deem stated that he had a gun and that, after she told him she did not have any money, Gonzales followed her as she started towards the door of the office. Gonzales then picked up a pint bottle of Calvert Extra Whiskey. Ms. Deem then heard her husband open the desk drawer in the office and, assuming that he was getting his gun, she dropped to the floor. Mr. Deems then began firing at Gonzales and Gonzales fled out the door. Gonzales later died of the gunshot wounds he received. The appellant, Humberto Jiminez, was arrested a few minutes later in the vicinity of the liquor store in an obviously inebriated state. The appellant had blood stains on his clothes, and was in possession of a pint bottle of whiskey resembling that which Gonzales had carried out of the store. He was later charged with aggravated robbery.

At a pre-trial hearing the appellant put on testimony concerning his alleged intoxication on the night of the robbery. Harold Haney, employed by the Ft. Smith police department, testified that he gave a breathalyzer test to the appellant on the night of the robbery. The appellant registered a blood alcohol content of .245. Haney stated further that the appellant was able to follow his directions. John Dugan, a drug and alcohol counselor with the Harbor House, stated that, in his opinion, if a person with a blood alcohol content of .245 was able to function in an apparently normal manner, then that person was probably in a blackout and unaware of his actions. At the close of this testimony the trial court denied the appellant's motion to dismiss based on the fact that the appellant was too inebriated to form the requisite purposeful mental state. The appellant later put on the same evidence before the jury.

The Arkansas Supreme Court has recently held that voluntary intoxication is no longer a defense to criminal prosecutions. *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986). The State agrees that this defense was available to the appellant because *White* had not been decided at the time. We need not decide whether this defense was available because the appellant has the burden to establish the defense by the preponderance of the evidence. *Coleman* v. *State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984), and, on this record, we cannot say that the appellant established, as a matter of law, that he was so intoxicated as to be incapable of forming the requisite mental state to commit aggravated robbery. The appellant's girlfriend, Teresa Pedroso, testified that the appellant, Gonzales, and Lazro Martinez were present in her home earlier on the day of the robbery. She stated further that she overheard them planning the robbery and that at the time they had not been drinking. She did see them later in the evening and at that time she noticed that they had been drinking and that they were drunk. Martinez testified that after Gonzales had been shot, the appellant refused to leave in the car with Martinez because he did not want to leave his friend. According to the testimony, at some point the appellant took the bottle of whiskey from Gonzales and attempted to leave the scene of the crime. All of these actions, along with the testimony of the police officers that the appellant was cooperative and able to follow directions, indicate that the appellant was capable of purposeful action, and we think the issue was properly presented to the jury.

At the close of the State's case, the appellant requested a dismissal based on the assertion that the testimony of the accomplice, Lazro Martinez, was not sufficiently corroborated. We disagree.

Arkansas Statutes Annotated § 43-2116 (Repl. 1977), specifically prohibits the conviction of an accused on the testimony of an accomplice unless that testimony is corroborated by other evidence tending to connect the defendant with the offense committed. The corroborating evidence must be sufficient to establish the commission of the offense and to connect the accused with it. *Redmon* v. *State*, 282 Ark. 353, 668 S.W.2d 541 (1984). The connecting evidence may be circumstantial but it must be substantial. *Olles* v. *State*, 260 Ark. 571, 542 S.W.2d 755 (1976).

There is no dispute that the crime was committed. The appellant was arrested within minutes of the crime, near the crime scene, with a bottle of whiskey that Gonzales took from the liquor store and with blood on the bottle and on his jacket. Ms. Pedroso testified that she overheard the appellant planning the crime with Gonzales and Martinez. Furthermore, Mike Hicks, an off-duty dispatcher with the Ft. Smith police department, testified that he saw the appellant running from the liquor store, and that he chased the appellant until he caught up with him. Flight by an accused may constitute a corroborating circumstance. *Johnson* v. *State*, 289 Ark. 589, 715 S.W.2d 441 (1986). We find that this evidence is sufficient to connect the appellant with the commission of the crime.

The appellant's last argument concerns unsolicited comments made by prosecution witnesses that tended to implicate the appellant in other robberies. It is the appellant's contention that the trial court erred in refusing to declare a mistrial when the comments were made.

When Lazro Martinez was testifying about the planning of the robbery, he stated that he had "always been the one to drive the car" when the three of them were out running around. The appellant objected on the basis that the statement indicated that the three had been involved in other crimes. After the trial court denied the appellant's motion for a mistrial, the appellant requested and received an admonition to the jury that they should disregard any "illusions (sic) to him always driving the car."

The second statement complained of in the brief occurred when Ms. Pedroso was testifying. She indicated that she had gone to see the appellant while he was in jail, and that the appellant had told her that "they had committed theft five times." Again the trial court denied the motion for a mistrial and admonished the jury at the appellant's request.

Mistrial is an extreme remedy and is only proper if the action on which it is predicated has infected the trial with so much prejudice to the defendant that justice cannot be served by a continuation of the trial. *Lasley* v. *State*, 274 Ark. 352, 625 S.W.2d 466 (1981). Because the trial judge is in a superior position to assess the possibility of prejudice, he is vested with great discretion in acting on motions for mistrial, and we will

reverse only where that discretion is manifestly abused. *Avery* v. *State*, 15 Ark. App. 134, 690 S.W.2d 732 (1985). With respect to nonresponsive answers, the rule is that:

> [W]hen a witness, in response to a proper question gives a nonresponsive answer stating matter that is incompetent and inadmissible as evidence, the trial court, on motion, should strike out the answer or so much of it as is improper and direct the jury to disregard it as evidence in the case.

Queary v. *State*, 259 Ark. 123, 124, 531 S.W.2d 485, 486 (1976). In the case at bar, the witnesses' nonresponsive answers did no more than raise the possibility that the appellant might have participated in criminal activity. We think that any prejudice caused by the comments was cured by the admonitions to the jury. *See Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987).

Affirmed.

COULSON and MAYFIELD, JJ., agree.

GENERATION PRODUCTS COMPANY, Inc. *v.* Nancy VAN HOYE

CA 87-414 748 S.W.2d 353

Court of Appeals of Arkansas
Division II
Opinion delivered April 27, 1988

[redacted]

Raymond Harrill, for appellant.

No brief filed.

MELVIN MAYFIELD, Judge. This is an appeal from a chancery court order dismissing the complaint filed by the appellants. The complaint alleged that appellants and appellee entered into a written lease agreement under which the appellee leased to the appellants the front boutique of the premises at 1917 North Grant Street, Little Rock, Arkansas. The lease provided that during its term the appellants would have the right of first refusal if the back boutique of the premises should become available.

The complaint further alleged that during the term of the lease the back boutique became vacant but that appellee let that portion of the building to other parties without notifying appellants; that when appellants discovered the back boutique had been relet, they demanded that if the premises again became vacant during the term of the lease, the appellee make the premises available to appellants; that the premises did again become vacant during the term of the lease but the appellee again breached the lease by letting the property to another party without notice to appellants. The complaint alleged that due to business expansion, and appellee's breach of the lease, the appellants were forced to move to another location to meet business needs; that they sustained damages as a result of the breach of the lease; and that they should have judgment for those damaged sustained.

The appellee answered and raised the defenses of laches, acquiescence, waiver, and estoppel based upon the allegation that appellants had known of the vacancies but had failed to contact the appellee about leasing the back boutique. On the same day,

the appellee filed a motion to transfer to chancery because of the equitable defenses raised. That motion was subsequently granted over the appellants' objection.

On the day set for trial, the chancellor talked in chambers to counsel for both parties. After reviewing the pleadings, the court said it found from the statements of counsel that the appellants' cause of action was barred by acquiescence, waiver, and estoppel. The court then dismissed the complaint on its own motion.

On appeal to this court, the appellants first argue that the chancellor was in error procedurally. However, in *Millsaps* v. *Nixon*, 102 Ark. 435, 144 S.W. 915 (1912), the court, on its own motion, while the opening statement was being made by defense counsel, stopped the proceedings and directed a verdict for the defendant on the basis that the opening statements of counsel showed that the plaintiff did not have a cause of action. This procedure is generally conceded to be within the power of the trial court. *See* 75 Am. Jur. 2d *Trial* § 505 (1974). Furthermore, in *Griffin* v. *Monsanto Co.*, 240 Ark. 420, 400 S.W.2d 492 (1966), the Arkansas Supreme Court treated the trial court's ruling on a motion to dismiss as a ruling on a motion for summary judgment. But in either procedure, no summary disposition of the litigation may be made if there are issues of fact to be resolved. *Griffin* and Am. Jur. 2d, *supra. See also* Ark. R. Civ. P. 56.

The first reason given in the trial court's judgment for dismissing the appellants' complaint was that their cause of action was barred by acquiescence. In 3 Pomeroy *Equity Jurisprudence* (5th ed.) § 817 (1941), it is said that acquiescence is simply a bar to equitable relief and leaves one to his legal action alone, and in order for this to occur "the acquiescence must be with knowledge . . . must be voluntary . . . and it must last for an unreasonable length of time."

The second basis stated for the chancellor's action was that the appellants' cause of action was barred by waiver. This involves an intentional surrender of a right.

> Waiver is the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits. It may occur when one, with full knowledge of the material

> facts, does something which is inconsistent with the right or his intention to rely upon it. . . . [C]onduct amounting to waiver should be carefully inspected and all evidence upon the subject impartially scrutinized. [Citations omitted.]

Ray Dodge, Inc. v. *Moore*, 251 Ark. 1036, 1039, 479 S.W.2d 518 (1972).

The final ground stated by the judgment as a reason for barring appellants' claim was estoppel. The rule with respect to estoppel has been stated as follows:

> A party who by his acts, declarations or admissions, or by his failure to act or speak under circumstances where he should do so, either with design or willful disregard of others, induces or misleads another to conduct or dealings which he would not have entered upon, but for such misleading influence, will not be allowed, because of estoppel, afterward to assert his right to the detriment of the person so misled. . . . A party claiming estoppel must prove that he has relied in good faith on the conduct of the party against whom the estoppel is asserted to his detriment. [Citations omitted.]

Bethell v. *Bethell*, 268 Ark. 409, 424, 597 S.W.2d 576 (1980).

In his statements to the chancellor, counsel for the appellants did not admit or concede that the elements necessary for acquiescence, waiver, or estoppel existed. Nor can we find from his statements any indication that the existence of these issues would not depend upon the evidence presented. We, therefore, find that the chancellor erred in the summary dismissal of appellants' complaint.

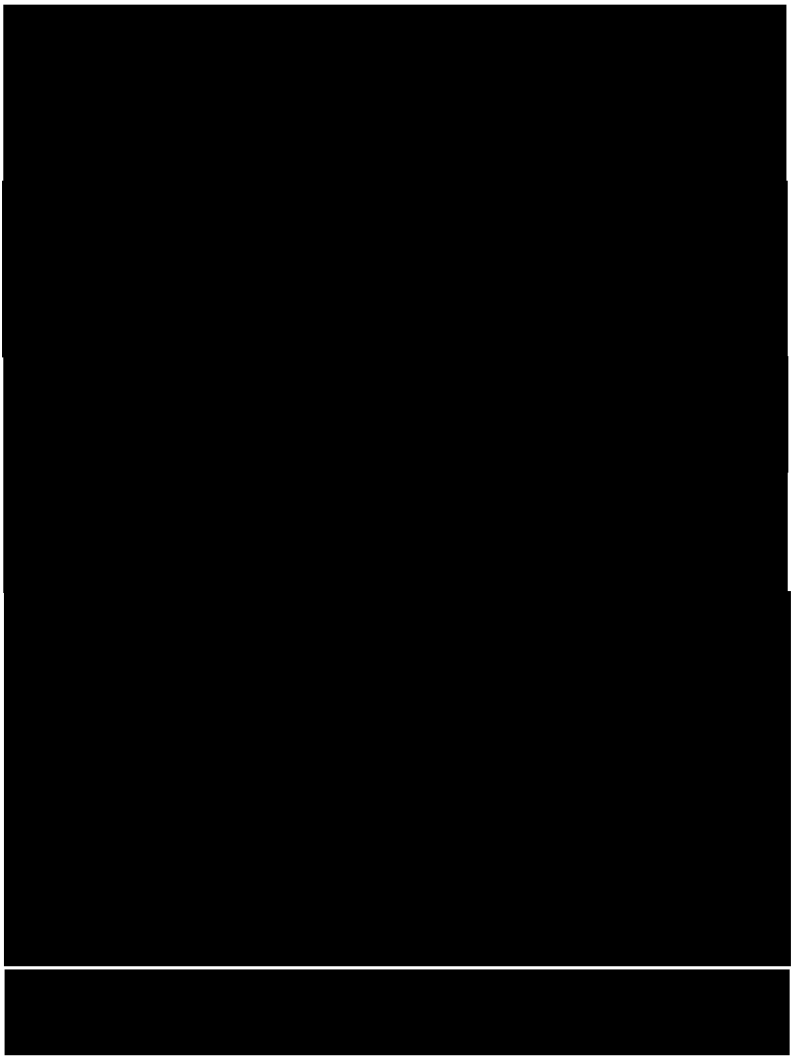
Reversed and remanded.

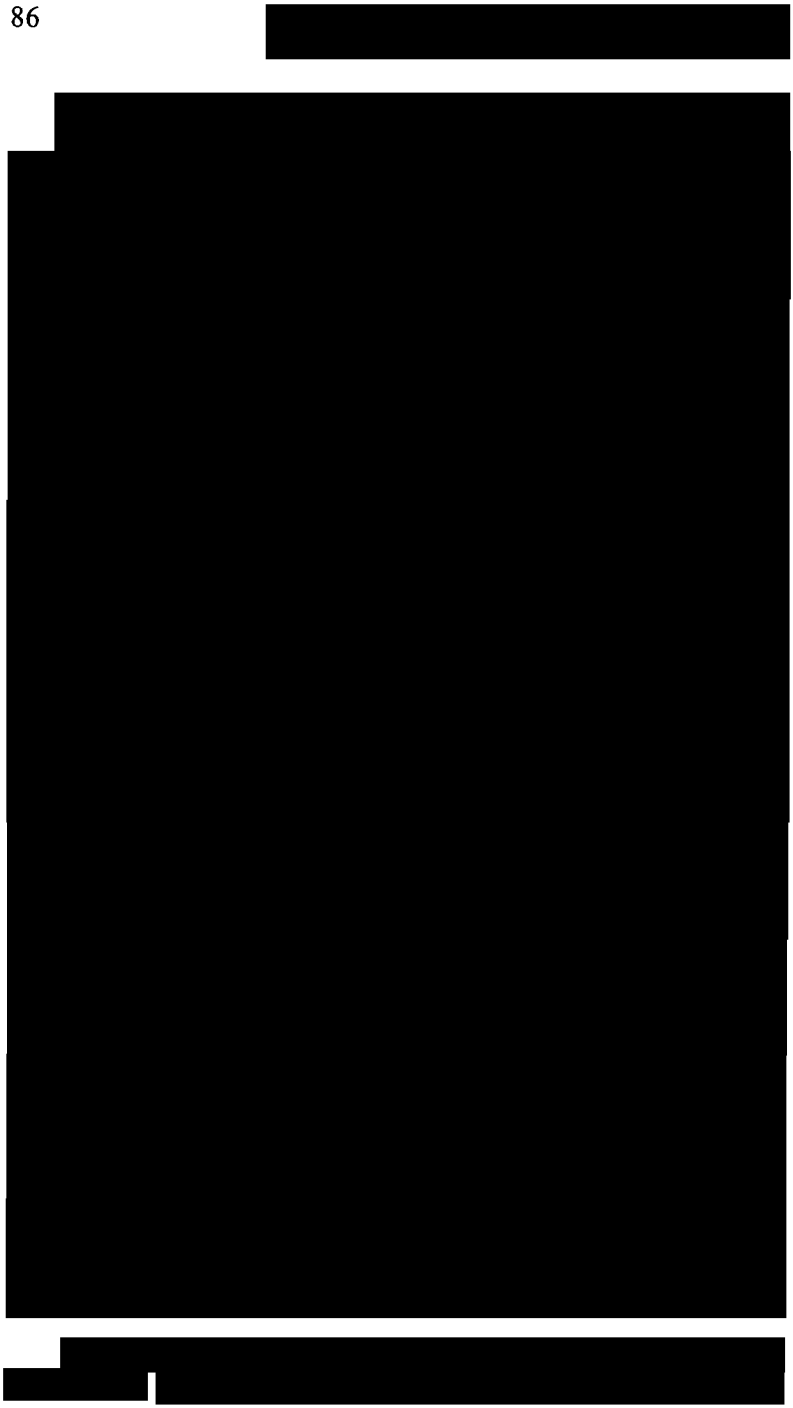
COOPER and COULSON, JJ., agree.

Joe B. REED *v.* Leanne REED

CA 87-118 749 S.W.2d 335

Supreme Court of Arkansas
En Banc
Opinion delivered May 4, 1988





William Isaacs, for appellant.

Lanny K. Solloway, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Washington County Chancery Court. Appellant, Joe B. Reed, appeals from a divorce decree finding certain personal property to be the separate property of the appellee, Leanne Reed, and not subject to division upon divorce. We affirm in part, reverse in part, and remand.

Following the death of her father, appellee deposited money from her inheritance into a money market account and a savings account both in the joint names of the parties. Prior to filing for divorce, appellee withdrew part of the funds from the money market account and all of the funds from the savings account, and deposited them along with other funds into an account in her separate name. The chancellor found the balance of the funds in the money market account and the account in the separate name of appellee to be the sole property of the appellee and not subject to division upon divorce.

Appellant contends that the trial court erred in awarding to the appellee, in division of property on divorce, the proceeds of the joint account and the account in the sole name of appellee created just prior to the filing of this action.

The two accounts with which this appeal is concerned, are money market investment accounts. The first account, an account in the joint names of the parties, is made up of appellee's inheritance, proceeds under a contract for sale of real property inherited by appellee, and interest and dividends earned thereon. The second account, opened in the separate name of appellee in contemplation of divorce, contains funds from several sources including a jointly held savings account, appellee's salary check, a stipend, one month's proceeds under a contract for sale of real property inherited by appellee, and funds withdrawn from the first money market account described above. The chancellor awarded the remainder of the funds in the first account and all of the funds in the second account to appellee as her sole property.

For reversal, appellant essentially contends that by placing the funds which she inherited in accounts bearing joint names, appellee created a tenancy by the entirety in the funds and that

they must be divided pursuant to Arkansas Statutes Annotated § 34-1215 (Supp. 1985). We agree.

I.

First, we deal with the account held in joint names. The law applicable to personal property held by the entireties, accounts in particular, was recently clarified in *Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988). We recognize that the chancellor did not have the benefit of the *Lofton* precedent, but we find it to be controlling in the case at bar.

In *Lofton*, funds inherited by the husband were placed into certificates of deposit in the joint names of the parties. There, we held that once property is placed in the names of persons who are husband and wife without specifying the manner in which they take, there is a strong presumption that the property is owned by the parties as tenants by the entirety. *Id.* at 209-10, 745 S.W.2d at 639. We stated that the presumption may be overcome only by clear and convincing evidence that the spouse did not intend to make a gift of one-half interest to the other spouse. *Id.*

Clear and convincing evidence has been defined as evidence so clear, direct, weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitance, of the matter asserted. *Id. See also Glasgow* v. *Greenfield*, 9 Ark. App. 224, 657 S.W.2d 578 (1983). Because we review chancery cases *de novo* and reverse the chancellor's findings only if they are clearly erroneous or clearly against the preponderance of the evidence, *Cuzick* v. *Lesly*, 16 Ark. App. 237, 700 S.W.2d 63 (1985), the issue before us is whether the chancellor's finding that appellee overcame the presumption that the account was held by the entirety by clear and convincing evidence, is against a preponderance of the evidence.

Upon our careful review of the record, the only evidence presented by appellee to rebut the presumption that she intended to make a gift was that appellant had never used any of the funds and that he was "not allowed" to do so. This evidence falls far short of the quantum of proof required to rebut the existing presumption, especially in light of appellant's testimony that he had not used the funds because they had been set aside for major

purchases, none of which were made during the life of the account. Therefore, we hold that the chancellor's finding that the balance of the joint money market account was appellee's sole property, is clearly against the preponderance of the evidence. We remand for the chancellor to modify his judgment to reflect that said account was owned by the parties as tenants by the entireties prior to divorce and to divide the account pursuant to Ark. Stat. Ann. § 34-1215 (Supp. 1985).

Finally, we review the division of the account which appellee opened in her separate name just prior to the filing of this action. The record reflects that the account consisted of the following:

$ 1,155.07	Appellee's salary check
100.00	Appellee's stipend
3,372.56	Proceeds inherited by appellee under contract for sale of real property[1]
7,496.27	Funds withdrawn from jointly held savings account
9,420.86	Funds withdrawn from the joint money market account discussed above
503.95	Interest, Dividends, etc.
$22,048.71	Total account value

Because the funds used to establish the separate account came from several sources, individual consideration of each item is required.

First, appellee's salary check and stipend, earned subsequent to the marriage, are clearly marital property, *see Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), and should have been divided pursuant to Arkansas Statutes Annotated § 34-1214 (Supp. 1985). His findings that the amounts were the sole property of appellee are clearly against a preponderance of the evidence. On remand, the amounts should be divided pursuant to Ark. Stat. Ann. § 34-1214 as the chancellor believes the equities require.

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[1] Apparently, prior to his death, appellee's father executed contracts for the sale of several tracts of real property under which he received periodic payments until his death. The right to receive a percentage of these proceeds was inherited by appellee.

[redacted]

[redacted] The proceeds inherited under contracts for the sale of real properties are not marital property as defined in Ark. Stat. Ann. § 34-1214. Nor are they held as tenants by the entirety since appellee did not deposit them into an account so held. We therefore affirm the chancellor's decision that this amount is the sole and separate property of appellee.

[redacted] Funds were also deposited from a savings account which was held by the parties jointly. The evidence reveals that this account was used primarily for convenience in conjunction with the jointly held money market account described above to hold the monthly proceeds under contracts of sale prior to depositing them in the money market account. The presumption that the savings account was held by the entirety arises here also. The only evidence presented by appellee to rebut the presumption was that she was the only one who used the account and that appellant had nothing to do with depositing or withdrawing from the account. Again, this evidence fails to reach the quantum of proof required to overcome the presumption and the account is deemed to have been held by the entirety. Therefore, the funds withdrawn from the savings account held as tenancy by the entirety in contemplation of divorce should have been divided pursuant to Ark. Stat. Ann. § 34-1215. *See, Lofton* at 207, 745 S.W.2d at 638-39. Likewise, the funds withdrawn from the money market account held as tenants by the entirety and deposited into appellee's separate account should have been divided under the same statute. *Id.*

II.

[redacted] Finally, treatment of a portion of the interest and dividends earned on appellee's separate account is governed by the supreme court's recent decision of *Wagoner* v. *Wagoner*, 294 Ark. 82, 740 S.W.2d 915 (1987). Although our above disposition necessarily means that some of the interest was earned on non-marital property, some on marital property and some on tenancy by the entirety property, *Wagoner* holds that interest earned on non-marital property is marital property and is divided pursuant to Ark. Stat. Ann. § 34-1214. Therefore, on remand, the chancellor is to determine the interest and dividends earned on: (1) non-marital property (proceeds from the real estate contract never deposited into a joint account) and divide them pursuant to

Wagoner under § 34-1214; (2) marital property (salary and stipend) and divide them as marital property pursuant to § 34-1214; and (3) tenancy by the entirety property (funds from joint savings and joint money market accounts) and divide them as tenancy by the entirety property pursuant to § 34-1215. If the interest from the funds cannot be characterized, the chancellor should divide all interest and dividends pursuant to § 34-1214, since all were earned subsequent to marriage.

Affirmed in part, reversed in part, and remanded.

CRACRAFT and MAYFIELD, JJ., concur as to part II.

COOPER, J., dissents as to part II.

JENNINGS, J., dissents as to part I.

GEORGE K. CRACRAFT, Judge, concurring. I agree with the conclusions announced in the majority opinion. I would, however, amplify its concluding paragraph to state more clearly what I understand our holding to be. As I understand our decision, we determined that, in order to be consistent, we should adhere to the traditional distinctions made between property held as tenants by the entireties and all other estates. Thus, we hold that income from marital and non-marital property will be divided on divorce as marital property under the provisions of Ark. Stat. Ann. § 34-1214 (Supp. 1985). Income earned during the marriage from entireties property will be treated the same as all other assets held by the entireties and divided on divorce in accordance with the provisions of Ark. Stat. Ann. § 34-1215 (Supp. 1985).

MAYFIELD, J., joins in this concurrence.

JAMES R. COOPER, Judge, dissenting in part. I agree with the majority opinion as to the first point. However, I do not agree with the majority conclusion that income earned from entireties property is to be treated as are other assets held as tenants by the entirety and divided under Ark. Stat. Ann. § 34-1215 (Supp. 1985).

In *Wagoner* v. *Wagoner*, 294 Ark. 82, 740 S.W.2d 915 (1987), the Arkansas Supreme Court dealt with income earned during the marriage on non-marital property which was acquired subsequent to the marriage. In *Wagoner*, the court explained its holding in *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), and

stated:

> In *Day*, this court held that *all* earnings or other property acquired by each spouse subsequent to marriage must be treated as marital property unless falling within one of the statutory exceptions. *Day*, 281 Ark. at 268, 663 S.W.2d at 722.

Wagoner, 294 Ark. at 84, 740 S.W.2d at 916. The majority cites no exception in Ark. Stat. Ann. § 34-1214 (Supp. 1985) which would remove this type of income from inclusion under § 34-1214 as marital property. The majority simply concludes that § 34-1215 governs.

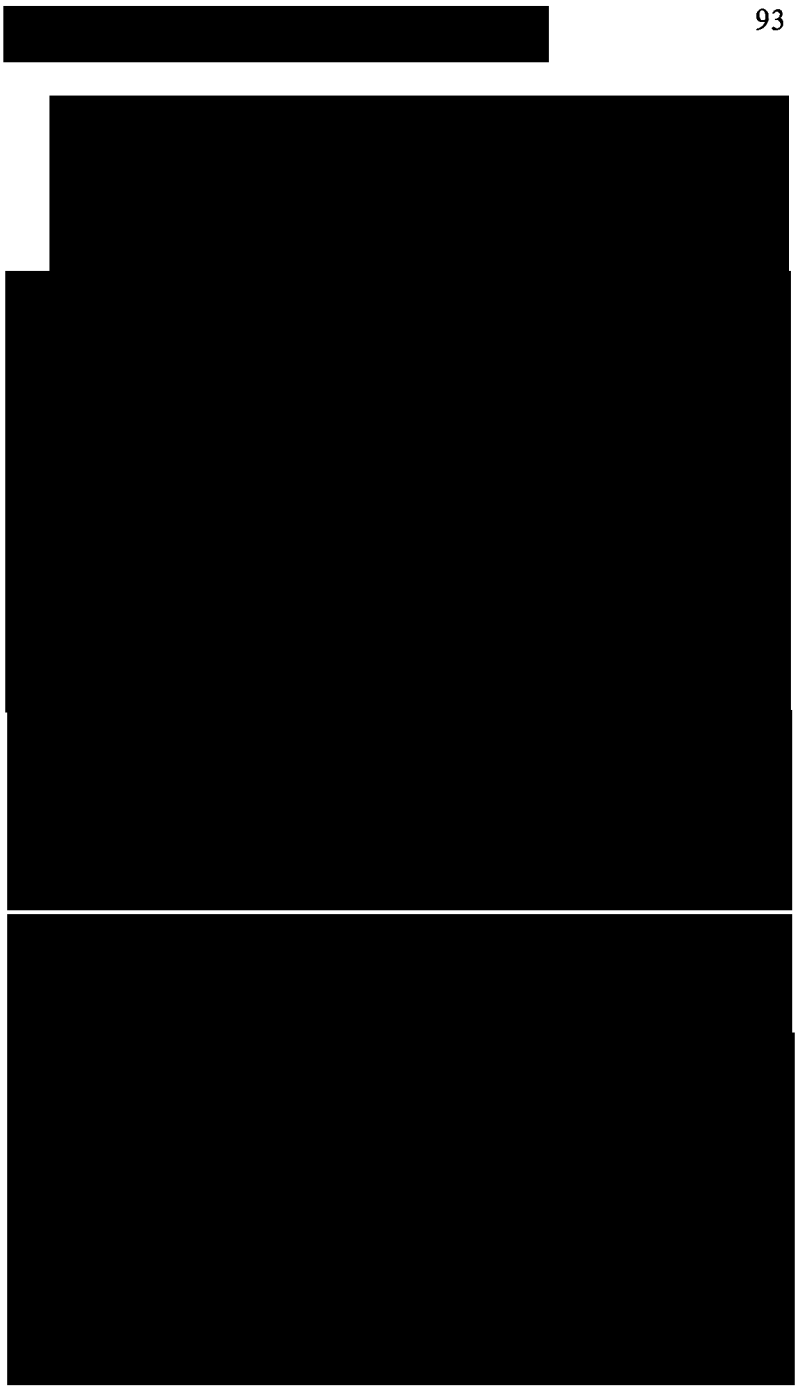
I dissent.

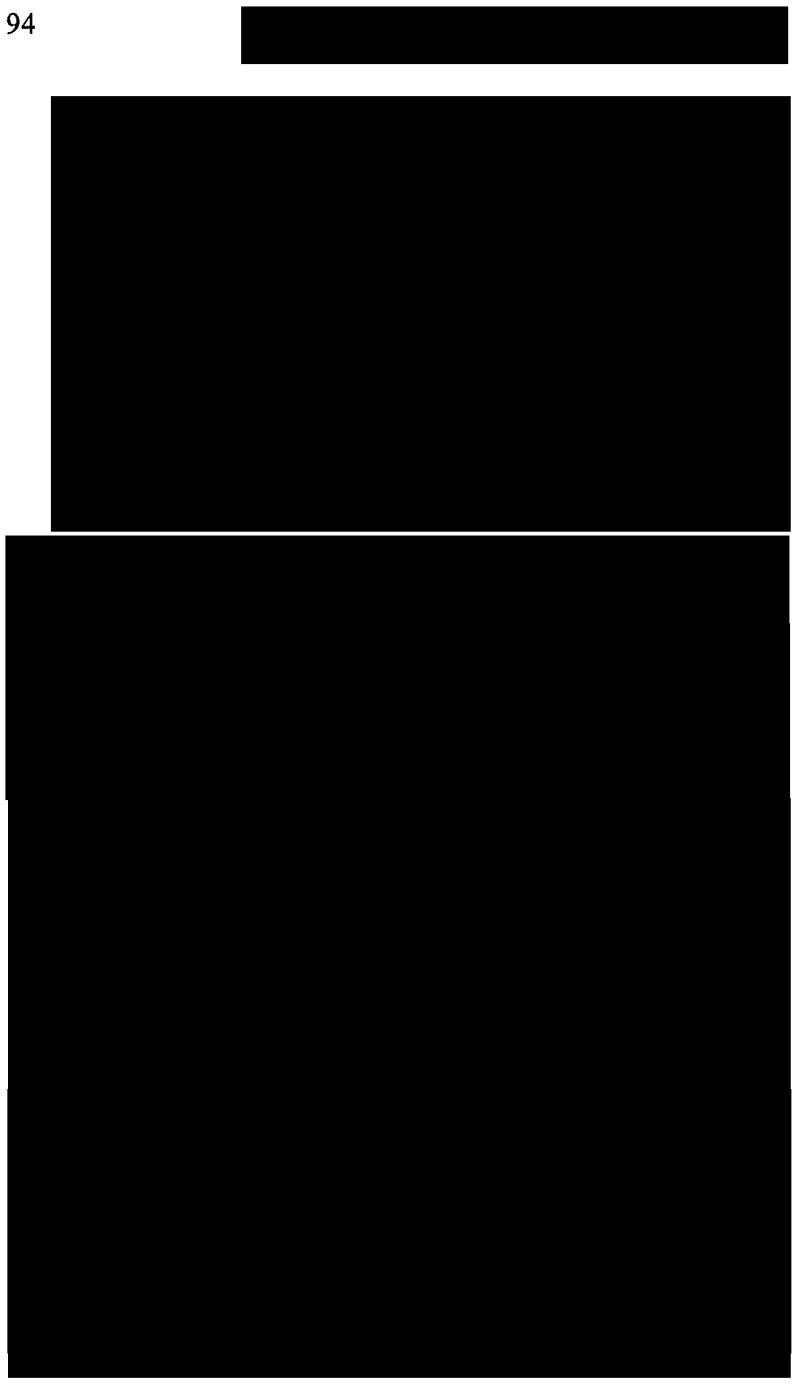
JOHN E. JENNINGS, Judge, dissenting. The majority opinion is based upon two propositions: first, that jointly held bank accounts are divisible in divorce under Ark. Stat. Ann. § 34-1215 and, second, that when a spouse deposits his or her separate funds in a jointly held bank account, a strong presumption of gift arises. For reasons explained in my dissent in *Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988), I disagree with both propositions. The chancellor's decision should be affirmed.

John F. MANUEL *v.* Ronald Harold McCORKLE and Katherine Marie Manuel McCorkle

CA 87-321 749 S.W.2d 341

Court of Appeals of Arkansas
En Banc
Opinion delivered May 4, 1988





[redacted]

Brick & Stokes, P.A., for appellant.

Hale, Fogleman & Rogers, for appellees.

GEORGE K. CRACRAFT, Judge. John F. Manuel appeals from an order of the Crittenden County Probate Court granting the petition of Ronald Harold McCorkle and Katherine Marie McCorkle for the adoption of two children of the former marriage of John Manuel and Katherine McCorkle. He contends that the court's findings that his consent to the adoption was not required and that it was in the best interest of the minors that they be

adopted by appellee Ronald McCorkle are not supported by the evidence. We disagree and affirm.

It is well settled that statutory provisions for the adoption of minors are to be strictly construed and applied. *Bemis* v. *Hare*, 19 Ark. App. 198, 718 S.W.2d 481 (1986). Under Ark. Stat. Ann. § 56-206 (Supp. 1985), a petition to adopt a minor may not be granted without written consent of the parents, unless that consent is not required in the subsequent section. Arkansas Statutes Annotated § 56-207 (Supp. 1985) provides that consent is not required of a non-custodial parent if that parent, for a period of at least one year, has failed significantly and without justifiable cause to provide for the care and support of the child as required by law or judicial decree.

The party seeking to adopt a child without the consent of a natural parent must prove by clear and convincing evidence that the failure to support the child not only continued for at least one year but also that it was willful, intentional, and without justifiable cause. Because one should not be permitted to assert a right until the facts on which it is predicated have accrued, the one-year period after which the parent may lose his right to consent to the adoption must accrue before the petition for adoption is filed. *Dixon* v. *Dixon*, 286 Ark. 128, 689 S.W.2d 556 (1985); *Dale* v. *Franklin*, 22 Ark. App. 98, 733 S.W.2d 747 (1987). The term "failed significantly without justifiable cause" does not mean that the parent must have failed totally but denotes a failure that is meaningful, important, and willful. *Bemis* v. *Hare, supra.*

The mere fact that a parent has forfeited his right to have his consent to an adoption required does not mean that the adoption must be granted. The trial court must further find from clear and convincing evidence that the adoption is in the best interest of the child. *Bemis* v. *Hare, supra.* On appellate review, we will reverse the trial judge's determinations only if they are clearly erroneous or clearly against a preponderance of the evidence. *Dixon* v. *Dixon, supra; Brown* v. *Johnson*, 10 Ark. App. 110, 661 S.W.2d 443 (1983); Ark. R. Civ. P. 52(a).

The appellant first contends that the trial court erred in its finding that the appellant's consent to the adoption was not required because he had failed significantly to support his two

minor children without justifiable cause for a period of at least one year. We do not agree.

Appellant and appellee Katherine McCorkle were married in 1979, separated late in the summer of 1984, and were divorced on February 11, 1985, by a decree which awarded custody of the minors to Mrs. McCorkle and ordered appellant to pay $25.00 per week for the support of the two children. Mrs. McCorkle testified that, from the date of their separation until after the petition for adoption of the children was filed on May 6, 1986, appellant paid a total of $25.00 for the support of the children and had given them a coloring book. She testified that when she and appellant separated she had no money or place to live and was forced to take her two children to live with her mother and sisters until she obtained a public grant for dependent children and public housing. During the period before she received these two grants, she and the children were forced to exist entirely on money and Food Stamps which her mother and sister shared with her. After she obtained welfare assistance, she was unable to even furnish the housing provided her. Her sister gave her two beds for the children, and her mother gave her a mattress and box spring which she placed on the floor for her own use. She testified that she and the two children continued to live on public welfare funds, with no help from the appellant, until she obtained several jobs and then married the appellee, who has supported them since their marriage on November 18, 1985.

She stated that, although there was a brief attempt at reconciliation in the fall of 1984, the appellant did not then furnish any support but forced her and the children to live on welfare payments. The appellant admitted that this was true. Mrs. McCorkle's testimony as to the poverty to which she and the children were subjected for a period in excess of one year was amply corroborated by the testimony of other witnesses.

Appellant testified that, although directed to make his support payments through the registry of the court, he had made his payments to Mrs. McCorkle directly but had no other proof of having done so. He further testified that, in any event, his failure to support the children was not willful because he had injured himself and had been unable to work as a truck driver until after the petition was filed in May of 1986. However, his employer

testified that he knew nothing of such an injury and stated that there was work available for appellant at a substantial weekly wage during that entire period if he had wanted it. There was also evidence that, in February of 1986, the court's order for visitation had to be changed because of appellant's "work schedule" driving trucks. There was further evidence that, in February of 1986, appellant was found to be in arrears in his child support payments in the amount of $1825.00, and was given a three-month period to see what he could do about paying some part of the arrearage. He made no payments pursuant to this order. He had remarried and was providing support for his new wife, her child, and a child of that marriage.

[redacted] On this conflicting evidence, we cannot conclude that the trial court's finding that appellant had significantly, willfully, and without justification failed to support his children for a period in excess of one year prior to the date of the filing of the petition for adoption is clearly erroneous.

[redacted] Appellant next contends that, even if we conclude that his consent was not required because of his failure to provide for the care and support of his children, the trial court erred in finding that it was in the best interest of the children to be adopted. We do not agree. It has been stated that, all things being equal, the law will favor a natural parent over all others. In these cases, we have recognized that temporal and material enhancements are not conclusive of where the best interest of a child lies, but is a fact which may be considered in a proper case. Consideration must also be given to the fostering of moral, cultural, and spiritual values as well as family relationships. Best interest does not necessarily mean a higher station in life, and those parents who support their child in their own style of life, however poor or humble, should not be deprived of parental privileges except under compelling circumstances. *Bush* v. *Dietz*, 284 Ark. 191, 680 S.W.2d 704 (1984). This rule, however, is premised on the assumption that the parent is in fact contributing to the care and support of his children to the best of his abilities even though his abilities be meager.

[redacted] It is well settled that parental rights are not proprietary ones and are subject to the faithful performance of the correlated duties and the obligations of a parent to care for

and protect the child. The law will protect the preferential right of a parent only so long as that parent discharges these correlated duties, and this preference should not be continued beyond the point where those duties and obligations are ignored or have been shifted to others. *Watkins* v. *Dudgeon*, 270 Ark. 516, 606 S.W.2d 78 (Ark. App. 1980); *Pender* v. *McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979). It has been stated that this preference for natural parents is based on the presumption that they will take care of their children, bring them up properly, and treat them with kindness and affection, but when that presumption has been dissipated the courts will interfere and place the child where those duties will be discharged by someone more willing and able to do so. *Loveless* v. *May*, 278 Ark. 127, 644 S.W.2d 261 (1983); *Brown* v. *Johnson, supra.*

[redacted] It is impossible to carefully define that point at which the interests of a child are best fostered by terminating existing parental relationships and creating new ones. Each case must be determined on its own peculiar facts and circumstances. For this reason, our courts very wisely give great deference to the superior position of the trial court to make that determination. In these cases, a heavy burden is placed on the trier-of-fact to utilize to the fullest extent his powers of perception in the evaluation of witnesses, their testimony, and where the interest of the child actually lies. In no case does the superior position, ability, opportunity, and insight of the trial judge in observing the parties carry greater weight than those cases involving minor children. *Watts* v. *Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986).

[redacted] Here, the chancellor found that the appellant unjustifiably failed to discharge his duties of care and support for these children. Instead, he permitted them to be supported by private and public charity and to exist in abject poverty and deprivation until such time as the mother married a person ready, willing, and able to provide the care, support, and protection they were entitled to receive. Since that time, the appellant continued his renunciation of those obligations to his children and was content to let appellee Ronald McCorkle furnish the children with comfortable housing, adequate food and clothing, and those additional necessities and pleasures that a child ought to have. In the home of the appellees, these children are secure and adequately provided for. It is clear from the chancellor's closing

remarks that he did consider all of the factors bearing on the best interests of the children, and he concluded that, "having considered it all, it is a difficult case, but I feel it is in the best interests of the children to grant the adoption." Based on our review of the record, and giving due deference to the superior position of the chancellor to make that determination, we cannot conclude that his findings are clearly erroneous.

Affirmed.

CORBIN, C.J., and JENNINGS and COOPER, JJ., dissent.

DONALD L. CORBIN, Chief Judge, dissenting. I agree with the majority that appellant's consent to the adoption was not required because he failed significantly without just cause to support his children. However, I do not agree that the trial court was correct in finding that the adoption was in the children's best interest.

There is little dispute that appellant has failed miserably to support his minor children. On first blush it appears that appellant seeks to accept the privileges of parenting without accepting the responsibility that goes with it. Even so, failure to support is more properly addressed through contempt proceedings rather than termination of parental rights. The primary consideration in adoption proceedings is the best interest of the child not reward or punishment of the parent. *See McKee* v. *Bates*, 10 Ark. App. 51, 661 S.W.2d 415 (1983).

The matter before us is not a custody determination. Appellant admits that custody is proper in the appellees. He merely seeks to avoid termination of his relationship with his children. A final decree of adoption has the effect of relieving the natural parent of all rights and terminating all legal relationship between the child and his relatives including the natural parent. *Irvan* v. *Kizer*, 286 Ark. 105, 689 S.W.2d 548 (1985).

The record in this case bears out the extreme hostility between the adoptive father and the natural father. On at least one occasion, the adoptive father was arrested in connection with an altercation between the two. There is little doubt that because of this hostility, appellant will be denied all contact with his children. More importantly, these young children will not understand the legalities of the adoption proceedings for many years,

but will soon find out that their adoptive father can prevent them from seeing their father when they want.

The chancellor in his findings stated, "I am convinced that there is a definite affection between Mr. Manuel and his children. I have observed the children in the courtroom previously with Mr. Manuel . . . . I recognize that these children come from a large family and there is a definite affection on the part of all members of the family for these two children." However, he held it to be in the children's best interest to deprive them of this relationship with their father. I cannot agree. They have spent two weekends every month with the appellant since separation and at least two weeks with him each summer. Appellant drives three hours one way to pick them up so that they may spend time with him and he with them.

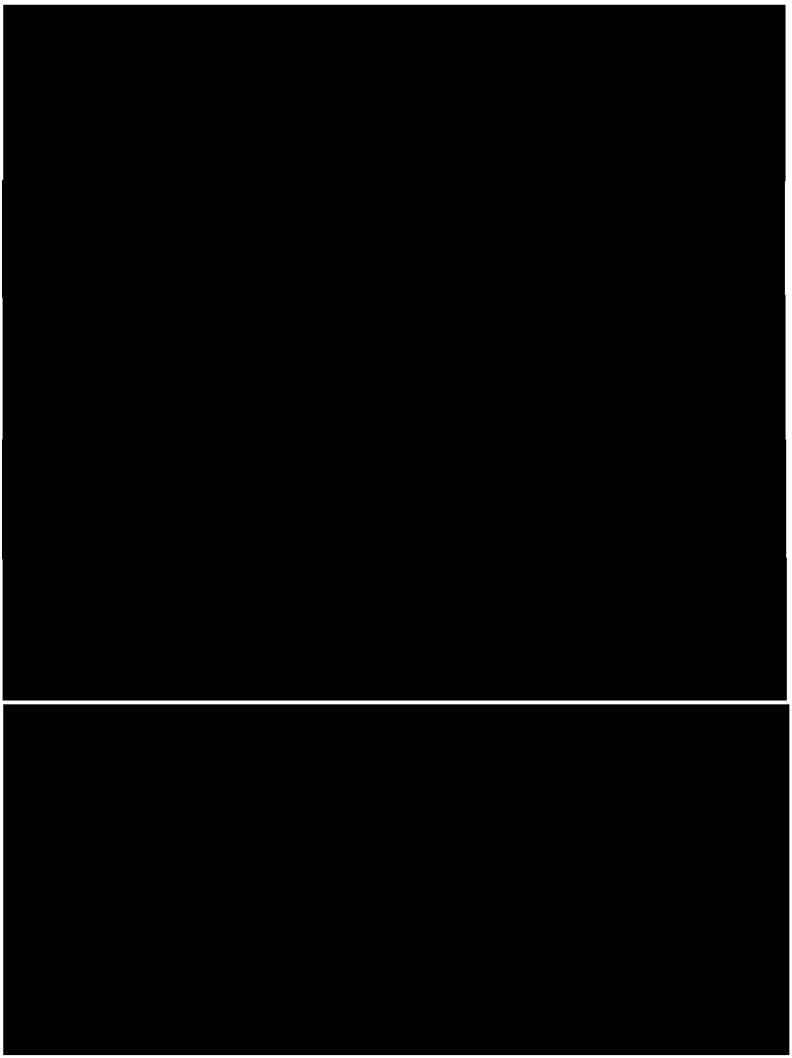
We have said on numerous occasions that the purpose of the statute allowing the father's consent to be excused for failure to support is to provide a child with a real father instead of one who, by his conduct, has proven to be a father by blood alone. *See, e.g., Bemis* v. *Hare*, 19 Ark. App. 198, 718 S.W.2d 481 (1986). Obviously, that is not the case here. The children will be deprived of a relationship with their father which has been developing over their entire lives and should continue to do so. Furthermore, their relationship with their paternal grandmother and half-sibling are irrevocably terminated. The chancellor noted in his findings that the case was a difficult one. Difficult cases should be resolved in favor of the natural relationship. Because our policy has been to favor maintaining the natural relationship when adoption is sought against a natural parent's protest, *Lindsey* v. *Ketchum*, 10 Ark. App. 128, 661 S.W.2d 453 (1983), I would reverse the granting of the petition for adoption under the circumstances in this case.

COOPER and JENNINGS, JJ., join in this dissent.

Ewillis Eugene TURNER *v.* STATE of Arkansas

CA CR 87-117 749 S.W.2d 339

Court of Appeals of Arkansas
En Banc
Opinion delivered May 4, 1988



[redacted]

William R. Simpson, Jr., Public Defender; *Kenneth S. Gould*, UALR Legal Clinic, by: *Tommy Cooper*, Rule XV Law Student, for appellant.

Steve Clark, Att'y Gen., by: *Lee Taylor Franke*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant, Ewillis Turner, was convicted of possession of marijuana. He received a suspended sentence of 10 days and a $100.00 fine, plus costs.

The evidence shows that on October 1, 1986, two Little Rock police officers, riding in the same vehicle, stopped at a street intersection in Little Rock and observed a black male, with a brown paper sack in his hand, standing in the middle of the street flagging down cars. The officers testified that the man flagged down a 1975 Ford LTD driven by the appellant and leaned into the driver's window and talked to the driver for 30 to 40 seconds as the officers pulled across the intersection. The officers said that as they drove up to appellant's car, the black man looked up and, apparently upon seeing them approach, dropped the paper sack into appellant's car and ran away. The appellant quickly picked up the sack and threw it out the window on the passenger side of his car. One of the officers retrieved the sack which contained several plastic bags of green vegetative matter that was later analyzed in the state crime laboratory and found to be marijuana. Appellant was arrested and taken to the police department.

[redacted] On appeal, the appellant argues the evidence was insufficient to find him guilty of possession of a controlled substance. Under Ark. Stat. Ann. § 82-2617(c) (Supp. 1985), it is unlawful for any person to possess a controlled substance unless the substance has been obtained directly from a valid prescription or except as otherwise authorized by the Controlled Substances Act. Possession as defined by Ark. Stat. Ann. § 41-115(15) (Repl. 1977) means "to exercise actual dominion, control, or management over a tangible object." Appellant contends that his fleeting, brief contact with the marijuana for the express purpose of getting rid of it was the antithesis of the exercise of the dominion,

control, or management necessary to constitute possession. He argues he never formed a present intent to possess marijuana and that his interest during the brief contact was clearly *not* to possess the marijuana.

On appeal in criminal cases, whether tried by a judge or jury, we review the evidence in the light most favorable to the state and affirm if there is any substantial evidence to support the trial court's judgment. *Lane* v. *State*, 288 Ark. 175, 702 S.W.2d 806 (1986); *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980). Intent, being a state of mind, can seldom be positively known to others, so it ordinarily cannot be shown by direct evidence, but it may be inferred from the facts and circumstances surrounding the act involved. *Heard* v. *State*, 284 Ark. 457, 683 S.W.2d 232 (1985).

In the present case, the appellant gave the following statement to the police when he was arrested:

> Detective Gray is writing this statement at my request. I was going to see my Uncle at 27th and State. As I turned off Wright Avenue, a dude stopped me, and asked me if I wanted to buy any dope. I didn't go there to buy. But when the dude asked, I decided to. Before we could trade any money for the dope, the dude threw a sack into my car, and ran off. When I saw the police, I threw the sack out of my car. I knew automatically that they were the police. I don't know who the dude was.

The appellant cites the case of *Moreau* v. *State*, 588 P.2d 275 (Alaska 1978), for its approval of a definition of possession that would exclude "a passing control, fleeting and shadowy in nature." However, that opinion also stated that "our holding does not insulate from prosecution those who seek to dispose of contraband upon discovering that the police are approaching." 588 P.2d 286. In our case, we find there was substantial evidence from which the judge, sitting as the jury, could find that the appellant picked up the sack of marijuana with the intent to exercise dominion, control, or management over it.

Indeed, the appellant admitted that he agreed to make the purchase but the seller threw the sack into the car and ran off before they "could trade any money for the dope." He also testified that he was "pretty sure" the sack contained marijuana and admitted in the statement he gave to the police that he threw the sack out of the car because he saw the police approaching.

Affirmed.

COOPER, J., dissents.

CORBIN, C.J., not participating.

JAMES R. COOPER, Judge, dissenting. I dissent because I believe there was insufficient evidence of possession in this case to support the appellant's conviction. "Possession" is defined as "[t]he detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment. . . ." *Black's Law Dictionary* 1047 (5th ed. 1979). It has been held that criminal possession of an illicit drug requires more than a fleeting and shadowy control of a passing nature. *United States* v. *Landry*, 257 F.2d 425 (7th Cir. 1958); *State* v. *Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982). In the present case, the appellant's act of "possession," which took the form of disposing of the marijuana, was the antithesis of detention, was both fleeting and shadowy in nature, and was in no sense directed at obtaining use and enjoyment of the substance.

I submit that the essential question in this case is whether the appellant exercised "actual dominion, control, or management" over the marijuana *before* he took steps to dispose of it. *See* Ark. Stat. Ann. § 41-115(15) (Repl. 1977); *Moreau* v. *State*, 588 P.2d 275 (Alaska 1978). Neither the appellant's statement nor any of the other evidence presented in this case demonstrates such an exercise of dominion and control. Under different circumstances it would be ludicrous to charge a person with possession of a controlled substance where the only evidence of possession was the immediate and unmistakeable disposal of unsolicited contraband. In this case, however, the appellant did state that he decided to purchase the marijuana when asked to do so, and I submit that his conviction was actually based on his stated, unconsummated intent to purchase. Nevertheless, the appellant was not charged with conspiracy or attempt, but rather with

actual possession of marijuana. I do not agree that the appellant's admission of his intent to purchase the marijuana is a circumstance from which one could conclude, without speculation or conjecture, that he actually exercised dominion and control over the contraband. I would reverse and dismiss.

McDANIEL BROTHERS CONSTRUCTION COMPANY, Inc., and as A Partnership, et al.
v. SIMMONS FIRST BANK of Jonesboro

CA 87-306 749 S.W.2d 348

Court of Appeals of Arkansas
Division II
Opinion delivered May 11, 1988
[Rehearing denied June 15, 1988.]

Barron & Coleman, P.A., by: *Randy Coleman* and *Keith I. Billingsley*, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

GEORGE K. CRACRAFT, Judge. McDaniel Brothers Construction Company, Inc., McDaniel Brothers Construction Company, a partnership, and the individual partners appeal from judgments totaling $1,389,785.45 rendered against them in favor of Simmons First Bank of Jonesboro. On appeal, the appellants advance several points for reversal. We find sufficient merit in appellants' argument that the trial court erred in finding the doctrine of *res judicata* inapplicable to the case to warrant reversal.

Between April of 1980 and February of 1983, the appellants in their various capacities executed six unsecured notes payable to appellee's predecessor. In 1983, all of these notes were secured by the execution of second mortgages on properties owned by appellants and leased to the United States Postal Services located in Pulaski and Mississippi Counties, Arkansas, and in the States of Missouri and Alabama. Both parties agreed that each of the four second mortgages secured all six notes rather than any particular one. The notes subsequently became in default. It was agreed that the law of Missouri and Alabama provided for nonjudicial foreclosure, to be followed by suits for deficiency judgments. The properties in those two states were sold under the powers of the mortgage, but the proceeds were not sufficient to provide funds for application to those notes secured by the second mortgages. No action for deficiency judgment was taken in either state.

Appellee then brought foreclosure actions in both Pulaski and Mississippi counties. The complaint in each case alleged the execution of the six notes and the subsequent execution of the real estate mortgages. Neither complaint prayed for personal judgments on the notes but only that the amount due on the notes be determined, the lien of the mortgages be foreclosed, and the proceeds applied to the indebtedness. The actions were removed to the United States District Court for the Eastern District of Arkansas because the postal department was a lessee of the premises and a necessary party to the action.

Separate decrees were entered in 1984 by the federal district court, which found the amounts due on the defaulted notes and ordered the lands sold and the proceeds applied to the indebtedness. No personal judgment was entered against the appellants, and the court retained jurisdiction only to confirm the sales and order distribution of the proceeds. It was agreed by all of the parties that the sales were confirmed and that the proceeds were inadequate to discharge any of the notes in full.

On August 22, 1985, the appellee brought this action in the circuit court of Craighead County seeking to recover a judgment for the deficiency. The appellants appeared and answered interposing various defenses, including the contention that the present action was barred under the doctrines of *res judicata* and waiver. The trial court entered an order in which it found that the appellants had failed in their burden of proving acts sufficient to make any of its defenses applicable and entered judgments against the appellants in the amount sued for on the notes. We agree that the trial court erred in its ruling as to the defense of *res judicata.*

Our rule applicable to the doctrine of *res judicata* is perhaps best stated in the case of *Eiermann* v. *Beck*, 221 Ark. 138, 141, 252 S.W.2d 388, 389 (1952), in the following language:

> Our cases do not draw a distinct line beyond which *res judicata* invariably applies and within which it does not. The very nature of litigation makes that impossible. The rule, however, seems to be that if the forum selected by the plaintiff has jurisdiction of the person and the subject-matter, and the parties in each instance are the same, and if claims that were made or could have been made grew out of

> the same transaction, then it is the duty of the aggrieved party or parties to include in one action all rights subject to judicial determination at the time suit was brought, thus preventing multiple litigation.

Our courts have consistently held that the doctrine of *res judicata* applies not only to those issues which have actually been tried, but also to those which could have and therefore should have been determined in the one action.

Here, the forum selected by the appellee was the court of equity, which undoubtedly had jurisdiction not only to foreclose the mortgage lien but also to enter judgment on the notes. The federal district court to which the action was removed likewise had jurisdiction to settle both issues in the same proceeding. That court had before it the notes sued on in this case, determined the amount due on them, ordered the land sold, confirmed the sale, and applied the proceeds to the discharge of the indebtedness. The amount of judgment to be awarded on the notes was a matter which the court *could* have adjudicated in that action. Further action is therefore estopped by that initial adjudication in the absence of facts and circumstances preserving the issue for future litigation.

In *Pfeiffer* v. *Missouri State Life Insurance Co.*, 177 Ark. 1013, 8 S.W.2d 505 (1928), our supreme court recognized that competent persons can expressly agree that there will be no personal judgment taken against them at any time. It has also recognized that parties can by express agreement reserve the right to sue for a deficiency in subsequent proceedings and that, where such an agreement has been made, the doctrine of *res judicata* will not be applied. *Farrell* v. *Steward*, 134 Ark. 605 (mem.), 204 S.W. 423 (1918); A. Hughes, *Arkansas Mortgages* § 405a (1930).

Here, the trial court filed written findings of fact and conclusions of law in which it expressly found that the appellee had never expressly agreed to waive its right to pursue a deficiency judgment. Although this is a permissible finding to be made on the conflicting evidence, it does not dispose of the issue of *res judicata*. In *Pfeiffer*, the court found that the parties had in fact made an express agreement that the mortgagee would not pursue a deficiency judgment against the mortgagor. It further

found that this was an agreement that the parties had a right to make. It is clear from that opinion, however, that the failure to prove the existence of such an agreement would not have changed the result in that case, as the court concluded:

> We think the agreement between the parties constituted a waiver of the right to a personal judgment against Mrs. Pfeiffer. Appellee was entitled to have the question of personal liability of Mrs. Pfeiffer settled in the original suit, and, if it were not settled by the agreement, it was an issue in the case, and *could* have been settled, and it is therefore *res judicata.*

Pfeiffer, 177 Ark. at 1018, 8 S.W.2d at 507 (emphasis added). We conclude that the existence or nonexistence of an agreement to *waive* a deficiency judgment has no effect on the application of the doctrine of *res judicata*, for the existence of such an agreement is merely an alternative basis for denying recovery.

Here, the trial court further found:

> [Appellee] did not pray for *in personam* judgments in the judicial foreclosure actions in the State of Arkansas and the issue of *in personam* judgment was not submitted to the Court in either foreclosure action. The [appellants] approved the foreclosure decrees which solely were *in rem* foreclosure rights, which established that the parties were reserving any rights that they may have had concerning the issue of the [appellants'] personal liabilities on the underlying debts.

We do not agree. To the contrary, the quoted language from *Pfeiffer* would dictate an opposite result. The notes secured by these mortgages were introduced in the federal court action, as underlying debts secured by the lien sought to be foreclosed. Judgment *could* have been sought and rendered on those notes in the federal proceeding and, that not having been done, a separate action to recover the deficiency is barred absent an agreement *preserving* the issue for future litigation. From our review of the record, we find no evidence which would sustain the required finding that the parties had expressly agreed that the issue be preserved. The judgment of the trial court is therefore reversed and the case dismissed.

[redacted]

JENNINGS and COOPER, JJ., agree.

[redacted]

Larry R. HIBBS *v.* CITY OF JACKSONVILLE

CA 87-365 749 S.W.2d 350

Court of Appeals of Arkansas
Division II
Opinion delivered May 11, 1988

[redacted]

Mitchell, Williams, Selig & Tucker, by: *Mike Wilson*, for appellant.

Vaughan and Bambury, by: *Keith Vaughan* and *Robert E. Bambury*, for appellee.

JAMES R. COOPER, Judge. Larry R. Hibbs appeals from a decision of the Pulaski County Circuit Court affirming a decision

of the City of Jacksonville Civil Service Commission. Hibbs was fired by the Chief of Police from his position as Assistant Police Chief. He appealed to the Jacksonville Civil Service Commission, which conducted a hearing after which it reinstated Hibbs to the police department but demoted him to the rank of captain. Hibbs appealed to the Pulaski County Circuit Court, which reviewed the transcript of the proceedings before the Civil Service Commission and found that, while there were procedural errors committed by the Commission, the errors were not prejudicial. The court further found that the evidence supported the Commission's decision to reinstate Hibbs at a lower rank and to put him on six months probation. We affirm.

On appeal, we must determine whether the Commission's decision is supported by substantial evidence, and in determining the sufficiency of the evidence, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the appellee. *Briley* v. *Little Rock Civil Service Commission*, 266 Ark. 394, 583 S.W.2d 78 (1979).

First, the appellant claims that the Commission erred in requiring him to address the allegations against him as recited in a termination letter from the Chief of Police before any other evidence against him was produced. The appellant argues that the circuit court erred in finding that this procedure was erroneous but was nevertheless harmless and not prejudicial to the appellant. The appellant asserts, and the appellee seems to agree, that error is presumed prejudicial, relying on *Hanna Lumber Co.* v. *Neff*, 265 Ark. 462, 579 S.W.2d 95 (1979), and *Allen* v. *Arkansas State Highway Commission*, 247 Ark. 857, 448 S.W.2d 27 (1969). However, it is no longer presumed that error is prejudicial. *Jim Halsey Co., Inc.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985); *Donoho* v. *Donoho*, 22 Ark. App. 150, 737 S.W.2d 162 (1987). *See also McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984). Unless the appellant demonstrates prejudice accompanying error, we do not reverse. *Peoples Bank and Trust Co.* v. *Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986).

The circuit court reviewed the transcript of the proceedings before the Jacksonville Civil Service Commission and affirmed its decision. We have reviewed the transcript and, in

light of that review, we cannot say that the decision of the Commission is not supported by substantial evidence. There was evidence that the appellant, when the Chief of Police was absent, had countermanded directives of the Chief in regard to lunch hours for jailers and radio operators and had countermanded the Chief with regard to a rule violation inquiry within the department. There was also evidence that the appellant had wrongly disseminated departmental information and had been uncooperative or untruthful with regard to his actions.

In summary, the appellant had been terminated from a high-ranking position with the Jacksonville Police Department for alleged infractions but nevertheless won reinstatement, albeit at a lower rank, from the Civil Service Commission, after his hearing. Since there is substantial evidence to support the Commission's decision and because the procedural errors have not been shown to have prejudiced the appellant, we affirm.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Deborah Davis WOLD, Administrator of the Estate of David D. Davis, Deceased *v.* LIFE INSURANCE COMPANY OF ARKANSAS

CA 87-294 749 S.W.2d 346

Court of Appeals of Arkansas
Division II
Opinion delivered May 11, 1988
[Rehearing denied June 8, 1988.]

[redacted]

Brockmann & Norton, for appellant.

Davidson, Horne & Hollingsworth, A Professional Association, by: *Allan W. Horne* and *Chet Roberts*, for appellee.

JAMES R. COOPER, Judge. In her capacity as administrator of the estate of David D. Davis, the appellant in this civil case brought an action against the appellee for death benefits under a group life insurance policy issued by the appellee. After a jury trial, the trial judge granted the appellee's motion for a directed verdict. From that decision, comes this appeal.

For reversal, the appellant contends that a directed verdict was improper because there existed questions of material fact for the jury to decide. We agree, and we reverse.

The record shows that the decedent was the owner of John Noah's Restaurant. In 1982, he procured from the appellee a group life insurance policy providing coverage for himself and his employees. Under the terms of the group policy as issued in March 1982, the benefit payable for loss of life was $10,000.00 for insureds less than sixty-five years of age; for insureds between the ages of sixty-five and seventy, the death benefit was reduced to $5,000.00. The decedent attained age sixty-five on January 7, 1985, and died on June 2, 1985, at the approximate age of sixty-five and one-half years.

On September 27, 1982, a "renewability endorsement" was executed, providing that the policyholder could, at his option, renew the policy at the conclusion of each year of coverage by paying the renewal premiums. The appellee retained the right to discontinue the policy upon the occurrence of specified events, but was required to give the policyholder written notice of the date upon which discontinuance would become effective.

On March 1, 1985, an amendment was attached to the policy providing that life insurance benefits would terminate at age sixty-five rather than at age seventy as stated in the policy issued in March 1982. The decedent was already over sixty-five at the time of the amendment; however, his name continued to appear

on premium notices, and premiums were paid until his death the following June. The plaintiff subsequently filed a claim for death benefits which was denied by the appellee on the basis of the March 1985 amendment.

The appellant contends that the directed verdict was improper because the March 1985 amendment was void for lack of consideration, and that material issues of fact concerning coverage under the original provisions of the insurance policy remained for the jury to determine. We agree.

It is generally held that a limiting endorsement to an existing contract of insurance must be supported by consideration. *See Southern Farm Bureau Casualty Insurance Co.* v. *United States*, 395 F.2d 176 (8th Cir. 1968); *McBride* v. *Sheridan*, 266 F. Supp. 314 (W.D. Ark. 1967); M. Rhodes, 1 *Couch on Insurance 2d* § 4:26 (Rev. ed. 1984); Annotation, *Consideration for Rider, Indorsement, or Other Modification of Insurance Policy to Change Risks Covered*, 52 A.L.R. 2d 826 (1957). At trial there was evidence that the appellee would have cancelled the policy had the decedent failed to agree to the endorsement terminating coverage at age sixty-five. There was also testimony showing that the appellee's intent to cancel under such circumstances was not expressed to the policyholder, and that no notice of cancellation was delivered. The issue before us, therefore, is whether the insurer's forbearance from cancelling the policy was sufficient consideration for the limiting endorsement where the insurer's intent to otherwise cancel was not expressed.

Some courts have held that an uncommunicated intent to cancel upon the policyholder's refusal of a limiting endorsement constitutes adequate consideration for the endorsement. *See, e.g., United States Fidelity and Guaranty Co.* v. *Mathis*, 236 So. 2d 730 (Miss. 1970). However, we think the better rule is that the insurer's intent to cancel must be communicated in order for forbearance from exercising a right of cancellation to provide consideration for a limiting endorsement. The reasoning behind this rule was expressed by the Eighth Circuit in *Southern Farm Bureau Casualty Insurance Co.* v. *United States, supra*, a case applying Arkansas law:

> [M]ere forbearance in exercising a right to cancel is not

[redacted]

> sufficient consideration—this always could be used as an after-the-fact consideration when a loss occurred. If the insurance company desires to cancel, it should so state in clear terms and proceed accordingly.

395 F.2d at 181. *See also, United States* v. *National Insurance Underwriter's*, 266 F. Supp. 636 (D. Minn. 1967).

We hold that under the evidence presented in this case, the March 1985 amendment was void for want of consideration and the original terms of the policy remained in force upon renewal, *see Southern Farm Bureau, supra; Aetna Insurance Co.* v. *Short*, 124 Ark. 505, 187 S.W. 657 (1916). Therefore, the trial court erred in directing a verdict in favor of the appellee.

Reversed and remanded.

COULSON and MAYFIELD, JJ., agree.

[redacted]

Nola Neher HILL, Employee *v.* TRAVENOL LABORATORIES, INC. Employer

CA 87-367 748 S.W.2d 356

Court of Appeals of Arkansas
Division I
Opinion delivered May 11, 1988

[redacted]

[redacted]

Frederick S. "Rick" Spencer, for appellant.

Harper, Young, Smith & Maurras, by: *Tom Harper, Jr.*, for appellee.

BETH GLADDEN COULSON, Judge. Appellant, Nola Neher Hill, raises four points for reversal in this appeal from a decision of the Arkansas Workers' Compensation Commission denying her claim. We find, however, that the appeal was not filed in a timely manner as required by Ark. Code Ann. § 11-9-711(b) (1987), and we therefore dismiss it.

On May 18, 1987, the Commission filed its opinion denying appellant's claim. Appellant filed a petition for reconsideration, which the Commission, declaring it to be "without merit," denied on July 1, 1987. On July 20, 1987, appellant filed a notice of appeal with the Commission. Although the document indicates that the appeal is from the decision of the Commission denying reconsideration on July 1, 1987, the substance of her appeal is in fact concerned with the Commission's opinion dated May 18, 1987.

[redacted] The time allotted for filing an appeal with this court from a decision by the Commission is prescribed by Ark. Code Ann. § 11-9-711(b)(1) (1987):

> A compensation order or award of the Workers' Compensation Commission shall become final unless a party to the dispute shall, within thirty (30) days from receipt by him of the order or award, file notice of appeal to the Court of Appeals, which is designated as the forum for judicial review of those orders and awards.

In *Morrison* v. *Tyson Foods, Inc.*, 11 Ark. App. 161, 668 S.W.2d 47 (1984), we emphasized the finality of a Commission order in the absence of an appeal filed within thirty days. We also noted that the Commission has the authority to consider a motion for rehearing which is filed within the thirty days allowed for an

appeal, but we stressed that "*the filing of a motion for reconsideration, or rehearing, does not extend the time to file the notice of appeal.*" (Emphasis added.)

The notice was not timely filed. The petition for reconsideration did not, as *Morrison* v. *Tyson Foods, Inc., supra*, establishes, extend the time allowed appellant for filing a notice of appeal.

Appeal dismissed.

CORBIN, C.J., and MAYFIELD, J., agree.

Garry R. WILLIAMS *v.* STATE of Arkansas

CA CR 87-209 748 S.W.2d 355

Court of Appeals of Arkansas
Division I
Opinion delivered May 11, 1988
[Rehearing denied June 1, 1988.]

John Wesley Hall, Jr., for appellant.

Steve Clark, Att'y Gen., by: *C. Kent Jolliff*, Asst. Att'y Gen., for appellee.

BETH GLADDEN COULSON, Judge. Appellant, Garry Ray Williams, brings this appeal from his conviction for rape. Appellant waived his right to a jury trial and was tried before a circuit judge, sitting without a jury. On appeal, appellant argues that his conviction for rape is not supported by sufficient evidence. We do not reach the merits of that argument because it is raised for the first time on appeal.

[redacted] This court does not consider matters which were not raised before the trial court. *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987). This is a settled rule. Accordingly, we do not consider appellant's argument, and the judgment of the circuit court is affirmed.

Affirmed.

CORBIN, C.J., and MAYFIELD, J., agree.

[redacted]

Michael J. FALLON *v.* STATE of Arkansas

CA CR 87-243 749 S.W.2d 686

Court of Appeals of Arkansas
Division I
Opinion delivered May 18, 1988

[redacted]

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

Steve Clark, Att'y Gen., by: *R.B. Friedlander*, Solicitor Gen., for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Pulaski County Circuit Court, First Division. Appellant, Michael J. Fallon, appeals his conviction of theft by receiving and the sentence imposed therefor. We affirm.

A felony information was filed September 8, 1986, charging appellant with theft by receiving, a violation of Ark. Code Ann. § 5-36-106 (1987) (formerly Ark. Stat. Ann. § 41-2206 (Repl. 1977)). A jury trial was held on June 8, 1987, at which time the appellant was found guilty as charged and was sentenced to fifteen years in the Arkansas Department of Correction as an habitual offender. From his conviction, comes this appeal.

As his only point for reversal, appellant asserts that the trial court erred when it denied appellant's motion for continuance after he had dismissed his attorney on the morning of trial. We disagree.

For reversal, appellant relies on *Parker* v. *State*, 18 Ark. App. 252, 715 S.W.2d 210 (1986). In *Parker*, the court stated that when a defendant requests a change of counsel it is appropriate for the trial court to treat the request as a motion for continuance. *Id.* at 258, 715 S.W.2d at 213. While we agree that this is a proper statement of the law, the facts and circumstances under which *Parker* was decided make it inapplicable to the case at bar.

In *Parker*, the defendant requested a change of counsel on the morning of trial. The trial court, in denying the request, gave the defendant the option of going to trial with his retained counsel or representing himself. There we held that appellant did not express a clear intent to waive his right to counsel since he "strenuously objected to representing himself and only chose what he considered to be the least objectionable of two undesirable choices." *Id.* at 259-60, 715 S.W.2d at 214.

Conversely, in the case at bar, appellant did not request a change or substitution of counsel, as was done in *Parker*; he dismissed his appointed counsel and sought to represent himself. At the pretrial hearing on the morning of trial, appellant, in making his request, stated:

> I'd like to mention, okay, in the last ten months I've been assigned three Public Defenders and each one of them has been more interested in defending me from the State's point of view than my point of view.
>
> . . . .
>
> It's for this reason that *I feel like I would be better suited representing myself*. . . I don't feel like that any of the Public Defenders I've talked to are willing to help me as I need to be helped on this case here.

The court noted that he had a constitutional right to proceed pro se if he wished, but repeatedly emphasized that doing so was very risky. After several attempts to persuade the appellant to allow the public defender to appear on his behalf, the court asked, "Do you want to be dumb and represent yourself or do you want to let them represent you and, if you get convicted, preserve a record for appeal?" Appellant replied, "Represent myself."

The record repeatedly supports the fact that appellant knowingly and intelligently waived his right to have counsel appear on his behalf. The judge therefore allowed him to appear pro se, but required counsel to be seated at the table with him for assistance if needed. The propriety of this decision is not challenged on appeal.

Because appellant requested to represent himself rather than to secure substitute counsel, the request did not have the effect of a motion for a continuance. At no time did appellant move for a continuance or indicate in any manner that the trial should be postponed. It is well settled that where an argument was not presented to the trial court, it cannot be raised for the first time on appeal. *Webber* v. *State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985). We, therefore, affirm.

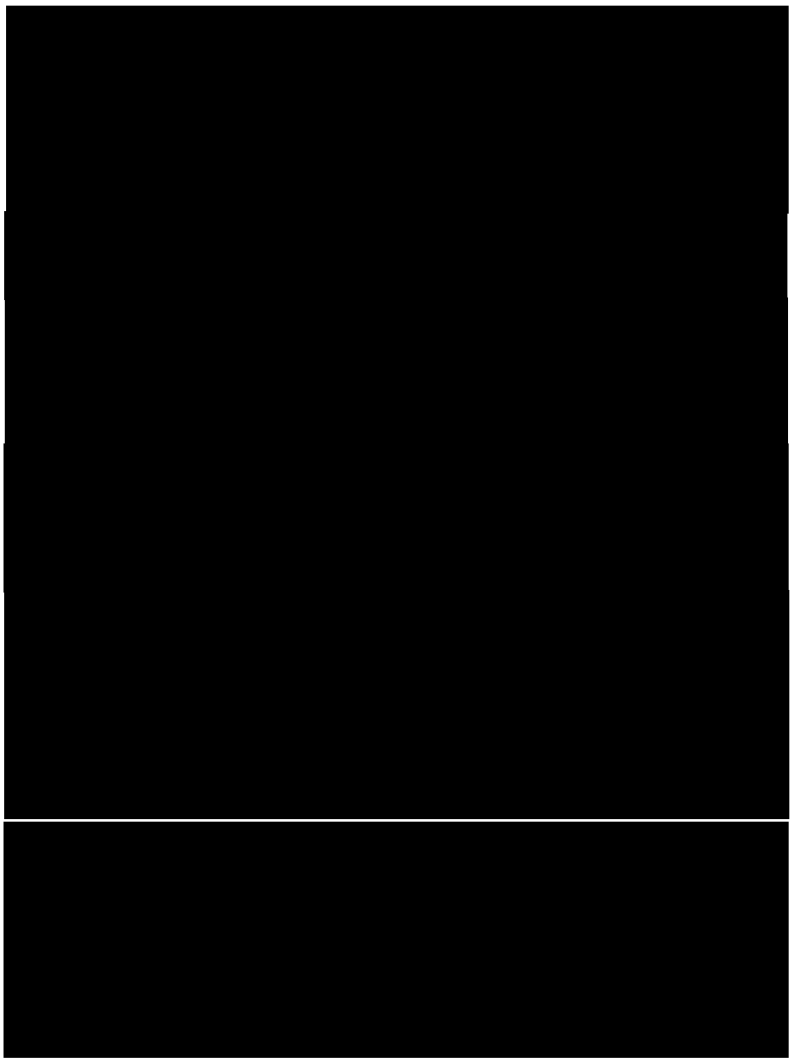
Affirmed.

MAYFIELD and COULSON, JJ., agree.

Joseph HANDY *v.* STATE of Arkansas

CA CR 87-166 749 S.W.2d 683

Court of Appeals of Arkansas
Division II
Opinion delivered May 18, 1988



John W. Walker, P.A., by: *John W. Walker*; and *James P. Massie*, for appellant.

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

GEORGE K. CRACRAFT, Judge. Joseph Handy appeals from his conviction of the crimes of kidnapping and rape for which he received consecutive ten-year sentences. He contends that the trial court erred in permitting him to be convicted and sentenced for both offenses. We disagree and affirm.

When viewed most favorably to the State, the evidence discloses that the victim, a seventeen-year-old girl, and two of her friends went swimming in a bauxite pit near Little Rock. There they encountered the appellant, who was known to them. As the victim and her friends started to leave in their automobile, appellant stepped out in front of the vehicle, stopped them, and came up to the window and asked for a cigarette. One of the girls gave him a cigarette, and he inquired about the speakers of the automobile's stereo system. He then opened the door and jumped in the car. According to the victim, appellant stated his intention to have sexual intercourse with one or more of the girls in rather graphic terms. When they hysterically refused, he drove the car down a dirt road and stated that if any one of them tried to escape he would kill the others. While he was driving, one of the girls kept

trying to open the door and push the victim out so that she might escape. She stated that appellant kept screaming "If you jump out I'm going to kill the other ones." After driving for about a mile, appellant stopped the car, pulled the victim down onto the ground, beat her about the head with a wine bottle, removed her swimsuit, and then raped her. While he was raping the victim, the other two girls escaped. When appellant realized they were gone, he took everything from their purses and some jewelry from inside the vehicle, and left the scene.

The appellant contends that he could not be convicted and sentenced for both rape and kidnapping because of the following provisions of Ark. Code Ann. § 5-1-110 (1987) (formerly Ark. Stat. Ann. § 41-105 (Repl. 1977)):

> (a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> (1) one offense is included in the other, as defined in subsection (b) of this section;
>
> * * *
>
> (b) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
>
> (1) it is established by proof of the same or less than all of the elements required to establish the commission of the offense charged . . . .

The purpose of this statute is to allow a conviction of a lesser included offense when the accused is not convicted of the greater offense and to prohibit an accused from being convicted of more than one offense when the proof required to establish the offense necessarily includes proof of every element of another. We conclude that neither provision is applicable here.

Arkansas Code Annotated § 5-14-103 (1987) (formerly Ark. Stat. Ann. § 41-1803 (Repl. 1977)) provides that a person commits rape if he engages in sexual intercourse or deviate sexual activity with another person by forcible compulsion.

Unquestionably, when the evidence is viewed most favorably to the State, it establishes that a rape occurred. Arkansas Code Annotated § 5-11-102 (1987) (formerly Ark. Stat. Ann. § 41-1702 (Repl. 1977)), in pertinent part, provides that a person commits kidnapping if, without consent, he restrains another person so as to interfere substantially with his liberty with the purpose of committing rape or facilitating the commission of any other felony. The jury could easily conclude that the appellant did interfere with the victim's liberty for the purpose of facilitating the commission of rape. Neither rape nor kidnapping is a lesser included offense of the other, as each involves separate elements and it is not necessary to prove one offense in order to prove the other. Although appellant's *purpose* to commit rape was an element of both the rape and kidnapping in light of the manner in which he was charged in this case, it was not necessary that the rape have been consummated or that all of its elements be proven in order to prove the kidnapping. Further, our supreme court has held on several occasions that a person may be convicted of both kidnapping and rape. *See e.g., Hickerson* v. *State*, 282 Ark. 217, 667 S.W.2d 654 (1984); *Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Conley* v. *State*, 270 Ark. 886, 607 S.W.2d 328 (1980).

Nor do we conclude that the acts of the appellant constituted one continuous offense. Rape and kidnapping are separate offenses. While it is true that an offense such as rape necessarily contemplates restrictions on the victim's liberty while the crime is being committed, it is clear that a rapist who employs more than the minimum restraint which necessarily or normally accompanies the crime of rape may also be convicted of kidnapping. *Beed* v. *State, supra; Hickey* v. *State*, 14 Ark. App. 50, 684 S.W.2d 830 (1985). *See also* Commentary to Ark. Code Ann. § 5-11-102 (1987) (formerly Ark. Stat. Ann. § 41-1702 (Repl. 1977)). In *Cook* v. *State*, 284 Ark. 333, 681 S.W.2d 378 (1984), the court recognized that it is the quality and nature of the restraint, rather than the duration, that determines whether a kidnapping charge can be sustained, and that, where the restraint is substantial, no minimum length of restraint is required to effect a conviction of the charge. Where the action of the kidnapper substantially confines his victim in such a way that escape is made difficult or impossible, the fact that the restraint is of relatively

brief duration does not necessarily remove it from the scope of our statute.

Here, there was evidence that the appellant got into the car, stated his felonious purpose, and threatened the girls on more than one occasion with death or serious physical injury if anyone attempted to escape before he had accomplished this purpose. There was evidence that he drove the vehicle down a secluded road for at least one mile before accomplishing the act for which the restraint had been imposed. As in *Cook*, the victim was forced to remain in the car by threats and was removed to an area where escape or detection was made more difficult. She was struck several times by the appellant with a wine bottle before she was raped. We cannot conclude that the nature or duration of the restraint imposed was not in excess of that normally incidental to the crime of rape.

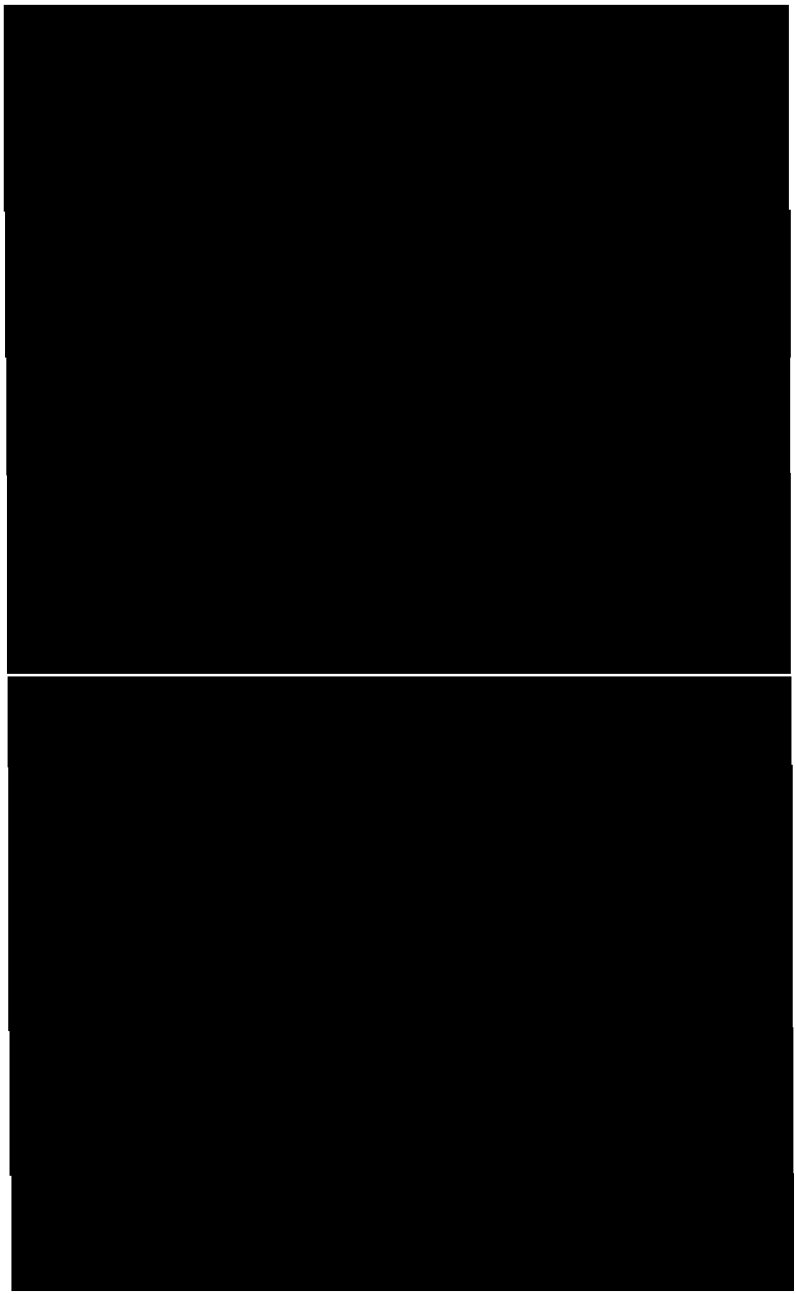
We find no error and affirm.

COOPER and JENNINGS, JJ., agree.

L.D. McMULLAN, E.L. Smith and Tom L. Dunn, et al.
v. Jack MOLNAIRD, et al.

CA 87-358 749 S.W.2d 352

Court of Appeals of Arkansas
Division II
Opinion delivered May 18, 1988



[redacted]

Landers and Shepherd, for appellants.

Law Offices of Ian W. Vickery, by: *Ian W. Vickery*, for appellees.

GEORGE K. CRACRAFT, Judge. L. D. McMullan, E. L. Smith, and Tom L. Dunn appeal from a judgment entered against them in the Union County Circuit Court finding them liable for civil damages for violations of the Arkansas Securities Act, Ark. Code Ann. § 23-42-101 et seq. (1987) (formerly Ark. Stat. Ann. § 67-1235 et seq. (Repl. 1980)). We find no error and affirm.

[redacted] Arkansas Code Annotated § 23-42-501 (1987) (formerly Ark. Stat. Ann. § 67-1241 (Repl. 1980)) provides that it is unlawful for any person to sell or offer to sell securities which have not been registered in accordance with the Act. Certificates of interest or participation in oil leases are included in the legislative definition of securities required to be registered under the Act. Ark. Code Ann. § 23-42-102(12) (1987) (formerly Ark. Stat. Ann. § 67-1247(1) (Repl. 1980)). The Arkansas Securities Act was passed primarily for the purpose of protecting members of the public who might invest in offerings by promoters of securities. *Graham* v. *Kane*, 264 Ark. 949, 576 S.W.2d 711 (1979). Upon the showing of a sale of a security, the burden shifts to the seller to show that the security was either registered or exempt from the Act, or that the buyer is estopped from claiming civil damages. *Schultz & Watkins* v. *Rector-Phillips-Morse*, 261 Ark. 769, 552 S.W.2d 4 (1977).

Appellees brought this action alleging that appellants had offered to and did sell and assign to them decimal interests in oil leases at various locations. They also alleged that appellants had failed to comply with the registration requirements of the Securities Act, and had exaggerated and misrepresented the capabilities of the interests. Appellees prayed for judgment under the civil liability provisions contained in Ark. Code Ann. § 23-42-106 (1987) (formerly Ark. Stat. Ann. § 67-1256 (Repl. 1980)). Appellants answered by general denial and later filed an amended answer claiming the defenses of laches, estoppel, and waiver on the part of the appellees.

On July 17, 1986, appellees filed a motion for summary judgment to which were attached portions of pretrial depositions and affidavits of each of the seventeen appellees in which all averred that they had acquired from the appellants those decimal oil-lease interests set forth in the complaint for the consideration stated in the complaint. Appellees also averred that they were not knowledgeable or experienced in oil and gas ventures and were incapable of evaluating the merits or risks of these ventures. They further stated that none of them were engaged in the oil business or trained in any of the facets of the vocation of producing and exploring for petroleum products. It was averred that the interests sold to the appellees were not registered in accordance with the Act. On August 8, 1986, appellants filed a response in which they denied the allegations made in the motion. No supporting documents were attached to that response.

On October 15, 1986, a hearing was held on the motion for summary judgment. Prior to the day of the hearing, appellants had filed no counter-affidavits or other documents. At the hearing, appellants tendered an amended response to which were attached documents which they contend were contradictory to those accompanying the motion for summary judgment and would establish questions of fact. The trial court ruled that the amended response and its supporting documents were untimely filed and would not be considered on the issue of liability. The court then announced that appellees were entitled to summary judgment on the issue of liability, but that it would allow additional testimony to be taken on the issue of damages.

A hearing was then held on the issue of damages at the conclusion of which appellants asked for and were granted the right to offer additional rebuttal evidence as to damages, and a second hearing was scheduled by the court. Although at both of these hearings appellants attempted to introduce evidence as to their liability, the court ruled in each instance that all further testimony was limited to the issue of damages as the issue of liability had been summarily determined at the initial hearing on uncontradicted affidavits.

Appellants contend on appeal that the trial court erred in finding that there was no disputed material fact to be determined on the issue of liability and in entering a finding that the

appellants were liable for civil damages under the Securities Act. They further argue that the court erred in its finding of the amount of damages. We find no error and affirm.

Motions for summary judgment are governed by Rule 56 of the Arkansas Rules of Civil Procedure, which provides that such a judgment may be entered if the pleadings, depositions, answers, interrogatories, and admissions on file, in addition to affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c) provides that a summary judgment, interlocutory in character, may be entered on the issue of liability alone even if there remains a genuine issue of fact as to the amount of damages. Summary judgment is an extreme remedy which should be allowed only when it is clear that there is no genuine issue of fact and the moving party is entitled to a judgment as a matter of law. *Johnson* v. *Stuckey and Spear, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984). Although affidavits and documents in support of motions for summary judgment are construed against the moving party, once a prima facie showing of entitlement to summary judgment is made, the responding party must discard the shielding cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact. *Pruitt* v. *Cargill, Inc.*, 284 Ark. 474, 683 S.W.2d 906 (1985); *Hughes Western World, Inc.* v. *Westmoor Manufacturing Co.*, 269 Ark. 300, 601 S.W.2d 826 (1980).

Appellants contend that they did controvert the prima facie showing of the appellees by attaching documents to their amended response which they claim contradicted the supporting documents of the appellees. That argument must fail for two reasons. The documents attached to the amended response were not abstracted and we do not know their content even though the appellants do refer to them in their argument. *Kitchens* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980). Of primary concern, however, is the fact that the response and attachments were untimely filed. Rule 56(c) requires that when a proper motion for summary judgment has been filed the adverse party must, *prior to the day of hearing*, serve opposing affidavits. Here, the affidavits on which the appellants would rely were not filed until the hearing on the motion for summary judgment was in progress. Opposing affidavits filed on the date of hearing are

untimely and run afoul of the express provisions of Rule 56(c) as well as the trial court's inherent power to control proceedings before it. Such affidavits and documents need not be considered by the court. *See Jones* v. *Menard*, 559 F.2d 1282 (5th Cir. 1977).

Appellants argue that the record contains testimony and pleadings alleging that several of the appellees actively solicited other appellees to invest in the securities and that the information was received by one appellee from another rather than from appellants. The testimony referred to appears to be that which was attached to the untimely response or taken *ore tenus* at the subsequent hearings on the question of damages. Rule 56 does not permit supplementation by oral testimony of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits filed in considering whether summary judgment is appropriate. We therefore disregard the oral testimony for this purpose. *Montgomery Ward and Co.* v. *Credit*, 274 Ark. 66, 621 S.W.2d 855 (1981); *Sikes* v. *Segers*, 263 Ark. 164, 563 S.W.2d 441 (1978); *Dixie Furniture Co.* v. *Arkansas Power & Light Co.*, 19 Ark. App. 160, 718 S.W.2d 120 (1986). Appellants do not point out to us, and our examination of the record does not disclose, that the depositions to which they refer were filed in the case prior to the hearing on the motion.

Appellants next contend that the amount of damages was disputed and therefore summary judgment was improper. However, as noted above, Rule 56(c)provides that a summary judgment, interlocutory in character, may be rendered on the issue of liability alone, even if there is an issue of fact as to the amount of damages.

Appellants finally argue that the case had been set for jury trial prior to the two hearings on damages and that, even if the court had determined that summary judgment should be issued on liability, a jury trial on the issue of damages should have been held.

When the trial court rescheduled the hearing without a jury, there was no protest and the appellants appeared and presented their evidence to the court sitting without a jury. The issue of the right to trial by jury was not raised in the trial court and will not be considered on appeal in the absence of a valid objection being made to the action of the court at the time.

[redacted]

Affirmed.

COOPER and JENNINGS, JJ., agree.

[redacted]

MIDLAND DEVELOPMENT, INC. and Marvin Strange
v. PINE TRUSS, INC.

CA 87-435 750 S.W.2d 62

Court of Appeals of Arkansas
Division II
Opinion delivered May 25, 1988

[redacted]

[redacted]

Croxton & Boyer, by: *Ronald L. Boyer*, for appellants.

Slinkard & Halbrook, P.A., by: *Howard L. Slinkard*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Benton County Circuit Court. Appellants, Midland Development, Inc. (hereinafter Midland) and Marvin Strange, appeal from an order dismissing their counterclaim and third party complaint, respectively. We affirm.

In August of 1985, appellant Midland sent a purchase order to appellee for 80 pitch trusses. Appellant received delivery of, and accepted the trusses as conforming to the contract. Thereafter, appellant Midland failed and refused to make payment in the contract amount of $4,129.22. Appellee instituted suit for recovery of the purchase price. Appellant Midland filed a counterclaim and Strange filed a third party complaint. The court dismissed both claims and entered summary judgment in favor of appellee. From the dismissal comes this appeal.

For reversal, appellants raise the following questions: (1) Whether the effect of the Wingo Act prohibits set-off as well as rescission and restitution upon failure of the breaching party to provide conforming goods in accordance with the Uniform Commercial Code, Article 2, as codified by Ark. Code Ann. §§ 4-2-101 through 4-2-725; (2) whether Marvin Strange could intervene and if his intervention met the requirements set forth in

Arkansas Rules of Civil Procedure, Rule 24. Their points will be addressed in order.

First, appellant Midland essentially argues that its failure to comply with Ark. Code Ann. § 4-27-104 (1987) does not prohibit it from setting up a defense including rescission, restitution, and set-off based upon a prior transaction between the parties.

The pertinent provision of the Wingo Act provides as follows:

> As an additional penalty, any foreign corporation which fails or refuses to file its articles of incorporation or certificate as aforesaid cannot make any contract in the state which can be enforced by it either in law or equity, and the compliance with the provisions of this section after the date of any such contract or after any suit is instituted thereon shall in no way validate the contract.

Ark. Code Ann. § 4-27-104(c) (1987) (formerly Ark. Stat. Ann. § 64-1202 (Repl. 1980)).

There is no dispute that appellant Midland, a foreign corporation, was not authorized to do business in Arkansas for failure to comply with the filing requirements of the Wingo Act. Nor does Midland dispute that it received conforming goods for which it refused to make payment. Appellant asserts, however, that it is not attempting to enforce a contract. It argues that it therefore should have been allowed to set-up as a defense that in a previous transaction it paid appellee for goods which were rejected and returned to appellee due to alleged non-conformities for which no substitute goods nor reimbursement had been made. In effect, appellant is seeking to recover restitution on a prior transaction and have it set-off against the amount for which this suit was brought.

The Arkansas Supreme Court has recognized that:

> The test to determine whether the plaintiff is entitled to recover in an action like this, or not, is his ability to establish his case without any aid from the illegal transaction. If his right to recover depends on the contract which is prohibited by statute, and that contract must necessarily be proved to make out his case, there can be no recovery.

Ark. Airmotive Div. of Currey Aerial Sprayers, Inc. v. *Ark. Aviation Sales, Inc.*, 232 Ark. 354, 335 S.W.2d 813 (1960) (quoting *Republic Power & Service Co.* v. *Gus Blass Co.*, 165 Ark. 163, 263 S.W. 785 (1924)).

For this reason, foreign corporations operating in violation of the Wingo Act have been allowed to recover in Arkansas based upon theories such as quasi-contract, which do not require use of the unenforceable contract to prove their case. *See, e.g., Dews* v. *Halliburton Ind., Inc.*, 288 Ark. 532, 708 S.W.2d 67 (1986).

However, appellant's defenses are based upon the Uniform Commercial Code provisions regarding the sale of goods codified at Ark. Code Ann. §§ 4-2-101 through 4-2-725 (1987) (formerly Ark. Stat. Ann. §§ 85-2-101 through 85-2-725 (Add. 1961)). The UCC governs *contracts* for the sale of goods. Appellant alleged that goods in the prior transaction were non-conforming. Goods conform to the contract when they are in accordance with the *obligations under the contract.* Ark. Code Ann. § 4-2-106(2) (1987) (formerly Ark. Stat. Ann. § 85-2-106(2) (Add. 1961)). Therefore, to prove any non-conformance, Midland would have to prove the obligations of the contract and that the goods were not in accordance therewith. The proving of the contract would be unavoidable and would therefore be prohibited, even though intended only for defensive purposes. Had Midland sought enforcement in equity on a theory not dependent upon the contract, we would have a different issue before us. We cannot say the trial court erred in dismissing Midland's counterclaim for set-off when they presented no theory to the court which did not unavoidably involve the unenforceable contract.

Appellant's second point for reversal essentially argues that appellant, Marvin Strange, president of Midland, should have been allowed to intervene in the cause of action as a matter of right because he is a third party beneficiary to the unenforceable contract as owner of the apartment complex in which the alleged non-conforming trusses were to be incorporated.

Arkansas Rules of Civil Procedure 24 governs the matter of intervention in a civil cause of action and provides for both intervention as a matter of right and permissive intervention. Intervention as a matter of right cannot be denied. *Schacht* v.

Garner, 281 Ark. 45, 661 S.W.2d 361 (1983). However, this rule does not give an absolute right to intervene unless the application complies with the procedural requirements. *See, Bank of Quitman* v. *Phillips*, 270 Ark. 53, 603 S.W.2d 450 (1980). We would first point out that appellant Strange's motion was not properly submitted as it was titled third-party complaint and counterclaim. However, even if the motion had been properly filed and titled, it would fail under the case law interpreting the standards for intervention as a matter of right.

In *Billabong Products, Inc.* v. *Orange City Bank*, 278 Ark. 206, 644 S.W.2d 594 (1983), the supreme court enunciated three requirements an applicant must meet to prevail as a matter of right: (1) that he has a recognized interest in the subject matter of the primary litigation, (2) that his interest might be impaired by the disposition of the suit, and (3) that his interest is not adequately represented by existing parties. *Id.* at 208, 644 S.W.2d at 595.

As was true in *Billabong*, appellant Strange has not claimed a sufficient interest relating to the transaction which is the subject of this suit, or the transaction which Midland claims entitles them to a set-off. Nor will his interest be impaired by the disposition of the current litigation. "Generally, if the one seeking intervention will be left with his right to pursue his own independent remedy against the parties, regardless of the outcome of the pending case, then he has no interest that needs protecting by intervention of right." *Id.* at 208-09, 644 S.W.2d at 595. Strange, as owner of the complex, has a remedy against Midland if the apartment complex is not completed. The fact that he would desire not to pursue an action against a corporation of which he is president is an insufficient reason to allow intervention as a matter of right. Therefore at best, appellant would have been allowed to intervene only in the court's discretion. The court found that the attempted intervention was a subterfuge to avoid application of the Wingo Act. We cannot say that his finding was clearly erroneous and therefore, he did not abuse his discretion in denying appellant Strange's attempt to intervene.

Affirmed.

CRACRAFT and COULSON, JJ., agree.

Donnie Glen HENDRIX *v.* Doris Hendrix LUCY

CA 87-357 750 S.W.2d 66

Court of Appeals of Arkansas
Division II
Opinion delivered May 25, 1988

Don G. Gillaspie, for appellant.

Robert C. Vittitow, for appellee.

JAMES R. COOPER, Judge. The appellee in this divorce case petitioned the chancellor to cite the appellant for contempt for failure to make mortgage payments as required by the parties' property settlement agreement. The appellant responded by asserting that the property had been destroyed by fire, and the mortgage paid in full out of the fire insurance proceeds. In an order dated June 22, 1987, the chancellor found that the parties' intent in entering into the agreement was that the appellee should receive from the appellant the equivalent of the balance owed on the house at the date of the agreement, whether by direct payments on the mortgage or by payments to the appellee. From that decision, comes this appeal.

For reversal, the appellant contends that the chancellor erred in finding that the parties intended that the appellant would continue to make payments to the appellee even if the mortgage

had been paid in full out of fire insurance proceeds. We find no error, and we affirm.

The record shows that the parties were divorced on November 5, 1979. The divorce decree incorporated their property settlement agreement dated October 23, 1979. The agreement required the appellant to pay the mortgage payments on the marital home until the balance was paid in full, and to execute a quitclaim deed conveying his interest in the property to the appellee upon payment of the mortgage in full. In an order clarifying the decree, entered on March 8, 1982, the chancellor construed the agreement as vesting title in the appellee as of November 6, 1979, subject only to the indebtedness existing on the home on that date. No appeal was brought from this order, and it became final.

In May 1982 the appellee sold the house to Clarence Hicks. The sale was in the form of a ten-year lease to Hicks; during the ten-year period, Hicks was to pay $25,000.00 consideration for the lease, and was given the option of purchasing the property for one dollar after payment of the total lease amount. Hicks was required to insure the property during the lease period.

The property burned in November 1986. Insurance proceeds of $33,464.00 were paid jointly to the appellant, the appellee, the mortgagee bank, and Hicks. The mortgagee was paid in full from the insurance proceeds, receiving $7,008.40. It was stipulated that the appellee received approximately $18,000.00 from the sale of the home, and that the appellant made the mortgage payments required by the agreement until November 1986, when the property burned.

The only issue before us is whether the chancellor erred in holding that it was the parties' intent that the appellee should receive from the appellant the amount due on the mortgage as of the date of the agreement, whether by payments on the mortgage or by payments to the appellee. We cannot say it was clearly erroneous to hold that the language of the agreement to the effect that the appellant would make the house payments of $142.00 per month until the balance was paid in full reflected an intention that the appellant should pay the mortgage payments so that the appellee would receive the entire equity in the home. *See Jones* v.

Jones, 236 Ark. 296, 365 S.W.2d 716 (1963). Therefore, the chancellor was not clearly wrong in finding that this intention would be frustrated if the appellant's duty to pay was construed to terminate upon payment of the mortgage from the proceeds of an insurance policy the appellant did not procure. We find no error, and we affirm.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Daniel D. PARKS a/k/a Danny D. Parks *v.* STATE of Arkansas

CA CR 87-228 750 S.W.2d 65

Court of Appeals of Arkansas
Division I
Opinion delivered May 25, 1988
[Rehearing denied June 29, 1988.]

[redacted]

Stephen Bennett, for appellant.

Steve Clark, Att'y Gen., by: *C. Kent Jolliff*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Daniel Parks was convicted by a jury of theft of leased personal property in violation of Ark. Stat. Ann. § 41-2209 (Repl. 1977 & Supp. 1985) and was fined $7,500.00. On appeal, Parks argues that the trial court erred in refusing to instruct the jury on the affirmative defense provided for in Ark. Stat. Ann. § 41-2209(e) (Repl. 1977). We find no error and affirm.

On October 18, 1985, Parks leased a 1985 Cadillac El Dorado from Brent Tyrell. The one year lease provided for monthly payments of $800.00. Parks made no payment on the lease after 1985 and, in approximately April of 1986, Tyrell swore out a warrant and Parks was arrested. The car was recovered and Tyrell subsequently obtained a civil judgment against Parks.

Parks offered, and the trial judge refused to give, a jury instruction which tracks the language of Ark. Stat. Ann. § 41-2209(e). That statute provides:

> The following factors shall constitute an affirmative defense to prosecution for theft: That the lessee accurately stated his name and address at the time of the rental, that the lessee's failure to return the item at the expiration date of the rental contract was lawful, that the lessee failed to receive the lessor's notice personally and the lessee returned the personal property to the owner or lessor within forty-eight (48) hours of the commencement of prosecution, together with any charges for the overdue period and the value of damages to the personal property, if any.

Appellant correctly argues that if there is any evidence to support the giving of his instruction it was error to refuse to do so. *See Hall* v. *State*, 286 Ark. 52, 689 S.W.2d 524 (1985). The converse of the proposition is equally true: there is no error in the refusal to give an instruction where there is no evidence to support the giving of that instruction. *Couch* v. *State*, 274 Ark. 29, 621 S.W.2d 694 (1981).

The statute clearly contemplates that all of the listed factors must be present in order to establish an affirmative defense. Here, there was evidence that Parks accurately stated his name and address at the time of the rental and there was some evidence that he failed to receive the lessor's notice personally. The record, however, is entirely devoid of evidence that Parks ever paid to Tyrell "any charges for the overdue period" or "the value of damages to the personal property." Because there was no evidence as to this element of the statutory affirmative defense, the court did not err in refusing to give the requested instruction.

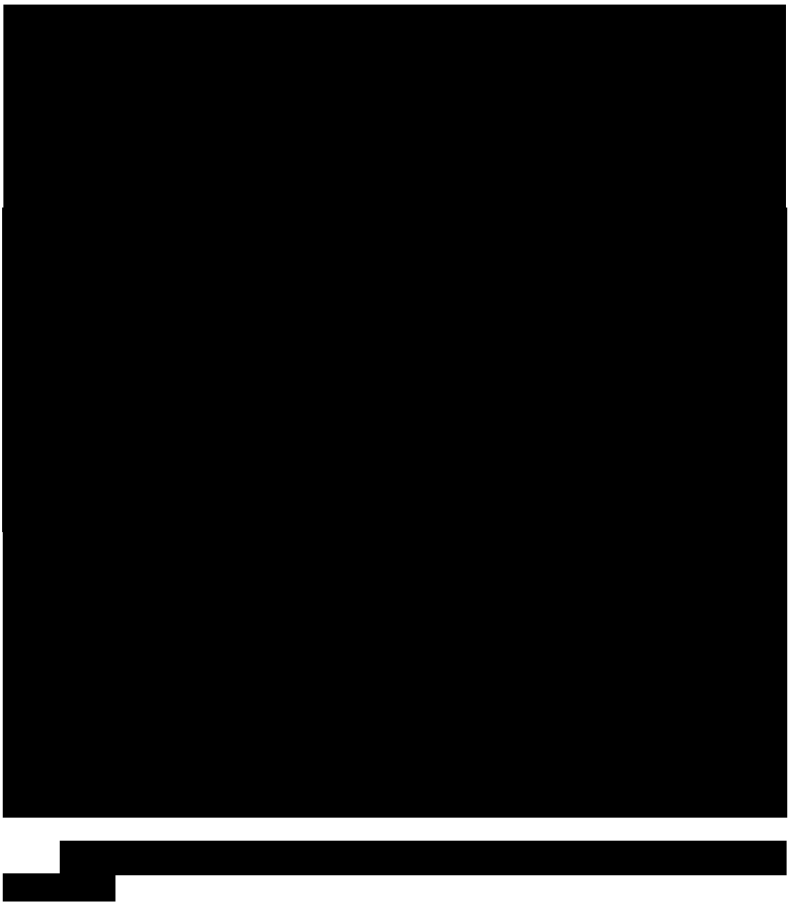
Affirmed.

COOPER and MAYFIELD, JJ., agree.

SOUTHWESTERN BELL TELEPHONE COMPANY
v. ARKANSAS PUBLIC SERVICE COMMISSION

CA 87-202 751 S.W.2d 8

Court of Appeals of Arkansas.
En Banc
Opinion delivered June 1, 1988



Richard C. Hartgrove; Garry S. Wann; Durward D. Dupre; T. Michael Payne; and *Friday, Eldredge & Clark*, by: *Herschel Friday* and *Jeff Broadwater*, for appellant.

Lee McCulloch, for appellee.

DONALD L. CORBIN, Chief Judge. On December 17, 1986, this court reversed and remanded a decision of the Arkansas Public Service Commission because of the Commission's inconsistent treatment of investment tax credits (ITC) and accumulated deferred income taxes (ADIT) in its calculation of appellant's cost of capital. *Southwestern Bell Tel. Co.* v. *Arkansas Pub. Serv. Comm'n*, 19 Ark. App. 322, 720 S.W.2d 924 (1986). On March 17, 1987, a hearing was held by the Commission pursuant to our remand, after which the Commission adopted a capital structure calculation which resulted in a reduction of appellant's rate of return from 9.76% to 9.71%. The Commission's action thus reduced Bell's net annual revenue requirement by approximately $736,000.00, from which Bell appeals. We find no error and affirm.

Appellant contends that the appellee's treatment of ITC and ADIT on remand is contrary to our earlier directives in *Southwestern Bell*, where we ordered the Commission to recalculate the appellant's appropriate rate of return, to give proper and consistent consideration to Investment Tax Credits and Accumulated Deferred Income Taxes, and to apply the methodology selected in a consistent manner. There, we held the use of total company ITC and ADIT (along with total-company equity and debt which, apparently, are not susceptible of calculation on a jurisdictional basis) in a capital structure calculation which included Arkansas-only customer deposits was inconsistent and improper. This court's opinion plainly directed the Commission to recalculate appellant's rate of return and to consistently apply the methodology selected.

After remand, total-company funding sources were used throughout appellant's capital structure calculation. Appellant, however, disagrees with the use of total company amounts to derive an allowable rate of return for its Arkansas rate base. Instead, it urges that ITC, ADIT, and customer deposits attributable to Arkansas only should be separated and used in the calculation. The appellee, on the other hand, contends that its use of total company amounts throughout the cost of capital calculation complies with this court's directive of consistency. We agree with the appellee. The primary basis for reversal in that case was

using Arkansas-only customer deposits on the one hand while using total company ITC and ADIT in the same calculation, despite the fact that ITC and ADIT were as readily identifiable as to their origin as were customer deposits.

The Commission has wide discretion in choosing its approach to rate regulation, and we do not advise the Commission as to how to make its findings or exercise its discretion. Only if we find the findings of the Commission to be unsupported by substantial evidence or that the Commission has abused its discretion may we reverse. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *General Tel. Co. of the Southwest* v. *Arkansas Pub. Serv. Comm'n*, 23 Ark. App. 73, 744 S.W.2d 392 (1988); *Walnut Hill Tel. Co.* v. *Arkansas Pub. Serv. Comm'n*, 17 Ark. App. 259, 709 S.W.2d 96 (1986). The Public Service Commission is free, within the strictures of its statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. No public utility has an absolute right to any method of valuation or rate of return, and the PSC has wide discretion in its approach to rate regulation. This court is generally not concerned with the method used by the Commission in calculating rates as long as the Commission's action is based on substantial evidence. It is the result reached, and not the method used, which primarily controls. If the Commission's decision is supported by substantial evidence and the total effect of the rate order is not unjust, unreasonable, unlawful or discriminatory, judicial inquiry terminates. *Southwestern Bell*, 19 Ark. App. at 327, 720 S.W.2d at 927; *Southwestern Bell Tel. Co.* v. *Arkansas Pub. Serv. Comm'n*, 18 Ark. App. 260, 715 S.W.2d 451 (1986); *Walnut Hill Tel.*, 17 Ark. App. at 265, 709 S.W.2d at 99.

Arkansas Code Annotated Section 23-2-423 (1987) defines our scope of review:

> (3) The finding of the commission as to the facts, if supported by substantial evidence, shall be conclusive.
>
> (4) The review shall not be extended further than to determine whether the commission's findings are supported by substantial evidence and whether the commission has regularly pursued

its authority, including a determination of whether the order or decision under review violated any right of the petitioner under the laws or Constitution of the United States or of the State of Arkansas.

Appellant's allowable rate of return was derived through what is called the "weighted cost of capital" approach. An application of this method involves the accumulation of the sources of funds available to a company, a derivation of the costs associated therewith (i.e., interest charges, dividend expenses, etc.), and a calculation of the relative proportions of each funding source to the total. The "weighted" cost of capital is then derived, and that figure becomes the allowed rate of return on rate base which the company is permitted the opportunity to earn on its investment. The capital structure adopted by the Commission from which appellant's rate of return was derived in this case is as follows:

Component	Proportion	Cost	Weighted Cost
Long-term debt	.3482	.0938	.0327
Short-term debt	.0209	.1044	.0022
Common equity	.4588	.1350	.0619
Customer deposits	.0049	.0635	.0003
ADIT	.1663	-0-	-0-
ITC	.0009	-0-	-0-
WEIGHTED COST OF CAPITAL			.0971

The above figures and costs are those attributable to the entire company's[1] capital structure.

The appellant claims that the Commission's action in this case runs afoul of something it calls the "Theoretically Equivalent Rule." In *Southwestern Bell*, 19 Ark. App. at 324, 720 S.W.2d at 925, we discussed the concept of theoretical

[1] Besides Arkansas, Southwestern Bell serves Kansas, Oklahoma, Texas and Missouri, and also has interstate operations subject to federal regulation.

equivalence, not from the standpoint of an intractable "rule," but rather from the posture of observation. We stated:

> Both parties agree that ITC's and ADIT's can and should be given regulatory treatment in either one of two "theoretically equivalent" methods: (1) a deduction from rate base, or (2) inclusion in the company's cost of capital calculation as a cost-free source of capital. The second method was employed in this case by the Commission. In the first method, the amount of tax benefit attributable to Arkansas plant and equipment would be derived from the company's accounts and deducted from the company's rate base. In the second method, the tax benefits are included in the cost of capital calculation, or an adjustment is made to account for the tax benefit after the company's cost of capital is calculated without the benefits being included.

This case involves the second method of treatment. Appellant mistakenly reads too much into this court's taking note of the concept that the two methods for treatment of ITC and ADIT in ratemaking are theoretically equivalent and argues that this court's directive to the Commission on remand required an application of what appellant calls the "Theoretically Equivalent Rule."

In the case at bar, the Commission determined that the entire company's funding sources are available to it to fund its Arkansas rate base and are not susceptible of separation on a jurisdictional basis. This is based on the notion of "fungibility" of funds.[2] We cannot say that the Commission's cost of capital calculation in this case is not supported by substantial evidence nor that it runs afoul of our directive on remand. We require simply that all the elements involved in a calculation of a company's cost of capital be given consistent treatment. Here, all the funding elements involved in appellant's cost of capital calculation were derived on a total company basis. Such treat-

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[2] In *Southwestern Bell*, 19 Ark. App. at 327, 720 S.W.2d at 927, we observed that the concept of fungibility of funds holds that, once dollars are pooled into the funds of a multi-state utility, they cannot later be traced back to a particular source in a particular state.

ment is consistent.

Appellant relies on *Arkansas Power & Light Co.* v. *Arkansas Public Service Commission*, 261 Ark. 184, 546 S.W.2d 720 (1977), and *Russellville Water Co.* v. *Arkansas Public Service Commission*, 270 Ark. 584, 606 S.W.2d 552 (1980), as requiring "consistency among the elements of the ratemaking formula." *Russellville* involved the Commission's refusal to amortize or normalize savings and tax benefits associated with its amortization of certain extraordinary expenses over a period of time. Similarly, *AP & L* involved the Commission's failure to eliminate from the rate formula certain tax benefits associated with construction work in progress which it had eliminated from the rate base. The instant case is different. This case simply involves a determination of appellant's overall cost of capital, which hinges upon an exercise of judgment as to what sources of capital are available to a utility to fund its operations.

Finally, appellant argues that the Commission's interpretation of this court's opinion in *Southwestern Bell*, 19 Ark. App. at 322, 720 S.W.2d at 924, was incorrect. In light of the above, we do not agree.

There being no error or abuse, the orders of the Commission are affirmed.

Affirmed.

Bruce P. BRIDGES *v.* Benita C. BRIDGES
Charles Paul Bridges, et ux. *v.* Bruce P. Bridges and Benita Bridges (Rimmer)

CA 87-290 750 S.W.2d 412

Court of Appeals of Arkansas
Division II
Opinion delivered June 1, 1988
[Rehearing denied June 29, 1988.]

[redacted]

Law Offices of Ronald L. Griggs, by: *Ronald L. Griggs*, for

appellant.

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellees.

JAMES R. COOPER, Judge. This appeal arises from a foreclosure action and an action to enforce a divorce decree which were consolidated by agreement of the parties. On appeal the appellants, Bruce Bridges and Charles and Betty Bridges, argue three points for reversal: that the chancery court was without jurisdiction to alter the divorce decree because it was *res judicata*; that the chancery court was without jurisdiction to modify the divorce decree under ARCP Rule 60(b); and that the chancellor abused his discretion in the foreclosure action when it disallowed some expenses incurred by the appellants, Charles and Betty Bridges. We affirm.

The record reflects that Charles and Betty Bridges loaned their son, Bruce Bridges, and his wife, appellee Benita Bridges, $50,000 to purchase a home. Bruce and Benita signed a note which provided for payments of $200.00 per month with no interest unless they defaulted on the loan.

On June 25, 1984, Benita and Bruce were divorced in the Chancery Court of Union County. According to the terms of the decree, Benita was to have possession of the house until the children were grown or until she remarried. She was also responsible for the monthly note payments, keeping the house insured, maintaining the property, and paying the taxes. Upon the sale of the house, the proceeds were to be divided equally.

On September 2, 1986, Charles and Betty Bridges filed a foreclosure action against Bruce and Benita. Benita filed a counterclaim against Bruce alleging that her property rights were damaged by Bruce's failure to make the note payments during the time he was in possession of the house and that she was entitled to damages she may have suffered as a result of the foreclosure. By agreement of the parties, both actions were consolidated and a hearing was held on January 14, 1987. However, prior to the date of trial, the home was sold in a private sale for $70,000.

Because the appellants have not challenged the sufficiency of the evidence, only the facts necessary to the resolution of the issues will be recited. The chancellor found that, while Benita

may have defaulted in her responsibility to make the note payments on the house, Bruce knew that his parents planned to begin charging interest on the note and later to foreclose on the house and that he did nothing to mitigate damages. The chancellor also found that because of Bruce's failure to mitigate damages the equity in the house was reduced in the amount of $8,559.61, and Bruce was ordered to bear one-half of the amount of that reduction.

The appellants first argue that the chancellor did not have jurisdiction to award Benita a greater amount than Bruce from the sale proceeds because the divorce decree provided that the proceeds from the sale of the house were to be divided equally. It is the appellant's contention that any issue concerning the division of the proceeds of the house was barred by *res judicata.*

From the record, it appears that the defense of *res judicata* was not raised to the trial court. Rule 8(c) of the Arkansas Rules of Civil Procedure provides that a party must affirmatively plead some defenses. *Res judicata* is specifically listed as an affirmative defense which must be pled. *Allen* v. *Wallis*, 279 Ark. 149, 650 S.W.2d 225 (1983); *Kendrick* v. *Bowen*, 211 Ark. 196, 199 S.W.2d 740 (1947). Since the appellants did not raise the defense of *res judicata* to the trial court, we will not consider the issue. We do not consider issues raised for the first time on appeal. *Goode* v. *First National Bank of Conway*, 269 Ark. 755, 600 S.W.2d 436 (Ark. App. 1980).

The appellant next argues that the chancery court could not modify the divorce decree because to do so would violate ARCP Rule 60(b), which provides:

> (b) Ninety-Day Limitation. To correct any error or mistake or to prevent the miscarriage of justice, a decree or order of a circuit, chancery or probate court may be modified or set aside on motion of the court or any party, with or without notice to any party, within ninety days of its having been filed with the clerk.

It is the appellant's contention that since 90 days had passed since the filing of the divorce decree, the chancery court did not have the authority to modify the divorce decree.

However, this is not a case in which the divorce decree

was modified. This case began when the appellants Charles and Betty Bridges filed a foreclosure action, and the proceeds from the sale of the house were divided pursuant to that action. The chancellor abided by the decree and divided them evenly. However, he also found as a matter of fact that Bruce Bridges had been at fault for the diminished value of the equity in the house and subtracted that from his share of the proceeds and credited them to Benita. Although we review chancery cases *de novo*, a chancellor's findings of fact will not be disturbed on appeal absent a showing that they were clearly erroneous. *Harris* v. *Milloway*, 9 Ark. App. 350, 660 S.W.2d 174 (1983). We cannot say that the chancellor's findings were clearly erroneous because Bruce had signed the note and knew of its terms, he was in possession of the house during part of the period of time in question, and he knew that his parents intended to start charging interest on the house and yet he did nothing to prevent the note from becoming delinquent.

The appellants' last argument concerns some expenses that the appellants claimed they had incurred during the foreclosure which the chancellor refused to charge against the proceeds of the house. The appellants argue that they are entitled to attorney's fees, reimbursement for insurance premiums they paid on the house, the cost of an amortization schedule, the costs associated with changing the locks, and repairs to the roof and fireplace.

At trial, Benita testified that the leak around the roof and fireplace had been there since they built the house, and was caused by improper installation of the flashing. Charles testified that he purchased insurance on the house because Benita had allowed the policy to lapse. However, Benita testified that she let the old insurance lapse because she had purchased new insurance with a different company and she produced the policy at trial. Charles also testified that the attorney's fees were "for mostly getting a restraining order from Judge Yocum to keep Benita from going back out there. . ." Benita stated that she did not know anything about a restraining order and that she had already agreed not to return to the house. There is no fixed formula or policy to be considered in arriving at these fees other than the rule that the appropriately broad discretion of the trial court should not be abused. *See Briscoe* v. *Shoppers News, Inc.*, 10 Ark. App. 395, 664 S.W.2d 886 (1984). We find no abuse of discretion and

affirm.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Michael Leon DAVIS *v.* STATE of Arkansas

CA CR 87-172 751 S.W.2d 11

Court of Appeals of Arkansas
Division II
Opinion delivered June 1, 1988

[redacted]

[redacted]

William R. Simpson, Jr., Public Defender, *Jerry J. Sallings*, Deputy Public Defender, by: *Donald K. Campbell III*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Lee Taylor Franke*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted by a jury of sexual abuse, first degree, and sentenced to six years in the Arkansas Department of Correction. On appeal, he argues three points for reversal: that the trial court erred in allowing the four-year-old victim to testify by videotape because good cause was not shown; that the trial court abused its discretion in finding that the victim was competent to testify; and that the trial court stopped being a fair and neutral magistrate when it told the State how to prove one of the elements of the offense. We find no error and affirm.

The record reflects that on February 13, 1985, when the victim, Lindsay, was four years, three months old, she went to the grocery store with her mother, her younger brother, and another child the mother was babysitting. Lindsay was left alone for a few minutes, looking at toys. During these few minutes Lindsay was approached by the appellant, who was a stranger.

According to Lindsay, the appellant put his hands inside her pants and panties, touched her vagina, and said, "it feels good." The appellant, testifying in his own behalf, denied touching the child. He stated that he saw Lindsay crying in the store, that she was apparently alone, and he helped her return a toy to the shelf.

The appellant first argues that Lindsay's videotaped testimony should not have been allowed because the State failed to show "good cause" as required by Ark. Stat. Ann. § 43-2306

(Supp. 1985) [Ark. Code Ann. § 16-44-203(b) (1987)], which provides in part:

> In any prosecution for a sexual offense or criminal attempt to commit a sexual offense against a minor, upon motion of the prosecuting attorney, and after notice to the opposing counsel, the court may, for good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of seventeen (17) years.

It is the appellant's contention that a showing of good cause is mandatory and that the only cause shown by the State in this case was the child's age and some allegations by the State that the child could suffer emotional damage. There was no testimony as to the effect testifying would have on Lindsay.

Before addressing the merits of the argument, the State first contends that this issue was not properly preserved for appeal. We disagree.

[redacted] In his written response to the State's motion to videotape the testimony the appellant stated in paragraph two:

> 2. That if the victim is found to qualify as a competent witness by this court then there is no good cause to justify having the victim testify outside the viewing of the trier of fact where the demeanor and gestures of the victim can best be judged.

At the pre-trial hearing, the appellant stated that he objected to the videotaping for the reasons stated in his response. Although the appellant orally argued that the jury should be allowed to see the demeanor and gestures of the child; we think that the appellant's referral to good cause in his response properly preserved the issue for appeal.

[redacted] On the merit of the appellant's argument, we find that there was good cause and that the trial court did not err in allowing the videotaped testimony. In *McGuire* v. *State*, 288 Ark. 388, 706 S.W.2d 360 (1986) the appellant argued that the "good cause" provision in § 43-2306 was unconstitutionally vague. In addressing this issue the Supreme Court stated:

> Flexibility and reasonable breadth in a statute are permissible, rather than meticulous specificity or great exacti-

> tude, so long as it is clearly defined in words of common understanding. [cite omitted] The statute provides a reasonable rule of thumb to guide judges in determining whether a videotaped deposition is justified. Many factors can and should be considered in determining what is good cause. The circumstances surrounding the offense, the child's age, and the potential harm to the child would be a few of these factors.

McGuire, 288 Ark. at 394, 706 S.W.2d at 363. The Court concluded that the words "good cause" form a common legal phrase familiar to most people.

The appellant cites cases where witnesses specifically testified about the emotional impact on the child witness and he argues that it was error for the trial court to make a ruling on good cause without such testimony. *See McGuire, supra* (grandparents testified child would be harmed); *Chappell* v. *State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986) (social worker testified about trauma child had suffered). In most cases this kind of testimony would be desirable but, under the facts in this case, the absence of such testimony is not fatal to the trial court's finding of good cause.

At the time of trial, Lindsay was 4 years 10 months old and the appellant was a stranger to her. The trial court made its ruling after it had observed Lindsay testify at a hearing to determine her competency. Thus, the trial court had first-hand knowledge as to how Lindsay would react to direct and cross-examination. Based on these observations, and Lindsay's age, we think that the trial court's determination to allow Lindsay's testimony to be videotaped was reasonable under the circumstances. *McGuire, supra.*

The appellant next argues that the trial court abused its discretion in finding that Lindsay was a competent witness. In the alternative, the appellant argues that, in cases where testimony is videotaped, we should review the tape and make a determination of competency based upon the totality of the circumstances.

It is for the trial court to determine whether a child has the ability to observe, remember, and relate the truth of the matter being litigated, and whether the child has a moral

awareness of the duty to tell the truth. *Hendricks* v. *State*, 15 Ark. App. 378, 695 S.W.2d 843 (1985). Such a determination lies within the sound discretion of the trial court and will not be overturned on appeal in the absence of an abuse of discretion. *Id.* The trial court's opportunity to observe the witness, his manner, capacity, intelligence and understanding of the obligations of the oath are important factors in deciding the question of competency. *Kitchens* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980).

At both the pre-trial hearing and during her videotaped testimony Lindsay testified that if she told a lie at home she would be spanked and if she told a lie in court she would be "locked up." She demonstrated that she knew the difference between the truth and a lie and knew that her favorite cartoon character, Heathcliff, was not "real." She was able to state her full name, her birthdate, her age and the names of her Sunday school teachers. She was also able to recall what she had done on the prior Easter and the presents she had received the previous Christmas.

When testifying about the incident with the appellant, Lindsay displayed a good recollection of details surrounding the incident which were corroborated by other witnesses. She remembered who had accompanied her to the store that day and described in detail what she wore. She knew that she had been left alone for a few minutes because her mother had gone to ask a store clerk where the "cups for making cupcakes" were. She recalled that the appellant had cigarettes in his hand when he approached her, and even though she did not know how many, she did know that it was more than one.

[redacted] Although there were some discrepancies in her testimony, most of those discrepancies occurred when she was asked rather abstract questions on cross-examination. She was able to answer the more concrete question on both direct and cross-examination. Furthermore, the inconsistencies in her testimony affected the credibility and weight to be given to her testimony, not her competency to testify. *Cope* v. *State*, 293 Ark. 524, 739 S.W.2d 533 (1987).

[redacted] We decline to accept the appellant's suggestion that we should alter our standard when reviewing the competency of witnesses in cases where testimony has been videotaped. In Arkansas the competency of children to testify in criminal

matters has been found to be within the discretion of the trial court since at least 1869. *See Crosby* v. *State*, 93 Ark. 156, 124 S.W. 781 (1910); *Flanigan* v. *State*, 25 Ark. 92 (1869). The only case cited by the appellant in support of his argument is *Keith* v. *State*, 218 Ark. 174, 235 S.W.2d 539 (1951), in which the Court quoted the following statement from *Wheeler* v. *United States*, 159 U.S. 523 (1895):

> The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous.

218 Ark. at 181. It is the appellant's contention that the reasoning behind the rule is antiquated in cases where the witness's mannerisms and demeanor are preserved on videotape.

However, there are subtle nuances which a trial court may observe that are not observable on appellate review. The trial court has an opportunity to see the child not only while testifying, but also immediately before and immediately after. We can see no good reason to adopt two different standards of review; one for cases where testimony is preserved on videotape, and another standard for when the witness testifies in person.

At the close of the State's case, the appellant requested a directed verdict arguing that the State had failed to prove the age of the appellant. A person is guilty of sexual abuse, first degree, when, being eighteen or older, he engages in sexual contact with a person, not his spouse, who is less than fourteen years old. Ark. Stat. Ann. § 41-1808 (Repl. 1977) [Ark. Code Ann. § 5-14-108 (1987)]. Thus, the age of the accused is an element of the offense. *See James* v. *State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984).

In chambers, the State argued that the jurors could use their "common sense" to determine the appellant's age, or that the trial court could take judicial notice of his age. The court indicated that judicial notice would not be proper, and stated:

> That very well may be. And that's what bothers me a lot Mr. Adcock, but that's—judicial notice is not reserved for that sort of thing. And I don't think anybody can use their common sense to prove some sort of age, or some other element of the offense. Perhaps some circumstantial evidence. Here we have a grown man who witnesses identified as a man larger than himself, who's bearded, who's—that's been described on the record, etc. I'd just assumed that detective Smith had taken some sort of history from him, at the time he was arrested and probably got his birthdate. Is that it?

The State then asked if they could recall Detective Smith for that purpose. The appellant objected to such a procedure because the State had rested. Delores Beavers, an employee of the Little Rock Police Department, then testified that the appellant's birthdate was November 23, 1947.

The appellant argues that the trial court became an advocate when it told the State how to prove the appellant's age and that the trial court's advocacy denied him a fair and impartial trial. However, this argument was not made at trial. The appellant only argued that he would be opposed to re-opening the case for the State to prove the appellant's age. An objection must state the specific ground of the objection if the ground is not apparent from the context. *Pace* v. *State*, 265 Ark. 712, 580 S.W.2d 689 (1979). Where the ground for an objection is not presented to the trial court, it cannot be raised on appeal. *Hobbs* v. *State*, 277 Ark. 271, 641 S.W.2d 9 (1982); A.R.E. Rule 103(a). Furthermore, it has long been held that a party cannot change the grounds for an objection on appeal. *Vasquez* v. *State*, 287 Ark. 473A, 702 S.W.2d 411 (supp. op. 1986).

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Ida RIDLING *v.* Raymond BALLARD, Guardian of James Claude Ballard, NCM

CA 88-12 750 S.W.2d 415

Court of Appeals of Arkansas
Division I
Opinion delivered June 1, 1988

Helen Rice Grinder and *Villines & Lacy* by: *William R. Lacy,* for appellant.

Phil Stratton and Casey Jones, Ltd., by: *Phil Stratton*, for appellee.

JOHN E. JENNINGS, Judge. This is a dispute over the ownership of three certificates of deposit issued by the Clinton State Bank in the names of Claude Ballard and his sister, Ida Ridling, the appellant here. The certificates, totalling $20,000.00, were purchased sometime before 1986.

On March 28, 1986, Claude Ballard's son, Raymond, was appointed guardian of his father's estate. On the same day Raymond went to the bank to withdraw the funds represented by the certificates. The bank refused to turn over the funds because the certificates showed only Ms. Ridling's social security number and not that of Claude Ballard.

On March 31, 1986, Raymond filed suit for an injunction claiming that the funds represented by the certificates belonged to his father and asking that Clinton State Bank be enjoined from paying them to anyone else. Claude Ballard died on April 4, 1986. The suit was revived in the name of First National Bank of Conway, executor of the estate of Claude Ballard.

At a hearing held on March 4, 1987, the primary issue before the court was the ownership of the funds represented by the certificates of deposit. The chancellor found that the funds represented by the certificates belonged to Claude Ballard and that there was no evidence that he had intended to make a gift to Ms. Ridling. The order directed Clinton State Bank to release the funds to Raymond for purposes of paying bills to close out the guardianship. It further directed that any balance be paid over to Claude Ballard's estate.

Ms. Ridling's sole argument on appeal is that the chancellor erred in not awarding the certificates of deposit to her as required by Ark. Code Ann. § 23-32-1005(2)(A), (C) (1987) as the surviving joint tenant. We find no error and affirm.

The portions of the statute relied upon by appellant provide:

> (2)(A) If the person opening the account or purchasing the certificate of deposit designates in writing to the bank institution or federally or state chartered savings and loan association that the account or the certificate of deposit is to be held in 'joint tenancy' or in 'joint tenancy with right of survivorship,' or that the account or certificate of deposit shall be payable to the survivor or survivors of the persons named in the account or certificate of deposit, then the account or certificate of deposit and all additions thereto shall be the property of those persons as joint tenants with right of survivorship.
>
> . . .
>
> (C) The opening of the account or the purchase of the certificate of deposit in this form shall be conclusive evidence in any action or proceeding to which . . . the surviving party is a party of the intention of all of the parties to the account or certificate of deposit to vest title to the account or certificate of deposit, and the additions

thereto, in such survivor.

. . . .

The appellant also relies on *Walker* v. *Hooker*, 282 Ark. 61, 667 S.W.2d 637 (1984), for the proposition that where there is a writing signed by the purchaser indicating that the funds are held as joint tenants with right of survivorship, on death of one tenant the funds are rightfully paid to the survivor. The court in *Walker* referred to its prior holding that no survivorship interest is created when the decedent does not affix his signature to an instrument in substantial compliance with the statutory requirement. *Cook* v. *Bevill*, 246 Ark. 805, 440 S.W.2d 570 (1969).

While appellant recognizes that to create a joint tenancy in a certificate of deposit a designation in writing is required, she argues that since she was the "purchaser" her signature on the certificate satisfies that requirement. The testimony was uncontested that the funds used to purchase the certificates belonged to Claude Ballard; Ms. Ridling so testified. And, although Ms. Ridling testified that she thought Claude Ballard may have signed a signature card, no signature cards were offered in evidence. In *Snow & Smith* v. *Martenson*, 257 Ark. 937, 522 S.W.2d 371 (1975), where a similar statute was interpreted, the supreme court held that "the person opening such savings account" means the person who owns the money with which the account is being opened in the names of more than one person.

Since the funds used to purchase the certificates belonged to Claude Ballard, he was the "purchaser" as that word is used in *Walker. Snow & Smith, supra.* It was appellant's burden to prove that Claude Ballard signed a writing stating his intention that the funds be paid to Ms. Ridling upon his death. *McDonald* v. *Treet*, 268 Ark. 52, 593 S.W.2d 462 (1980). That burden was not met.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

P.A.M. TRANSPORTATION and Intercontinental Insurance Managers *v.* William K. MILLER

CA 87-405 750 S.W.2d 417

Court of Appeals of Arkansas
En Banc
Opinion delivered June 1, 1988
[Rehearing denied June 29, 1988.*]

* Corbin, C.J., would grant rehearing.

[redacted]

Laser, Sharp & Mayes, P.A., by: *Ralph R. Wilson*, for appellants.

Jay N. Tolley, for appellee.

BETH GLADDEN COULSON, Judge. Appellants, P.A.M. Transportation and Intercontinental Insurance Managers, contend in this appeal from a decision of the Arkansas Workers' Compensation Commission that the finding that appellee, William K. Miller, was within the scope and course of his employment at the time he was injured is not supported by substantial evidence. Upon reviewing the record, we find substantial evidence to support the Commission's decision.

Appellee was employed by appellant P.A.M. Transportation as a long-haul driver when he was injured on March 28, 1985. On that date, he left Marshall, Illinois, at about 5:00 a.m., and arrived sometime after 5:00 p.m. in Bentonville, Arkansas, where he delivered his trailer with its cargo to Wal-Mart. He then drove the truck to Springdale, where he regularly stayed at the Springdale Motel, arriving between 8:30 and 9:00 p.m. The Springdale Motel had no space for his truck, so he registered at a neighboring motel, the Scottish Inn.

In was appellant employer's policy that upon completion of their runs, drivers should return their rigs to P.A.M. headquarters at Tontitown for servicing. According to appellee's testimony, before he registered at the motel he phoned his employer's office to see whether someone there would be able to drive him the six-mile distance from Tontitown to Springdale. When he found no one available, appellee checked into his room at the Scottish Inn and attempted to call a friend, John ("Tony") McCormick, in hopes that he would be able to give him a ride back to Springdale from the P.A.M. terminal. Unable to contact McCormick, appellee went to a truck stop, where he ate some Vienna sausages. Then he walked to a nearby tavern, the Ozark Inn, where he had two beers and succeeded in reaching McCormick, who agreed to meet him at Tontitown and return him to Springdale.

Appellee left the tavern at closing time—11:00 p.m. Another patron of the Ozark Inn (later determined by the police to have

been driving while intoxicated) struck appellee while he was crossing a street, walking toward his truck. The investigating officer testified that he noticed that appellee had alcohol on his breath, that his speech was slurred, and that his pupils were constricted, but added that he did not administer any sort of test for intoxication because appellee was severely injured.

Following a hearing, an administrative law judge denied appellee benefits on the basis that he was not within the scope and course of his employment at the time he was injured. The Commission reversed the decision and remanded the case to the administrative law judge for an award of benefits. In February, 1987, on appeal to this court, we dismissed the matter because the Commission's Order for Remand was not final and appealable. Subsequently, the Commission entered a final award of medical expenses, temporary total disability benefits, permanent partial disability benefits, and attorney's fees. From that order, this appeal arises.

[redacted] As a long-haul driver, appellee falls into the category of traveling employee. Generally, injuries sustained in going to or coming from one's place of employment are not held compensable, as all members of the general public are exposed to the hazards of the highways. However, as Professor Larson notes in his treatise:

> Employees whose work entails travel away from the employer's premises are held in the majority of jurisdiction[s] to be within the course of their employment continuously during the trip, except when a distinct [departure] on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from the home are usually held compensable.

1A A. Larson, *The Law of Workmen's Compensation*, § 25.00 (1985). This "traveling employee" exception was adopted in Arkansas over thirty years ago in *Frank Lyon Company* v. *Oates*, 225 Ark. 682, 284 S.W.2d 637 (1955).

In *Arkansas Department of Health* v. *Huntley*, 12 Ark. App. 287, 675 S.W.2d 845 (1984), this court affirmed the Commission's determination that a woman on an overnight

business trip who had been assaulted while en route from a hotel bar to her room was injured in the course of her employment. We relied on the reasoning in *J & G Cabinets* v. *Hennington*, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980): "Activities of a personal nature, not forbidden but reasonably to be expected, may be a material incident of the employment and injuries suffered in the course of such activities are compensable. . . . The controlling issue is whether the activity is reasonably expectable so as to be an incident of the employment, and thus in essence a part of it." Regarding the status of the claimant in *Huntley, supra*, we observed that her use of the bar was a natural and probable consequence or incident of her stay in the hotel, and we concluded that at the time she was attacked in a passageway as she returned to her room "she had clearly regained her traveling employee status at this point."

The record in the present case reveals that at the time of his injury appellee had not completed his assigned duties for that day's long-distance haul. He was required to return the truck to the terminal. The uncontradicted testimony indicates that he made several efforts, both at his motel and later at the tavern, to contact a friend to provide transportation for him once he had delivered the vehicle. He was, therefore, still on duty when he was injured.

Questions of credibility and the weight and sufficiency to be given evidence are matters for the Commission to determine. Administrative agencies such as the Workers' Compensation Commission are better equipped by specialization, insight, and experience to analyze and determine issues and to translate evidence into findings of fact. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). Under our standard of limited review, decisions of the Commission must stand if supported by substantial evidence, and, in determining the sufficiency of the evidence to sustain the Commission's findings, the testimony must be weighed in the light most favorable to those findings. *Owens* v. *National Health Laboratories, Inc.*, 8 Ark. App. 92, 648 S.W.2d 829 (1983). Substantial evidence has been defined as more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is evidence of such force and character that it would, with reasonable and material

certainty and precision, compel a conclusion one way or the other. *DeFranscisco* v. *Arkansas Kraft Corp.*, 5 Ark. App. 195, 636 S.W.2d 291 (1982).

[redacted] Appellee's pause for refreshment, although perhaps reasonably expectable, was found by the Commission to have been a deviation from employment duties. As the Commission noted, citing *Huntley*, when the employee abandons the deviation and returns to the performance of his duties, he regains his status as a traveling employee. Appellee, at the time of his injury, was returning to his rig with the intention of driving it to appellant P.A.M. headquarters in Tontitown. Clearly there is substantial evidence that appellee, whatever his earlier deviation might have been, was at that moment acting within the course and scope of his employment.

Affirmed.

CORBIN, C.J., dissents.

DONALD L. CORBIN, Chief Judge, dissenting. The appellee was a "professional driver" with twenty-eight years experience driving eighteen-wheelers. The transportation industry is heavily regulated by the Federal Highway Industry, as well as state law. The driver and his trucking company are charged with the responsibility of knowing the regulations imposed by the federal and state regulatory bodies. Federal Motor Carrier Safety Regulations: Driving of Motor Vehicles, 49 C.F.R. § 392.5 (1987) provides, in pertinent part, as follows:

> (a) No person shall—
>
> (1) Consume an intoxicating beverage, regardless of its alcoholic content, or be under the influence of an intoxicating beverage, within 4 hours before going on duty or operating, or having physical control of, a motor vehicle; or
>
> (2) Consume an intoxicating beverage regardless of its alcoholic content, or be under the influence of an intoxicating beverage, while on duty, or operating, or in physical control of, a motor vehicle; or
>
> (3) Be on duty or operate a motor vehicle while the driver possesses an intoxicating beverage regardless of its

alcoholic content. However, this paragraph does not apply to possession of an intoxicating beverage which is manifested and transported as part of a shipment.

(b) No motor carrier shall require or permit a driver to—

(1) Violate any provision of paragraph (a) of this section; or

(2) Be on duty or operate a motor vehicle if, by the driver's general appearance or conduct or by other substantiating evidence, the driver appears to have consumed an intoxicating beverage within the preceding 4 hours.

The Commission viewed the appellee going to the tavern as a deviation from the course and scope of his employment. Our cases define "course of employment" as relating to the time, place and circumstances under which the injury occurred. *Owens* v. *Nat'l Health Laboratories, Inc.*, 8 Ark. App. 92, 648 S.W.2d 829 (1983). Professor Larson's formulation of the test for course of employment requires that the injury occur within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose or advancing the employer's interests directly or indirectly. 1 A. Larson, *The Law of Workmen's Compensation* § 14.00 (1985); 1A A. Larson, *The Law of Workmen's Compensation* § 20.00 (1985).

His attempt to "abandon" his deviation by returning the truck after consuming "two beers" was not in furtherance of his employer's best interest (*See Johnson Auto Co.* v. *Kelley*, 228 Ark. 364, 307 S.W.2d 867 (1957)), but was, in fact, prohibited behavior. In *Arkansas Department of Health* v. *Huntley*, 12 Ark. App. 287, 675 S.W.2d 845 (1984) we noted that:

> Activities of a personal nature, not forbidden but reasonably to be expected, may be a material incident of the employment and injuries suffered in the course of such activities are compensable. The fact that the injury is suffered during a lunch break, when the employee is not required to be on the premises, does not alter this principle. The controlling issue is whether the activity is reasonably expectable so as to be an incident of the employment, and thus in essence a part of it. [Citation omitted.]

Id. at 291, 675 S.W.2d at 848.

The distinction between the case at bar and the *Huntley* case is that in *Huntley*, the employee, while embarked on a deviation of a personal nature, was not engaged in prohibited behavior. Because of her traveling status, it would not be unreasonable for her to utilize all of the facilities of the hotel. Whereas, in the instant case, the employee, by drinking "two beers", was engaged in "prohibited behavior" even when he tried to resume his employment activities. I do not agree that it was in the employer's best interest for appellee to drive his employer's vehicle, exposing it to potential liability, by consuming intoxicating beverages in violation of the federal regulations.

I think where the Commission and the majority go astray is their recognition that the driver's consumption of "two beers" was perhaps "reasonably expected." I sympathize with the driver, but he deviated from his employment on an errand of a personal nature which was not in the best interests of his employer nor in furtherance of his employer's interest either indirectly or directly. It was such prohibited behavior that he could not have resumed his employment status for at least four hours from the time of the consumption of the "two beers." I would reverse and reinstate the Administrative Law Judge's opinion denying benefits.

Walter R. YOCKEY *v.* Nancy Z. YOCKEY

CA 88-18 750 S.W.2d 420

Court of Appeals of Arkansas
En Banc
Opinion delivered June 1, 1988

[redacted]

Mobley and Smith, by: *William F. Smith*, for appellant.

Joe Cambiano, for appellee.

PER CURIAM. The appellant's brief, filed on February 19, 1988, contains the following statement:

> In *Southard* v. *Southard* CA-85-300 (opinioned [sic] delivered October 14, 1987, not designated for publication) this court decided this exact issue.

The brief then proceeds to discuss *Southard* v. *Southard* and attempts to distinguish it from *Layman* v. *Layman*, 292 Ark. 539, 731 S.W.2d 771 (1987), and *Southard* is the only case decision relied upon to support the point being discussed. The appellee's brief requests that we "disallow" the appellant's argument on this point because it is made in violation of Rule 21(4) of the Rules of the Supreme Court and Court of Appeals, which reads in pertinent part as follows:

> Opinions of the Court of Appeals not designated for publication shall not be published in the official reports and shall not be cited, quoted, or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case).

Despite the fact that the appellee's brief quotes from the above rule and clearly objects to the appellant's citation of an unpublished opinion of this court, the appellant's reply brief again cites the *Southard* opinion and states that the facts in the case at bar are "clearly in point with the *Southard* case."

[redacted] Such manifest disregard of Rule 21 simply cannot be overlooked by this court. We therefore direct the clerk of the court to physically discard the appellant's abstract and brief and

the appellant's reply brief, and we grant appellant 20 days from the date of this per curiam in which to file the usual number of new briefs which do not cite or refer to the *Southard* v. *Southard* opinion.

After new briefs are filed by the appellant, the appellee shall have 30 days in which to file a supplemental brief and, on motion submitted, cost of printing and attorney's fee for preparing the appellee's supplemental brief, to be assessed against appellant, will be considered.