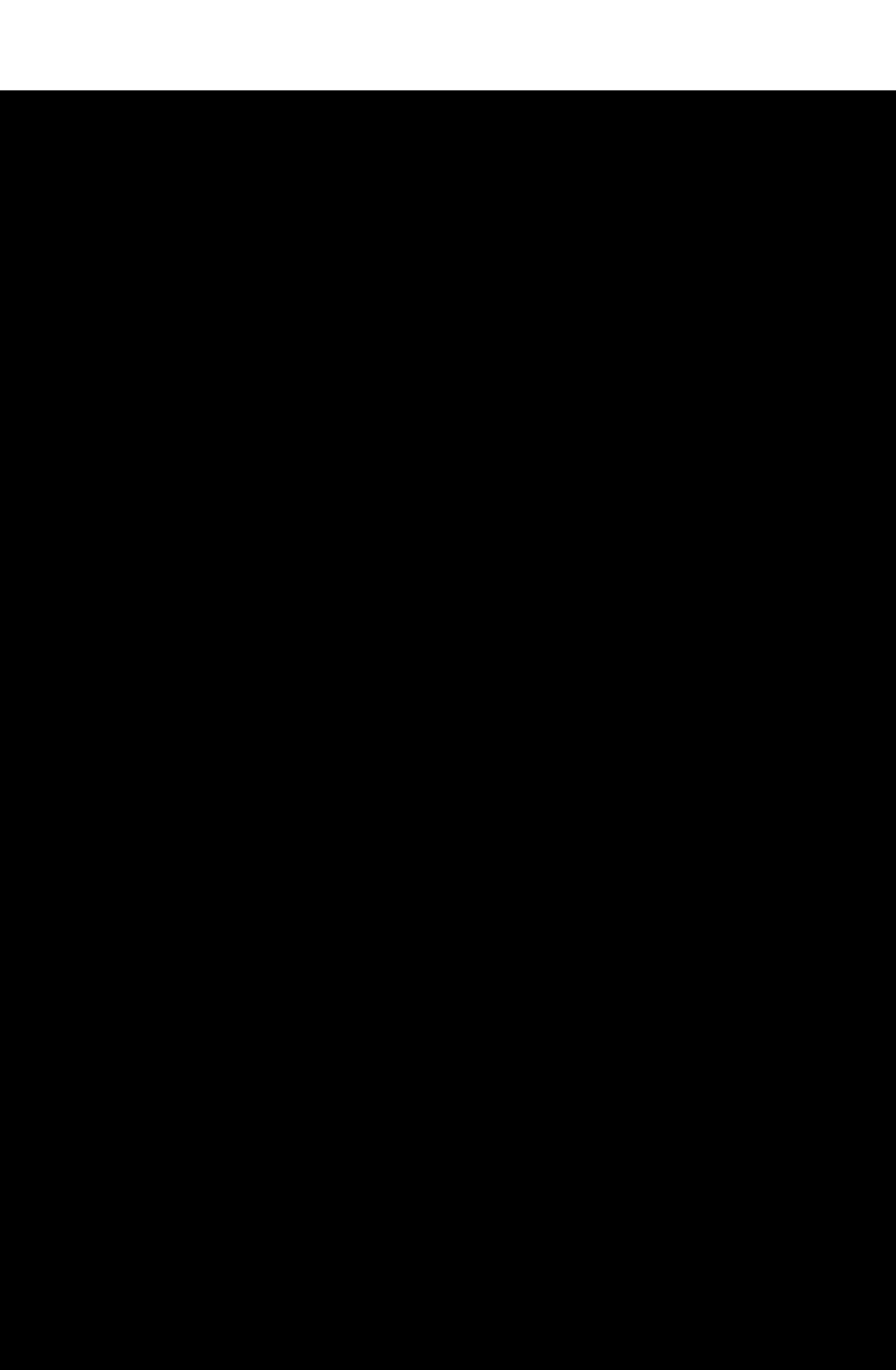
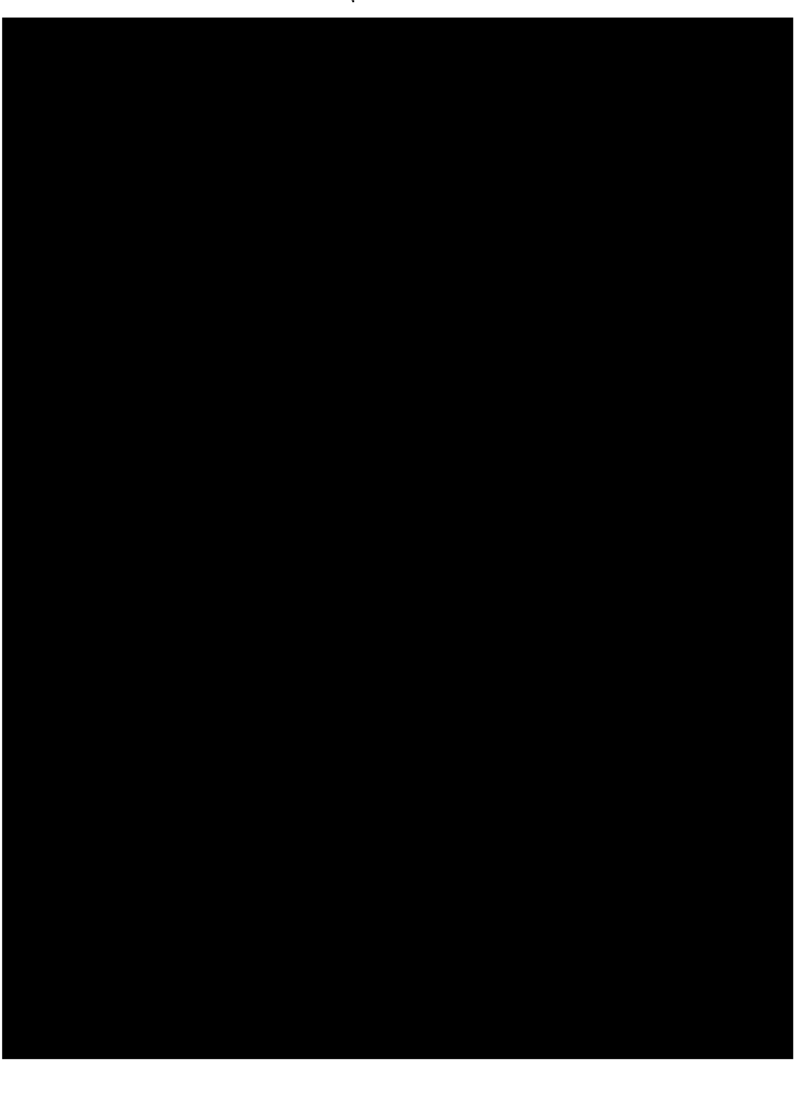
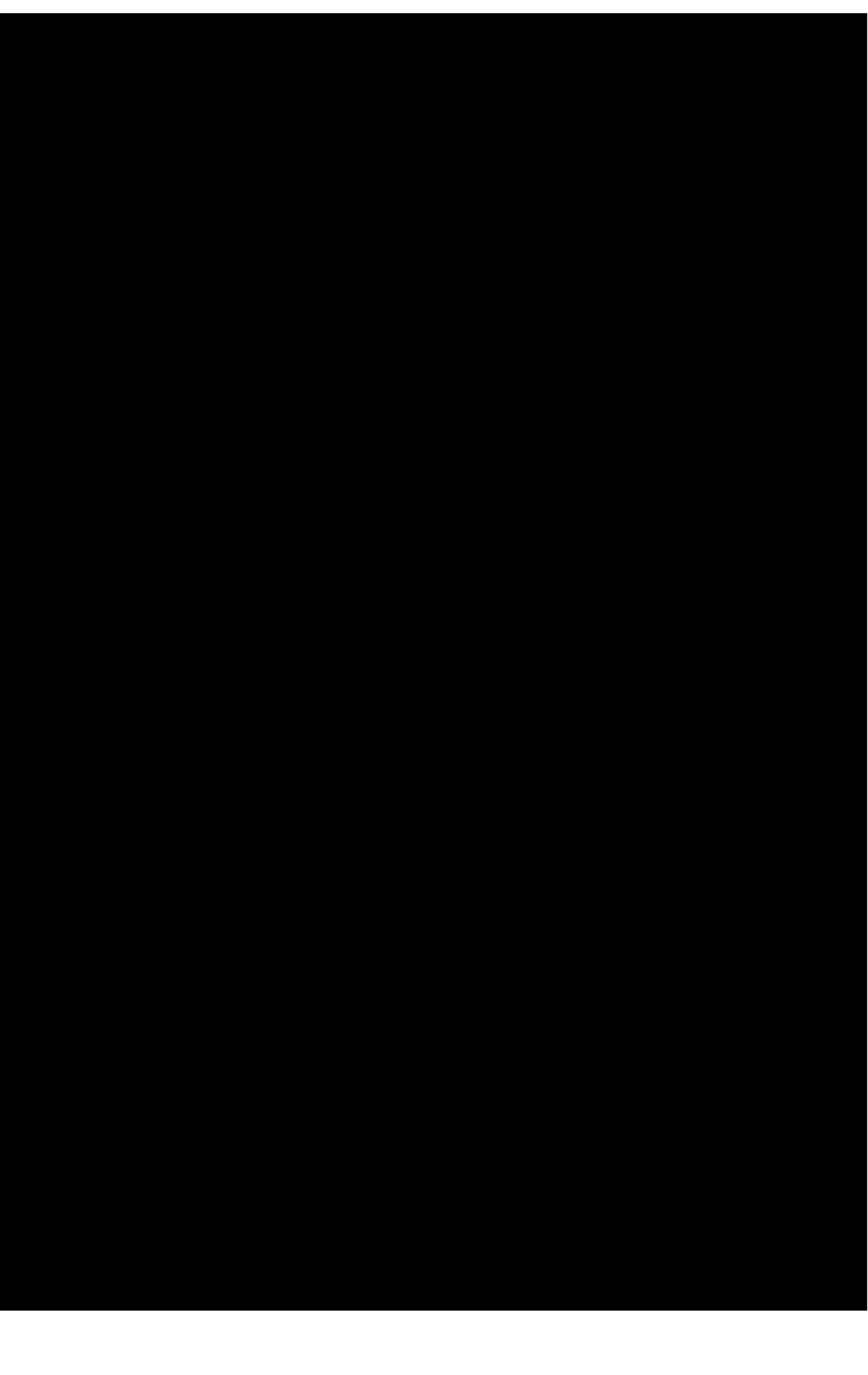
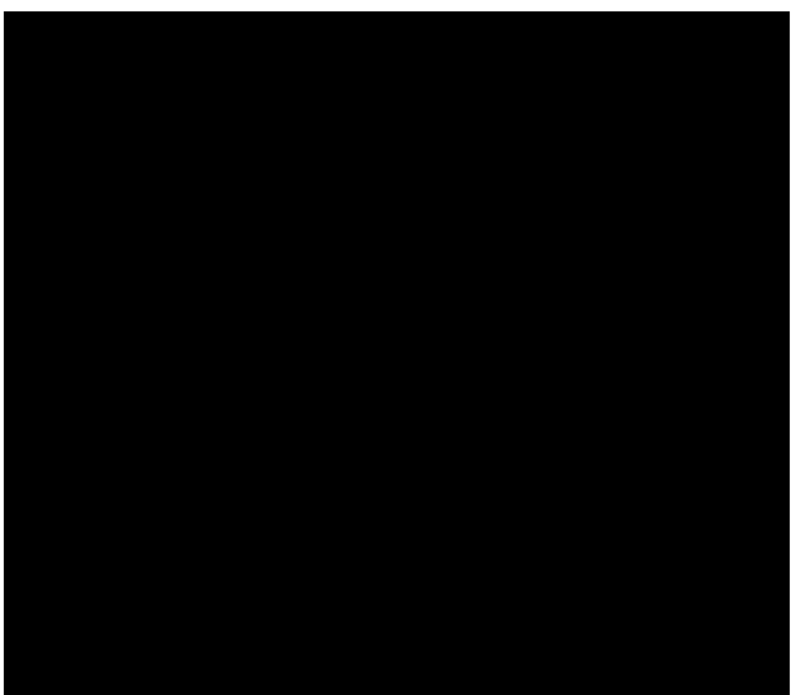




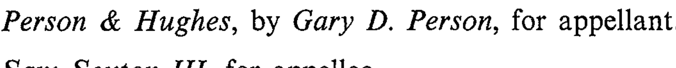




Charles Edward ELAM, Jr. *v.* Helen May ELAM, now Acosta

CA 91-384 832 S.W.2d 508

Court of Appeals of Arkansas
Division II
Opinion delivered June 17, 1992



Person & Hughes, by *Gary D. Person*, for appellant.

Sam Sexton III, for appellee.

ELIZABETH W. DANIELSON, Judge. Appellant Charles Elam, Jr., appeals from an order in which the Sebastian County Chancery Court granted appellee Helen Elam's petition for divorce and awarded her custody of the parties' minor child, Kenneth Elam. Appellant argues that the court should not have exercised jurisdiction over the child because a Tennessee court had previously entered an order placing guardianship of the child with his paternal grandparents and because there was insufficient service of process on appellant to give the court jurisdiction to award custody. We agree that the court should have declined to exercise jurisdiction over the child custody matter and reverse and remand.

The child of the parties was born in May of 1987. The parties apparently began experiencing financial difficulties in 1988 and agreed that it would be best for Kenneth to live with his paternal grandparents. In July of 1988 the grandparents filed a petition for guardianship of Kenneth, which stated that Mr. and Mrs. Charles Elam, Jr., (the parties to this appeal) were in agreement that Mr. and Mrs. Charles Elam, Sr., (the grandparents) maintain custody of Kenneth Elam. On July 28, 1988, an order was entered by the juvenile court of Obion County, Tennessee, appointing the grandparents, Charles and Oma Jean Elam, guardians of Kenneth.

On August 28, 1988, Helen Elam filed a petition for divorce in the Chancery Court of Sebastian County, Arkansas. In this petition it was stated that the parties' minor child was currently residing with his paternal grandparents and that it was Helen Elam's desire that Kenneth remain with his grandparents. Apparently appellee subsequently amended her petition to request custody of the child, though such amendment is not

included in the record. On October 27, 1989, the paternal grandparents filed in Obion County, Tennessee, a petition for adoption of Kenneth. In the divorce decree filed January 10, 1990, the Sebastian County Chancery Court granted appellee's petition for divorce and awarded her custody of the parties' son Kenneth.

Appellant argues that the Sebastian County Chancery Court should have declined to exercise jurisdiction pursuant to the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA), which is codified at Ark. Code Ann. § 9-13-201 et seq. (1987). Arkansas Code Annotated § 9-13-203 provides as follows:

> (a) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (1) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
>
> (2) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; . . .

"Home state" is defined as the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months. Ark. Code Ann. § 9-13-202(5) (1987).

Additionally, the courts of this state are required to recognize and enforce an initial or modification decree of a court of another state which has assumed jurisdiction under statutory provisions substantially in accordance with those of the UCCJA or under factual circumstances meeting the jurisdictional stan-

dards of the UCCJA. Ark. Code Ann. § 9-13-213 (1987). We note that Tennessee has adopted the UCCJA. *See* Tenn. Code Ann. § 36-6-201 et seq. (Repl. 1991).

Some of the general purposes of the UCCJA are to avoid jurisdictional competition and conflict with courts of other states in child custody matters; promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the best interest of the child; assure that litigation concerning the custody of the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships are most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state; discourage continuing controversies over child custody in the interest of greater stability for the child; to facilitate the enforcement of custody decrees of other states; and to promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.

The record indicates that the paternal grandparents were granted legal guardianship of Kenneth in July of 1988, and that Kenneth has been residing with them in Tennessee continuously since that time. At the time the court exercised jurisdiction over the child, the Tennessee court had already assumed jurisdiction and entered the guardianship order. Considering the provisions and purposes of the UCCJA and the circumstances of this case, we find that the Sebastian County court erroneously exercised jurisdiction over the minor, Kenneth Elam.

Appellee argues that she cannot be bound by the Tennessee guardianship decree since she was not a party to that action. However, the record shows that appellee's notarized signature appears on the petition for guardianship in Tennessee and we find nothing in the record to indicate that she has ever taken any steps to challenge the order granting guardianship. In fact, in her petition for divorce, she recognizes the fact that Kenneth was residing with his grandparents and stated it was her desire that he remain with them.

Since we have held that the Arkansas court should not have

exercised jurisdiction over the custody matter under the provisions of the UCCJA, we need not address appellant's second point on appeal concerning the sufficiency of the notice given him. The case is reversed and remanded for proceedings consistent with the Uniform Child Custody Jurisdiction Act.

Reversed and remanded.

COOPER and ROGERS, JJ., agree.

Kenneth BAKER *v.* DIRECTOR of Arkansas Employment Security Department

E 92-32 | 832 S.W.2d 864

Court of Appeals of Arkansas
Division I
Opinion delivered June 24, 1992

Appellant, pro se.

Ronald A. Calkins, for appellee.

George K. Cracraft, Chief Judge. Kenneth Baker appeals from a decision of the Arkansas Board of Review denying him benefits on finding that he had been discharged from his last employment for misconduct connected with the work on account of dishonesty. He challenges the sufficiency of the evidence to support the Board's findings. We find no error and affirm.

Misconduct in connection with one's work, as used in our statute, has been defined as meaning more than mere inefficiency or unsatisfactory conduct; it is some act of wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a disregard of the standard of behavior that the employer has a right to expect of his employees. *Dillaha Fruit Company* v. *Everett*, 9 Ark. App. 51, 652 S.W.2d 643 (1983). The misconduct found in this case was dishonesty, which has been defined as a disposition to lie, cheat, or defraud; untrustworthiness; lack of integrity. *Olson* v. *Everett*, 8 Ark. App. 230, 650 S.W.2d 247 (1983). Determining whether a claimant had been guilty of misconduct on account of dishonesty is a question of fact for the Board of Review to determine. *Id.*

On appeal of unemployment compensation cases, this court views the evidence in the light most favorable to the findings of the Board and will affirm if those findings are supported by substantial evidence. *Exson* v. *Everett*, 9 Ark. App. 177, 656 S.W.2d 711 (1983). The credibility of witnesses and the drawing

of inferences from the testimony is for the Board of Review, not this court. *W.C. Lee Construction Co.* v. *Stiles*, 13 Ark. App. 303, 683 S.W.2d 616 (1985).

The evidence in this case reflects that appellant was employed by the Arkansas Department of Correction as a security guard at its "boot camp" facility. At the time appellant was hired, the department of correction had a rule that it would not employ anyone in that capacity who did not have a high school diploma or its equivalent, and that only those persons meeting that educational qualification would be considered for the job. Appellant admitted that he was aware of that rule at the time he made application for employment. Nevertheless, he submitted a job application in which he falsely represented that he had completed the twelfth grade and received a diploma from Mills High School. Sometime later, appellant was interviewed on his application for a promotion. Appellant's responses to questions regarding his educational level were at first evasive and "[t]he rest of the interview, he was in a daze." Soon thereafter, appellant told the interviewer that he had not completed high school, but he claimed that Warden Ray Hobbs, the hiring officer, was aware of that fact. A subsequent investigation by the department confirmed that appellant had not graduated from Mills High School, and Warden Hobbs denied that he had ever been made aware of the true facts. Appellant was then discharged, in accordance with rules of the agency, for falsification of his job application.

On this evidence, the Board of Review found that appellant had intentionally falsified his application to obtain employment that he otherwise would not have obtained, and thereby furthered his own economic interest at the expense of his employer. The Board concluded that appellant was discharged from his employment for misconduct connected with the work on account of dishonesty and denied his claim for benefits. From our review of the record, we cannot conclude that the Board's findings are not supported by substantial evidence.

The case before us is distinguishable in many respects from *Olson* v. *Everett, supra.* When the appellant in *Olson* made application for his job, the employer did not supply an application for or otherwise make inquiry as to his physical condition. However, the appellant attached to his resume a form of his own,

which contained the following: "Physical record: List any physical defects. [Answer:] OK." Several months later, the appellant suffered an epileptic seizure at his home. When the employer was notified of the condition, the appellant was terminated because he had not disclosed his illness at the time of the hiring. The Board of Review denied benefits on finding that the appellant had been discharged for misconduct connected with the work on account of dishonesty.

On appeal, this court reversed the Board's decision because we could find no substantial evidence to support a finding that the appellant had intentionally lied to the employer or had otherwise been dishonest with him. The evidence disclosed that although the appellant had a history of epilepsy, he had had no manifestation of it for at least ten years prior to the signing of the application. The employer had not asked the appellant whether he suffered from epilepsy, seizures, or related symptoms, or any other questions regarding his health. Nor had the employer relied upon the statement that the appellant submitted. The employer testified that had he known of the appellant's condition, he still would have hired the appellant.

Here, the employer supplied a job application form on which appellant willfully falsified an answer that he knew to be material to the employment. In finding that action deceitful, the Board also referred to appellant's subsequent attempts to conceal and/or explain his prior conduct with additional false statement. From our review of the record, we cannot conclude that there is no substantial evidence to support the Board's finding that appellant's conduct constituted misconduct in connection with the work.

Affirmed.

JENNINGS, J., agrees.

MAYFIELD, J., concurs.

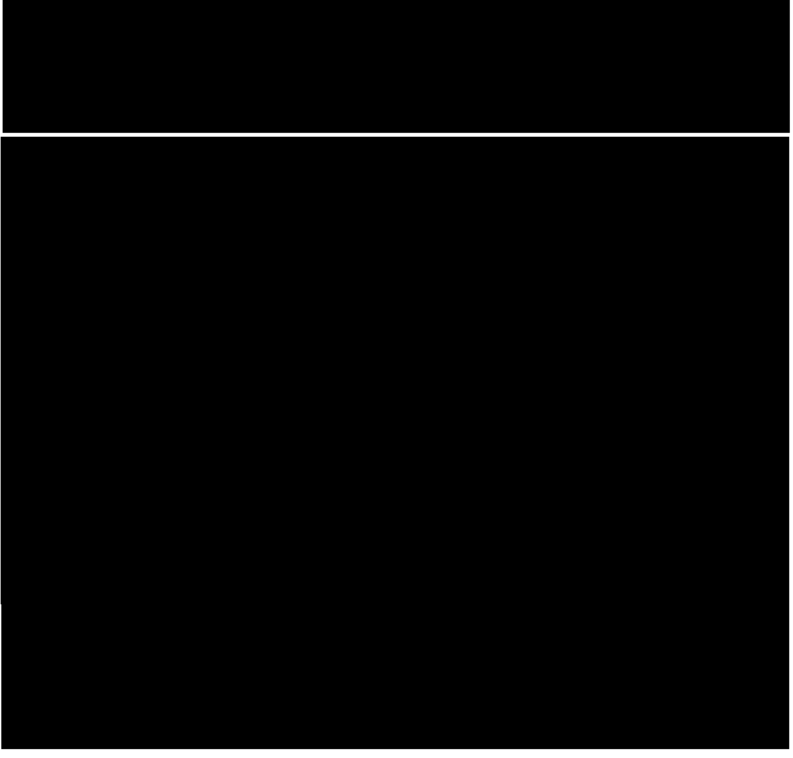
MELVIN MAYFIELD, Judge, concurring. I concur in the decision reached by the majority. I do not, however, find this case significantly different from *Olson* v. *Everett*, 8 Ark. App. 230, 650 S.W.2d 247 (1983), in which I dissented. There, the appellant was fired for failing to disclose the fact that he was epileptic — which was a dishonest act. Here, the appellant was

fired because he falsely represented he had received a high school diploma — which was a dishonest act. The real difference in the two cases, it seems to me, is the result reached by this court.

Michael REA *v.* James FLETCHER and National Union Fire Insurance Company

CA 91-154 832 S.W.2d 513

Court of Appeals of Arkansas
Division I
Opinion delivered June 24, 1992



Mills & Patterson, by: *William P. Mills*, for appellant.

Anderson & Kilpatrick, by: *A. Gene Williams*, for appellees.

MELVIN MAYFIELD, Judge. This is an appeal from a summary judgment. On October 5, 1989, appellant Michael Rea and appellee James Fletcher were employed by Rapistan Corporation on a construction site in Searcy, Arkansas, when appellant, who was being given a ride to the construction site, fell from the tailgate of Fletcher's vehicle and injured his spine. Appellant filed a complaint alleging his injury occurred because of Fletcher's careless and negligent acts.

Appellee Fletcher filed a motion for summary judgment contending an employer is required to provide a safe place to work for its employees and, under the exclusive remedy doctrine of the Arkansas Workers' Compensation Law, an employee who receives workers' compensation benefits for an injury during the course and scope of his work may not bring suit against his employer for injuries allegedly arising from unsafe working conditions.

Attached to the motion was Fletcher's affidavit stating that on October 5, 1989, he was employed as a millwright with Rapistan Corporation and that Rea was also employed by Rapistan. Persons working at the construction site were required to park their vehicles at a parking lot approximately one-half mile away. The corporation provided transportation from the lot to the site on a trailer pulled by one of two corporate pickup trucks, one of which was routinely driven by Fletcher's foreman Bill Beede. Employees were driven between the parking lot and job site in the morning, at lunch, and after work.

On the day of the incident, Beede told Fletcher to get his truck and bring it to the job site in case transportation was needed because neither of the corporate trucks was available and to use his truck to transport employees to the parking lot at lunch if the

corporate trucks were still unavailable. Another Rapistan employee drove Fletcher to the parking lot in a corporate golf cart to get his truck and Fletcher drove his truck to the job site. At lunch time the corporate trucks were still unavailable. As Fletcher was using his truck to transport Beede and other employees, appellant fell from the truck.

Appellant's response to the motion stated Fletcher was not his supervisor; was not in any supervisory capacity at the time of his acts; was not under the direct control of a supervisor; and his acts were a breach of personal duties Fletcher owed appellant.

The trial court granted appellee's motion for summary judgment on the basis that an employer is required to provide its employees a safe place to work; that the employee's parking lot and the area between the parking lot and the construction site where the plaintiff was allegedly injured were part of plaintiff's work place; that plaintiff's employer, Rapistan Construction Company, had a duty to maintain a safe place to work in that area; that absent willful or intentional misconduct, non-supervisory employees acting within the scope of their employment are also protected by the same tort immunity afforded their employers by the Arkansas Workers' Compensation Act; and that Fletcher was performing job-related activity at the express direction of his supervisor, and was acting within the scope of his employment when the alleged unintentional negligent act occurred.

Appellant contends that Fletcher's recklessness presents a question of fact. Appellant cites *King* v. *Cardin*, 229 Ark. 929, 319 S.W.2d 214 (1959), and argues that case authorized third-party actions by one employee against a coemployee and that under a statute like ours a negligent coemployee is regarded as a third person.

The appellee argues the sole issue before the trial court was whether, as a matter of law, appellee's employment status entitled him to tort immunity. Appellee also argues that appellant produced no specific facts regarding appellee's alleged recklessness.

■ In *Allen* v. *Kizer*, 294 Ark. 1, 740 S.W.2d 137 (1987), our supreme court stated:

> We denied tort immunity in *King* v. *Cardin*, 229 Ark. 929, 319 S.W.2d 214 (1959) for two fellow employees, a truck driver and a laborer, who negligently backed over the decedent employee with a truck. We held that for the purposes of Ark. Stat. Ann. § 81-1340 (Repl. 1976) of the Worker's Compensation Act, an employee's claim against this employer does not affect his right to sue a negligent coemployee. However, in *Neal* v. *Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969) we stated that the duty to provide a safe place to work is that of the employer and cannot be delegated to an employee.
>
> Recently, in *Simmons First Nat'l Bank* v. *Thompson*, 285 Ark. 275, 686 S.W.2d 415 (1985), we held that supervisory employees are immune from suit for negligence in failing to provide a safe place to work. *See Fore* v. *Circuit Court of Izard County*, 292 Ark. 13, 727 S.W.2d 840 (1987). In *Simmons* we stated, "Since an employer is immune under the Worker's Compensation statutes from suite for a negligent failure to provide a safe place to work, the same immunity should protect supervisory employees when their general duties involve the overseeing and discharging of that same responsibility."
>
> Based upon holdings in *Simmons* and *Fore*, we now conclude that supervisory as well as non-supervisory employees are immune from suit for negligence in failing to provide a safe place to work.

294 Ark. at 6.

In the instant case, appellee was simply a fellow employee of the appellant. It is not disputed that the employer required employees to park in a parking lot some distance from the job site; that the employer regularly furnished transportation from the parking lot to the job site using the employer's vehicles; that, on the day the incident occurred, the employer's vehicles were unavailable; that appellee was instructed by his supervisor to bring his pickup to the construction site to be used as transportation for other employees in case the employer's vehicles were unavailable; that at lunch time the employer's vehicles were still unavailable; and that the incident occurred as appellee was using his pickup at noon to transport fellow employees to the parking

lot.

Even assuming appellee was somehow negligent in driving his vehicle, he is immune from suit because under the facts of this case providing transportation from the employer-designated parking area to the job site involves the duty to provide a safe place to work.

Appellant has also argued there is a question of fact as to appellee's negligence and that a willful and intentional injury is an exception to the Worker's Compensation Act. *Sontag* v. *Orbit Value Co., Inc.*, 283 Ark. 191, 672 S.W.2d 50 (1984). The problem with appellant's argument is his complaint alleged only "careless and negligent acts" and that appellee drove in a "reckless" manner. And his affidavit which was attached to his response to appellee's motion for summary judgment states only that appellee "made a jackrabbit start, causing the truck to lurch forward." In *Sontag* the court held when the employee is able to show "actual, specific and deliberate intent" he may avoid the exclusive remedy under the Workers' Compensation Law. Since there are no allegations of "willful and intentional injury" appellant cannot avoid the exclusive remedy under the Workers' Compensation Law and maintain a tort action.

The trial court did not err in granting appellee's motion for summary judgment.

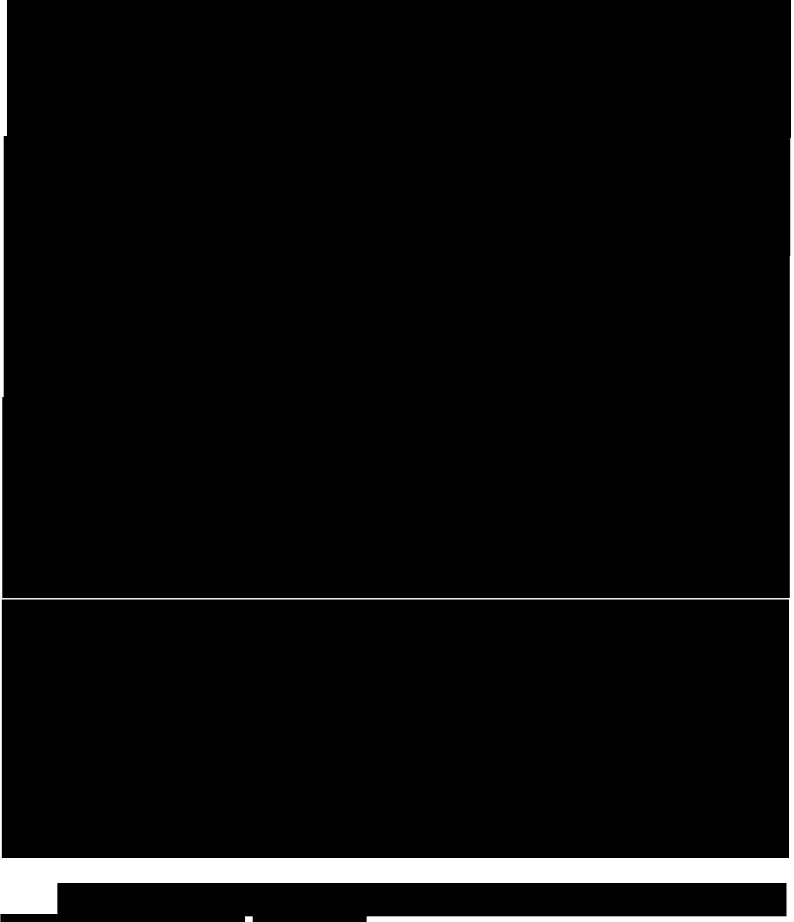
Affirmed.

JENNINGS and COOPER, JJ., agree.

ARKANSAS DEPARTMENT OF HUMAN SERVICES v. Pat CALDWELL

CA 91-296 832 S.W.2d 510

Court of Appeals of Arkansas
Division II
Opinion delivered June 24, 1992



S. Whittington Brown, for appellant.

W. Paul Blume and *Ted H. Sanders*, for appellee.

JUDITH ROGERS, Judge. The Department of Human Services appeals from the decision of the Baxter County Circuit Court reversing the agency's finding of some credible evidence of abuse, as allegedly perpetrated by appellee, Pat Caldwell, and thereby directing the removal of appellee's name from the State Central Registry. In addition to finding no credible evidence of abuse, the court also found that appellant's policies gave rise to an irrebuttable presumption of abuse, and held that the appellant's application of its policies under the facts of this case was arbitrary and capricious, and denied appellee due process of law. On appeal, appellant advances three issues, arguing that: (1) the trial court erred in holding that the hearing officer's findings were not supported by some credible evidence; (2) the trial court erred in ruling that its policies created an irrebuttable presumption of abuse; and (3) the trial court exceeded its authority under the Administrative Procedures Act.[1] We affirm.

On Thursday, September 22, 1988, appellee, who is an assistant principal at the Guy Berry Middle School in Mountain Home, paddled three fifth grade students who had been caught smoking on the playground. It was violation of school rules not only to smoke, but also to possess and strike matches on the school premises. In the presence of another teacher as a witness, the child in question received three licks with a wooden paddle, as did another one of the girls, while the third child only received one lick, as she did not actually smoke the cigarette. The girls were also instructed to write a report on smoking. The following afternoon, the child's mother noticed bruises on her daughter's buttocks. Feeling that the bruises had resulted from the spanking, the mother contacted school officials and then reported the paddling to the Baxter County Division of Children and Family Services as an incident of suspected child abuse. The assigned caseworker met with the child and her mother the next morning and took pictures of the child's buttocks. Upon completing the investigation, which included interviews with appellee and school

---

[1] On March 23, 1991, we certified this case to the supreme court under subsections (1) (c) and (4)(b) of Rule 29 of the Rules of the Supreme Court and Court of Appeals. Certification was refused.

personnel, and after consulting with her area manager, the caseworker "substantiated" the allegation of child abuse and forwarded a written report of the investigation for recordation in the State Central Registry, as is required pursuant to Ark. Code Ann. § 12-12-508 (1987). Appellee then requested administrative review of this determination, seeking to expunge her name from the registry. A hearing was held on May 31, 1989, after which the hearing officer issued an order in which she found "some credible evidence" to substantiate the occurrence of abuse. Appellee appealed to the circuit court, which reversed the agency's decision and directed that appellee's name be stricken from the registry. This appeal followed.

As its first issue, appellant contends that the trial court erred in determining that the hearing officer's findings were not supported by some credible evidence. We disagree.

Under the School Discipline Act, it is stated that any teacher or school principal may use corporal punishment in a reasonable manner against any pupil for good cause in order to maintain discipline and order within the public schools. Ark. Code Ann. § 6-18-505(c) (1987). For our purposes here, "abuse" is defined as any nonaccidental physical injury inflicted on a child by anyone legally responsible for the care and maintenance of the child, or an injury which is at variance with the history given. *See* Ark. Code Ann. § 12-12-502(2) (1987).[2] The question upon review in the circuit court is whether there is some credible evidence of alleged abuse to support the maintenance of the alleged abuser's name in the State Central Registry. *See Crawford/Sebastian County SCAN* v. *Kelly*, 300 Ark. 206, 778 S.W.2d 219 (1989). Our review is similarly limited and, on appeal, we review the entire record in making this determination. *Ark. Alcoholic Beverage Control Bd.* v. *Muncrief*, 308 Ark. 373, 826 S.W.2d 816 (1992).

At the administrative hearing, appellee testified that she was in charge of the school that day because the principal was absent.

---

[2] Ark. Code Ann. §§ 12-12-501 to -518 (1987), in effect at the time of these proceedings, has been repealed as amended by Act 1208 of 1991. The current subchapter dealing with child abuse reporting is codified at Ark. Code Ann. §§ 12-12-501 to -518 (Supp. 1991).

She said that she learned of the infraction from another teacher, and that, before deciding to paddle the children, she called another administrator for advice as to the appropriate punishment, stating that it was a difficult decision since this was the first incident of smoking she had confronted involving children in that age group. Appellee questioned the girls both separately and together. She explained that, because she had taken the child to the hospital the previous year when she had broken her arm on the playground, she shared a special relationship with the child such that the conversation with her dealt more with disappointment than with anger over what she had done. Appellee testified that she followed the normal routine in administering the paddling, which included obtaining another teacher as a witness. The children were first made to tell the witness what they had done wrong, and when paddled, each were told to bend over and touch their knees, so that the buttocks would be easily hit, and to look forward, rather than at her, to hopefully prevent them from moving. She said that the child remained still while she was being paddled, and that she gave her three "average" swats. She denied that she paddled the child in anger, and said that she would not have expected the child to have bruised from the paddling that she gave. She felt that she had spanked her appropriately and had not abused her, and that the only thing she could think of was that the child was wearing a thin dress that day.

The witness, Patricia Wallace, a fourth grade teacher, testified that she was positioned in front of the children as they were being paddled, and that the child displayed little reaction to the paddling. She said that she witnesses about half of the paddlings that occur at the school, and remarked that the licks in this instance were not out of the ordinary or excessive, but that they were rather light. She stated that appellee was calm, and not angry when she spanked these children. Michelle Ervin, the school nurse, saw the child on Monday, September 26th, four days after the paddling. In her report, she stated that she observed four very faint bruises which were about three quarters of an inch in diameter. She said that there was no swelling or other abrasions in the area. In her testimony, she said that she had to kneel and get about eight inches away before the bruises could be seen.

The child also testified at the hearing. She related that her behind was sore after the paddling, particularly when she sat

down, and she felt that she was being hit hard when she was spanked. She said that she cried both before and after the paddling. She further testified that appellee was disappointed in her for smoking, but not angry.

The child's mother testified that she learned of the spanking the next day when appellee directed the child to telephone her from school because the child had someone else sign her name to the note which was sent home to inform her of the paddling. She said that, when her daughter got home that afternoon, she looked at the child's buttocks and observed bruises after the child had explained to her how badly the spanking had hurt and that it hurt to sit down. The mother agreed that the child deserved a spanking for what she had done, but she felt that the paddling was excessive, stating that "it was just too hard." She said that her daughter bruised often, but "normal" in comparison to other children.

Jennifer Baker, the caseworker who investigated the report, testified that after she had completed the interviews she did not feel that appellee had been abusive. In substantiating the allegation, she said that the deciding factor was that marks were left from the paddling. She related that according to the department's policy she must substantiate an allegation of abuse if bruises remain after a twenty-four hour period. Because of this policy, she stated that she was compelled to substantiate the allegation in this case since bruises had resulted from the paddling. John Hangen, Ms. Baker's supervisor, who advised her in reaching a decision on this matter, testified it was the agency's position that, "if there is bruising, it is abusive and with bruising, we substantiate abuse." He said that his staff is directed to consider that discipline which results in bruising is excessive and physically abusive. He explained that the department needed to have a guideline, and that the guideline was that bruising is abusive.

Based on our review of the testimony and the photographs that were taken, we must agree with the decision of the circuit court reversing the agency's determination. In so holding, we are impressed with the caseworker's testimony that she did not feel that the paddling was abusive, and that substantiation was based solely on the evidence of bruising. We do not believe that one factor, standing alone and applied as a litmus test, without

consideration of all the attendant circumstances, is an appropriate measure to be used in all cases for determining whether an allegation of abuse is to be substantiated. There must be some exercise of judgment, as this is an area which does not lend itself to facile determination. On this record, we uphold the circuit court's finding of no credible evidence to support the allegation of abuse, and its finding that the punishment was not excessive or abusive.

Because of our holding on this issue, we need not address the remaining issues advanced by appellant which concern the trial court's alternative ground for reversing the agency's decision.

Affirmed.

CRACRAFT, C.J., and DANIELSON, J., agree.

Jimmy JONES *v.* CITY OF IMBODEN

CA91-351 832 S.W.2d 866

Court of Appeals of Arkansas
Division I
Opinion delivered July 1, 1992

Ponder & Jaboe, by: *Dick Jarboe*, for appellant.

J. Chris Bradley, for appellee

JOHN E. JENNINGS, Judge. Jimmy Jones was employed by the City of Imboden, Arkansas, as city marshal from 1965 until the first week of July 1989. Mr. Bob Taylor also lived in Imboden and Jones had known Taylor and his family for many years.

On several occasions during 1988 and 1989, Mr. Taylor created disturbances and Jones, as city marshal, had to physically restrain him and take him to a mental hospital. Taylor threatened to kill Jones on each occasion.

On the evening of August 11, 1989, some thirty days after Jones had resigned as city marshal, Taylor appeared outside his bedroom window again threatening to kill him. Jones called the sheriff and after deputies arrived Jones and Taylor got into a scuffle and Jones suffered a ruptured disc.

Mr. Jones filed a claim for workers' compensation against the City of Imboden and the administrative law judge awarded benefits. On appeal, the full Commission reversed. The Commission held that although there was a casual connection between the injury and the employment, the requirement that the injury occur "in the course of employment" was not met. *See* Ark. Code Ann. § 11-9-401 (1987).

We have said many times that "arising out of the employment" refers to the origin or cause of the accident while the phrase "in the course of employment" refers to the time, place, and circumstances under which the injury occurred.

Franklin Collier Farms v. *Bullard*, 33 Ark. App. 33, 800 S.W.2d 438 (1990); *Moore* v. *Darling Store Fixtures*, 22 Ark. App. 21, 732 S.W.2d 496 (1987); *Gerber Products* v. *McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985); *Owens* v. *National Health Laboratories, Inc.*, 8 Ark. App 92, 648 S.W.2d 829 (1983). In *City of El Dorado* v. *Sartor*, 21 Ark. App 143, 729 S.W.2d 430 (1987), we said:

> With respect to course of employment, the test advanced by Professor Larson 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 *Workmen's Compensation Law* §§ 14.00, 20.00 (1985).

One case relied upon by the appellant is *Graybeal* v. *Board of Supervisors of Montgomery County*, 216 Va. 77, 216 S.E.2d 52 (1975). Graybeal was a prosecuting attorney and in that capacity prosecuted Frank Dewease for murder. Dewease was convicted and sentenced to twenty years imprisonment. Dewease vowed revenge and five years later, Graybeal, while still employed as prosecuting attorney, arrived home late in the evening. He noticed a can on top of the family car and when he picked it up, it exploded, causing severe injuries.

Significantly, that court's prior pronouncements on the "in the course of" requirement parallel those of our courts. The Virginia Supreme Court said:

> The "course of" requirement, on the other hand, refers to continuity of time, space, and circumstances, only incidentally related to causation. This requirement must be satisfied by a showing of an unbroken course beginning with work and ending with injury under such circumstances that the beginning and the end are connected parts of a single work-related incident.
>
> Considering, then, that in the context of the present case "arising" means "originating," we believe the claimant's nighttime injury from the exploding bomb placed on the top of his family car no less arose in the course of his employment than if he had been shot by his revenge-

> seeking assailant in the courtroom immediately following the murder trial, or if he had been injured by a bomb triggered to explode in his office upon his return from the courtroom. The difference is in degree only and not in substance. In the realities of the present case, the course from prosecution to desire-for-revenge to injury was unbroken, constituting a single work-connected incident.

This is essentially the same concept written of by Chief Justice Cardozo in *Matter of Field* v. *Charmette Knitted Fabric Co.*, 245 N.Y. 139, 156 N.E. 642 (1927): "Continuity of cause has been so combined with contiguity in time and space that the quarrel from origin to ending must be taken to be one."

More closely in point is *Thornton* v. *Chamberlain Manuf. Corp.*, 62 N.J. 235, 300 A.2d 146 (1973). The claimant there was a production foreman who had, during his employment, reprimanded an employee named Sozio for his failure to wear safety glasses. Sozio had told the claimant, "I'll take care of your eyes later." Nine days after the claimant terminated his employment, he saw Sozio in a bar. Sozio attacked him and Thornton's injuries included the loss of vision in one eye.

Chief Justice Weintraub, speaking for the court, said:

> Thus an accident may fairly be said to "arise" in the course of the employment if it had its origin there in the sense that it was the end-product of a force or cause set in motion in the course of employment. That construction is reasonable and advances the basic purpose of the statute that an enterprise shall absorb the injuries reasonably related to it. Here the injuries were caused in every realistic sense by petitioner's exposure at work. We can think of no reason why the Legislature would want to deny relief because the work-generated force overtook petitioner at one moment rather than another.
>
> We are mindful that in the case at hand the employment relationship itself terminated before the work-initiated hazard ended in injury to him. In this respect, this case goes beyond the authorities cited above. But we see nothing critical in that further fact. In another case that fact might play a decisive role with respect to the work-connection of

> an injury, but in the case at hand it does not offer a rational basis to say the burden of this injury should not be borne by the enterprise from which it so clearly emerged. (Citation omitted.)

Similarly in *Jones* v. *Jay Truck Driver Training Ctr.*, 736 S.W.2d 468 (Mo. App. 1987), the court held that an employer's obligation under workers' compensation may extend beyond termination when the activity causing injury is a normal and reasonable incident of the employment relationship.

In *Bearshield* v. *City of Gregory*, 278 N.W.2d 166 (S.D. 1979), William Bearshield, a police officer for Gregory, South Dakota, had had contact, in the line of duty, with one Norman Bluebird. Later, while Bearshield was on vacation, Bluebird stabbed him to death. The South Dakota Supreme Court cited with approval both *Graybeal* and *Thornton.* The court said:

> We agree with these latter authorities and find their reasoning to be in line with the broad spirit of the worker's compensation statutes and the liberal construction they are to be afforded. The case before us is not a typical industrial injury case involving the usual employer-employee and cause-result nexus. This is a situation where decedent's employment, by its very nature, exposed him to injury of an unusual sort, i.e., a fatal assault by a revenge-seeking youth. This type of injury knows no particular location or working hours.

Bearshield, 278 N.W.2d at 170.

There is precedent in this state for the principle that an injury may be found to have occurred "in the course of employment" despite the fact that the claimant had been discharged prior to the work-related assault. *Johnson* v. *Safreed*, 224 Ark. 397, 273 S.W.2d 545 (1954); *Lundell* v. *Walker*, 204 Ark. 871, 165 S.W.2d 600 (1942). In *Lundell* the court stated, "[T]he conversation and act of killing were so much a part of the same transaction that discrimination cannot differentiate between them." In *Johnson* the court said, "We have held that the period between discharge and injury must be somewhat longer than the minute, or less, involved in the instant case."

The principle applicable in the case at bar is the same as

that involved in *Johnson* and *Lundell*: the difference is merely one of lapse of time. We agree with the Supreme Court of New Jersey in *Thornton, supra*, that the distinction is not a critical one in the case at bar.

For the reasons stated the decision of the Commission is reversed and the case is remanded for the purpose of the determination of benefits.

Reversed and remanded.

COOPER and MAYFIELD, JJ. agree.

DEFFENBAUGH INDUSTRIES and Travelers Insurance Company *v.* Earl ANGUS

CA 91-247 832 S.W.2d 869

Court of Appeals of Arkansas
En Banc
Opinion delivered July 8, 1992

Michael E. Ryburn, for appellant.

Schieffler Law Firm, by: *Edward H. Schieffler*, for appellee.

JAMES R. COOPER, Judge. Deffenbaugh Industries appeals from the Workers' Compensation Commission's decision finding compensable the injuries which Earl Angus sustained when a tornado totally destroyed the mobile home in which he lived on his employer's premises. The full Commission affirmed the finding of the administrative law judge that Mr. Angus' injuries "arose out of and in the course of" his employment. The appellant claims the

Commission erred in so finding. We affirm.

Earl Angus, the appellee, was manager of the appellant's facility in West Memphis, which was engaged in the business of collecting and reselling waste oil. The business operated 24 hours a day, seven days a week, and one condition of Mr. Angus' employment was that he reside on the premises, thus making himself available at all times. He obtained a zoning variance from the city of West Memphis which allowed a residence in a commercial area, and the minutes of the council meeting in which he was granted the variance stated that it was a "temporary permit for one year for security reasons." His employer purchased a mobile home and enclosed it by a fence on the premises of the waste oil facility. The rental agreement signed by the parties stated that "this agreement is being entered into by lessor because of lessee's employment relationship with lessor," and that "it is further agreed that the quarters provided to lessee by lessor are furnished for the convenience of the lessor and that the lessee is required to accept such lodging on the business premises of the lessor as a condition of employment of lessee by lessor." The appellee and his family lived in the mobile home, and though there was an office in another building from which Mr. Angus conducted business, there was a telephone installed in the mobile home which allowed truck drivers to contact him to notify him of their anticipated arrival.

On the night of December 14, 1987, Mr. Angus went to the residence while waiting for a truck driven by Billy Harris to arrive. He had been there approximately fifteen minutes, eating dinner, when a tornado swept through the West Memphis area. It struck the mobile home, killing Mrs. Angus and severely injuring Mr. Angus and his daughter. Mr. Harris arrived minutes after the storm and discovered the Angus family.

After a *de novo* review, the Commission affirmed the decision of the administrative law judge that Mr. Angus' injuries were compensable. It found that the constant presence of Mr. Angus on the premises was "partially necessitated for security purposes" and by the fact that he "had numerous duties which had to be performed as needed . . . twenty-four hours a day, seven days every week." At the time that the tornado struck, Mr. Angus had just finished performing various duties and was

expecting, within thirty minutes, a truck which he would be required to assist in unloading. Thus, said the Commission, his injuries arose out of and in the course of his employment.

On appeal from the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Tiller* v. *Sears, Roebuck & Company*, 27 Ark. App. 159, 767 S.W.2d 544 (1989). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *San Antonio Shoes* v. *Beatty*, 28 Ark. App. 201, 771 S.W.2d 802 (1989). In such a case, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable, i.e., that his injury was the result of an accident that arose in the course of his employment and that it grew out of or resulted from the employment. *Wolfe* v. *City of El Dorado*, 33 Ark. App. 25, 799 S.W.2d 812 (1990).

In order for an employee's disability to be compensable, he must prove that he sustained an injury "arising out of and in the course of his employment." Ark. Code Ann. § 11-9-401 (1987); *Gerber Products* v. *McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). The phrase "arising out of the employment" refers to the origin or cause of the accident. *Id.* The phrase "in the course of" the employment refers to the time, place and circumstances under which the injury occurs. *J&G Cabinets* v. *Hennington*, 269 Ark. 789 (Ark. App. 1980).

The appellant first argues that the appellee was not injured "in the course and scope of" his employment because he was not performing any job duties at the time he was injured, but rather was in his home eating dinner with his family. Nevertheless, Mr. Angus was a resident employee, on call 24 hours a day, seven days a week. Professor Larson states that in this situation "the entire period of his presence on the premises pursuant to this requirement is deemed included in the course of employment." 1A Larson, *Law of Worker's Compensation* § 24.00 (1990). The controlling question as to whether an injury occurs "in the course of" the employment is whether the activity is reasonably expectable so as to be an incident of the employment, and thus, a part of it. *J&G Cabinets, supra*. Because one could reasonably expect an employee who was continuously on call and was required to live

on the premises to, at some point, sit down to eat dinner, we hold that the Commission's decision that Mr. Angus was injured while "in the course of" his employment is supported by substantial evidence.

The appellant next argues that the Commission erred in declining to apply the positional risk doctrine. It discussed the doctrine but noted that Arkansas courts have not expressly adopted the positional risk doctrine. According to Larson, the doctrine is a substitute for the "arising out of" test, and he states:

> An important and growing number of courts are accepting the full implications of the positional-risk test: An injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. It is even more common for the test to be approved and used in particular situations. This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in a particular place at the particular time when he is injured by some neutral force, meaning "neutral" neither personal to the claimant nor distinctly associated with the employment.

1 A. Larson, *The Law of Workmen's Compensation*, § 6.50 (1990). The only requirement to be met before positional risk may be applied is that the risk which causes the injury must be a neutral one. A tornado is an Act of God, and Larson states that Acts of God are classified as "neutral risks," meaning that they are neither personal to the claimant nor distinctly associated with the employment. A. Larson, *The Positional Risk Doctrine in Workmens' Compensation*, 1973 Duke L.J., 761.

At least five states have adopted the positional risk doctrine in cases involving injuries due to tornados. They are as follows: Louisiana (*Harvey* v. *Caddo DeSoto Cotton Oil Company, Inc.*, 199 La. 720, 6 So.2d 747 (1942)); Mississippi (*Wiggins* v. *Knox Glass, Inc.*, 219 So.2d 154 (1969)); Michigan (*Whetro* v. *Awkerman*, 383 Mich. 235, 174 N.W.2d 783 (1969)); Georgia (*National Fire Insurance Company* v. *Edwards*, 152 Ga. App.

566, 263 S.E.2d 455 (1979)); and Nebraska (*Nippert* v. *Shinn Farm Construction Company*, 223 Neb. 236, 388 N.W.2d 820 (1986)). Eleven states have either specifically adopted the positional risk doctrine in "neutral risk" situations or applied its principles without expressly adopting it.

Arkansas cases have either discussed the positional risk doctrine or have reached conclusions consistent with the reasoning of the doctrine. For instance, in *Kendrick* v. *Peel, Eddy, & Gibbons Law Firm*, 32 Ark. App. 29, 795 S.W.2d 365 (1990), we stated:

> Although the positional risk doctrine has not yet been applied in Arkansas to sustain an award of compensation, our cases have indicated that the doctrine would be applied in a proper case. In *Pigg* v. *Auto Shack*, 27 Ark. App. 42, 766 S.W.2d 36 (1989)[1], we cited the case of *Parrish Esso Service Center* v. *Adams*, 237 Ark. 560, 374 S.W.2d 468 (1964), where compensation was awarded to a claimant who was injured at work by a gust of wind which 'lifted appellee into the air, carried him approximately seventy-five feet, and dropped him on the concrete apron.' We said in *Pigg* that while the words 'positional risk' were not used in *Parrish*, that case represents the type of fact situation where the positional risk doctrine arises.

32 Ark. App. at 31-32. *Kendrick* concerned an employee who was killed by an acquaintance. We found the risk to be personal rather than neutral and we declined to apply the positional risk doctrine.

Again we refer to the case of *Parrish Esso Service Center* v. *Adams*, 237 Ark. 560, 374 S.W.2d 468, as being the type of fact situation to which the positional risk doctrine would be appropriately applied. *See Kendrick, supra.* The employee was picked up by a gust of wind and dropped onto concrete while securing his employer's property. The Supreme Court applied the "increased risk" test in holding that the injury was compensable because the

---

[1] We note that though *Pigg* v. *Auto Shack* did not adopt or apply the positional risk doctrine, discussion of it in the opinion incorrectly states that when applying the doctrine, it is a substitute for "in the course of" the employment. The doctrine actually supplies a presumption that the injury "arose out of" the employment.

employment:

> placed him at that moment in a more dangerous situation insofar as the 'Act of God' was concerned than that to which the general public in that vicinity was subjected; for the general public was not required to go outside at such a time but could remain in places of safety. *Id.* at 568.

In urging us to apply the positional risk doctrine, the appellant contends Mr. Angus' injuries are not compensable because his employment did not expose him to a greater degree of risk than other members of the general public in the same vicinity. (Several people in the West Memphis area were injured or killed by this storm.) Though the appellant contends that it is applying "positional risk," this approach is commonly referred to as the "increased risk test," and, as applied by the appellant, it does away with our two-pronged test of "arising out of and in the course of" the employment. The appellee also urges us to adopt the positional risk doctrine, suggesting a contrary result. He argues that but for the conditions and obligations imposed by his employment, he would not have been placed in the position to be injured by the "neutral risk." This is a correct application of the "positional risk test." We see no need to draw fine distinctions between types of "neutral risks." A tornado or windstorm is no less "neutral" than a roving lunatic or a stray bullet.

We now join those courts which accept the positional risk doctrine to provide compensation for employees who are injured by neutral risks. The question of who should bear the burden of the costs of such an injury is a policy consideration, and use of the positional risk doctrine where the risk is neutral places the risk of loss on the employer, the party most able to sustain such a loss.[2] This, we believe, is in keeping with the spirit of our workers' compensation law.

We have repeatedly held that the Workers' Compensation Act is to be liberally construed in favor of the claimant in accordance with the Act's remedial purpose. *Pinkston* v. *General Tire & Rubber Co.*, 30 Ark. App. 46, 782 S.W.2d 375 (1990);

---

[2] *See* John F. Scarzafava, *Areas of Changing Interpretation: The Positional Risk Doctrine* 3 Workmen's Compensation L. Rev. 204, 206 (1976).

Ark. Code Ann. § 11-9-704(c)(3). Contrary to the dissenting judge's opinion, we are not abandoning our prior case law requiring a claimant to prove by a preponderance of the evidence that his injury arose out of and in the course of his employment. We are simply liberally construing the statute in an extremely narrow class of cases, those which involve neutral risks. In applying the doctrine to the case at bar, Mr. Angus' injuries "arose out of" his employment because "but for" the employment, he would not have been in his home on his employer's premises at the particular time at which the tornado hit the area. We hold that because substantial evidence supports the Commission's conclusion that Mr. Angus' injuries arose out of and in the course of his employment, it must be affirmed.

Affirmed.

CRACRAFT, C.J., DANIELSON, J. and ROGERS, J., dissent.

GEORGE K. CRACRAFT, Chief Judge, dissenting. I respectfully dissent because I am of the very strong opinion that the "positional risk" doctrine has no place within the framework of our Workers' Compensation Act. In my judgment, application of the doctrine to injuries resulting from "Acts of God" ignores clear and unambiguous sections of our Worker's Compensation Act, and many years of case law interpreting and applying those sections.

The only "injuries" for which workers' compensation benefits are provided are those that are sustained in the course of the employment *and* that arise out of it. Ark. Code Ann. §§ 11-9-102(4); 11-9-401(a)(1) (1987). "In the course of the employment" refers to the time, place, and circumstances under which an injury occurs. The phrase "arising out of the employment" refers to the origin or cause of the accident. *J&G Cabinets* v. *Hennington*, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980). In order for an injury to arise out of the employment, it must be a natural and probable consequence or incident of the employment and a natural result of one of its risks. *Id.* It is so well established as to require no citation that the burden of proving compensability rests squarely upon the claimant. More recent legislation provides that the Commission *shall* determine *every* issue on the basis of whether the party having the burden of proof on the issue has established it by a preponderance of the evidence; in so doing,

the Commission must weigh the evidence impartially and without giving the benefit of doubt to any party. Ark. Code Ann. § 11-9-704(c)(2) and (4) (Supp. 1991).

Since there was evidence that the claimant in this case was required to be on duty twenty-four hours a day, the prevailing opinion correctly approves the Commission's finding that the claimant was within the course of his employment at the time of the injury. That finding, standing alone, however, is insufficient to sustain an award. The claimant was also required to establish that his injury arose out of and was causally connected with some risk incident to the employment.

In this case, the affirming judges are dispensing with the need for proof of this second vital and statutorily-required element and applying a doctrine that they say is "a substitute for the 'arising out of' test." Their application of this doctrine is based on a finding that the injury resulted from a " 'neutral risk[],' meaning . . . [one] neither personal to the claimant *nor distinctly associated with the employment*." (Emphasis added.) In my opinion, this is a complete abandonment of our prior rulings that "[t]here must be affirmative proof of a *distinctive employment risk* as the cause of the injury." *See, e.g., Gerber Products* v. *McDonald*, 15 Ark. App. 226, 229, 691 S.W.2d 879, 880 (1985); *Bagwell* v. *Falcon Jet Corp.*, 8 Ark. App. 192, 649 S.W.2d 841, 843 (1983).

In addition, the affirming judges reject a well-reasoned rule, accepted and applied to "Act of God" cases by the vast majority of our sister states. The general rule applicable to injuries resulting from tornadoes and windstorms is set forth in 99 C.J.S *Workers' Compensation* § 250 (1958), as follows:

> Injuries sustained by employees as the result of windstorms or tornadoes are *not ordinarily compensable where such employees are not, as such, exposed to the risk of such harm to a greater degree than the public generally in the same vicinity, but compensation may be had where the injured employee is by reason of his employment specially exposed to injury from such causes.* [Emphasis added. Footnotes omitted.]

The same rule is stated to be one of general application in 82 Am.

Jur. 2d *Workmen's Compensation* § 327 (1976). In J. Sandoval, Annot., *Workmen's Compensation: Injury or Death Due to Storms*, 42 A.L.R.3d 385, 391-92 (1972), the author states:

> Generally, most jurisdictions have taken the view that to recover compensation for an injury arising out of and in the course of employment, there must be a causal connection between such injury and the employment. Under this view, the courts have generally recognized the rule, known as the "peculiar" or "increased risk" rule, that *if an employee by reason of his duties is exposed to a special or peculiar danger from the elements — that is, one greater than that to which other persons in the community are exposed — and if an unexpected injury is sustained by reason of the elements, a causal connection is thereby established between the employment and the injury* and therefore the injury constitutes an accident arising out of and in the course of employment within the workmen's compensation acts. [Emphasis added.]

In support of the statements that this is a majority view, the author lists cases from various jurisdictions that have held in accordance with it. A number of other cases so holding are contained in footnotes in 1 A. Larson, *Law of Workmen's Compensation* § 8.21(a) (1990). Indeed, as the prevailing opinion notes, our own supreme court has applied this same majority rule. *See Parrish Esso Service Center* v. *Adams*, 237 Ark. 560, 374 S.W.2d 468 (1964).

I cannot agree that this majority rule places any undue burden on workers or is somehow contrary to the spirit or purposes of our Act. It requires no more than that a worker prove that the character of his employment, or that the place at which that employment required that he be, was such as would intensify the risk of injury from extraordinary natural causes. In my judgment, this rule is much more in keeping with the purposes of our Workers' Compensation Act than is the positional risk doctrine; at least the majority rule complies with the legislative mandate that a worker prove a causal connection between his injury and some risk of his employment. Clearly, our Act was never intended to serve as general accident or health insurance. There is no presumption that a claim comes within the provisions

of the Act, and liberal construction of the Act in no way dispenses with the need for proof of compensability. *See Crouch Funeral Home* v. *Crouch*, 262 Ark. 417, 557 S.W.2d 392 (1977); *Duke* v. *Pekin Wood Products Co.*, 223 Ark. 182, 264 S.W.2d 834 (1954). Had the legislature intended to create an exception for cases involving Acts of God, it might easily have so provided.

Finally, notwithstanding the statement in the prevailing opinion that "[w]e now join those courts which accept the positional risk doctrine", I note that affirmances by an evenly divided court, such as this case, are not entitled to precedential weight. *France* v. *Nelson*, 292 Ark. 219, 729 S.W.2d 161 (1987).

DANIELSON and ROGERS, JJ., join in this dissent.

Eddie PATRICK *v.* ARKANSAS OAK FLOORING COMPANY

CA 91-423 833 S.W.2d 790

Court of Appeals of Arkansas
En Banc
Opinion delivered July 8, 1992

Baim, Gunti, Mouser, DeSimone, & Robinson, by: *William Kirby Mouser*, for appellant.

Friday, Eldredge & Clark, by: *James C. Baker, Jr.*, and *J. Michael Pickens*, for appellee.

JOHN E. JENNINGS, Judge. The claimant, Eddie Patrick, worked for Arkansas Oak Flooring Company as a ripsaw operator. On January 9, 1989, Patrick injured his shoulder. He was seen by Dr. Troy Oxner, an osteopathic physician. He was referred by Dr. Oxner to Dr. Bob Gullett and Dr. John Lytle, orthopedic surgeons. Neither could find an anatomical basis for the claimant's pain. He was apparently also seen by Dr. Brad Mosely. In an office note dated August 7, 1989, Dr. Gullett wrote:

> He relates that his shoulder hurts him. He can still move it well and there is no change really from what I have seen before. I have told him that I have done all that I am able to do to help him and perhaps he could visit back with his family doctor, Dr. Oxner, and perhaps referral to another orthopedic surgeon would be appropriate.

The claimant returned to Dr. Oxner and on August 8, 1989, Oxner wrote:

> I feel as though I have nothing else to offer this patient. Patient has been told that we have been unable to find anything that would point to the cause of his pain. Have instructed patient that if there was another physician that he thought might be able to help I would be glad to refer him at that time.

On September 7, 1989, Dr. Oxner's nurse wrote in her office notes:

> Patient comes in wanting appointment [with] Dr. Bishop as he feels his shoulder pain is due to a neurological problem. Dr. Oxner was consulted and it was agreed that we would set up appointment as requested.

Dr. Oxner also referred the claimant to Dr. Edward Weber, another orthopedic surgeon, at the claimant's request.

Dr. Bishop had a MRI performed and diagnosed Patrick's problem as impingement syndrome. Ultimately Dr. Weber recommended surgery, which has not yet been performed.

On these facts the Commission held that the employer was not responsible for the treatment by Drs. Bishop and Weber because their treatment was not a result of a "valid referral," but rather were "referrals based upon a request by the claimant." Whether the Commission's decision may stand is the only issue presented on appeal.

Arkansas Code Annotated section 11-9-514(a)(1) (1987) provides:

> If the employee selects a physician, the commission shall not authorize a change of physician unless the employee first establishes to the satisfaction of the commission that there is a compelling reason or circumstance justifying a change.

The Commission's authority to characterize a change of physician as a referral has its origin in the Commission's own Rule 23 which authorizes the Commission to permit deviation from the Commission's rule when compliance is impossible or impractical. *See Mohawk Rubber Co.* v. *Buford*, 259 Ark 615, 535 S.W.2d 819 (1976); *Mad Butcher, Inc.* v. *Parker*, 4 Ark.

App. 124, 628 S.W.2d 582 (1982). We have held that whether treatment is a result of a "referral" rather than a "change of physician" is a factual determination to be made by the Commission. *TEC* v. *Underwood*, 33 Ark. App. 116, 802 S.W.2d 481 (1991). When the Commission's findings of fact are challenged on appeal, we affirm if they are supported by substantial evidence. *Hope Brick Works* v. *Welch*, 33 Ark. App. 103, 802 S.W.2d 476 (1991). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). We do not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983). The Commission no longer has the discretion to retroactively approve a change of physicians. *Wright Contracting Co.* v. *Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

It is true that in the case at bar, Dr. Gullett suggested the possibility that Dr. Oxner might refer the claimant to a third orthopedic surgeon. Nevertheless, it was apparently the claimant's own idea to obtain referral to a neurologist. We conclude that the Commission's determination that the treatment by Drs. Bishop and Weber was actually in the nature of a change of physicians is supported by substantial evidence.

White v. *Lair Oil Co.*, 20 Ark. App. 136, 725 S.W.2d 10 (1987), is distinguishable. In *White* "emergency treatment" was involved and we said "the change was not of appellant's seeking but was instead prompted by exigent circumstances. . . ." Appellant also relies on *Electro-Air* v. *Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985), but in *Electro-Air* the referral was apparently a genuine one which merely coincided with the wishes of the claimant's attorney.

We hold that the Commission's decision is supported by substantial evidence.

Affirmed.

CRACRAFT, C.J., MAYFIELD, J., and COOPER, J., dissent.

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

disagree with the majority's conclusion that the claimant's treatment by Drs. Bishop and Weber constituted changes of physicians rather than referrals. In its opinion, the Commission states that the claimant's treatment by those doctors constituted changes of physicians because the claimant requested that he be referred to them. However, it is clear that a mere request for treatment by a particular physician is, in itself, insufficient to invalidate an otherwise valid referral. *See Electro-Air* v. *Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985). Whether or not particular treatment constitutes a referral, as opposed to a change of physicians, is a question of fact for the Commission. *TEC* v. *Underwood*, 33 Ark. App. 116, 802 S.W.2d 481 (1991). We must affirm the Commission's decision if fair-minded persons could reach the conclusion arrived at by the Commission. *Tuberville* v. *International Paper Co.*, 28 Ark. App. 196, 771 S.W.2d 805 (1989).

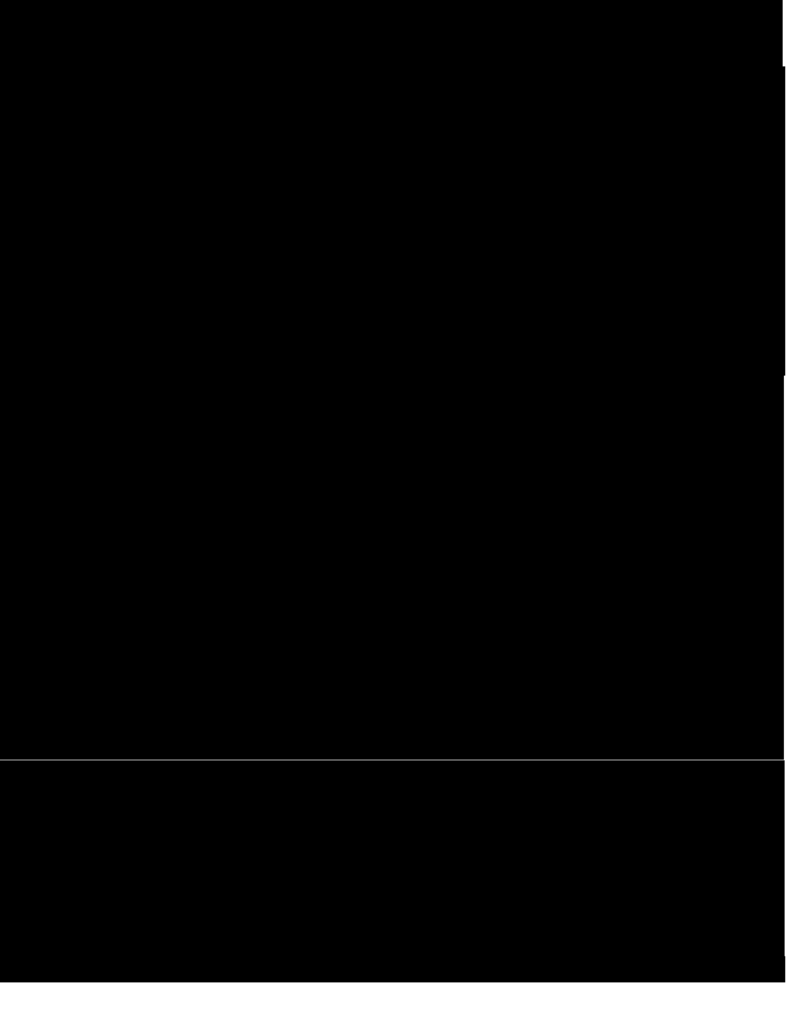
The Commission relied on office notes in which Dr. Oxner's nurse stated that the claimant came in wanting an appointment with Dr. Bishop, and Dr. Oxner's statement in his deposition that he referred the claimant to Dr. Weber at the claimant's request. However, the Commission took Dr. Oxner's statement out of context, ignoring the rest of his statement in which he made it plain that he could not determine the origin of the claimant's pain, and that he referred the claimant to another physician because he felt that he had nothing else to offer him. I submit that, when Dr. Oxner's statement is read in context, fair-minded persons could not therefore conclude that the claimant was not referred by him to Dr. Bishop. *See Tuberville* v. *International Paper Co.*, *supra.*

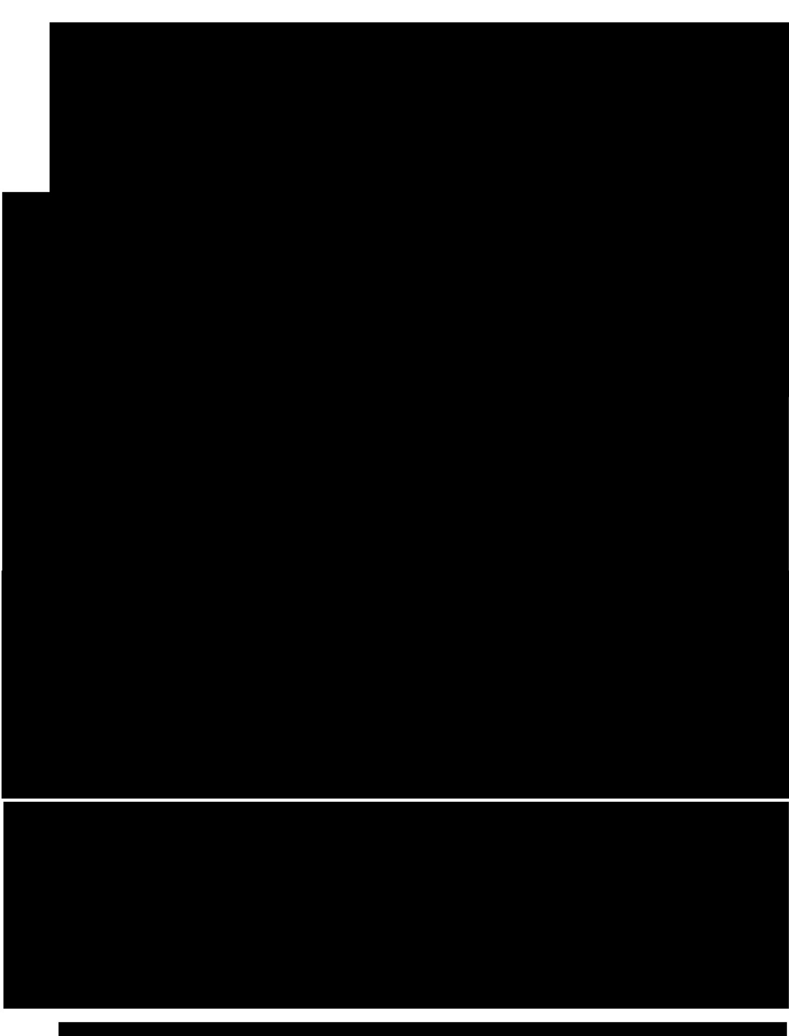
CRACRAFT, C.J., and MAYFIELD, J., join.

John Eric LAWRENCE *v.* STATE of Arkansas

CA CR 91-274 839 S.W.2d 10

Court of Appeals of Arkansas
En Banc
Opinion delivered July 8, 1992
[Rehearing denied August 19, 1992.]





Jonathan P. Shermer, Jr., for appellant.

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

JUDITH ROGERS, Judge. On March 4, 1990, a stolen vehicle driven by appellant, John Eric Lawrence, crossed the center line of the highway and collided head-on with an approaching vehicle.

Killed in the accident were Verla Chisum, a passenger in the oncoming vehicle, and Gregory Paul Gay, a passenger in the car appellant was driving. The other driver, Sandra Chisum, sustained severe injuries as a result of the collision. The wreck occurred just moments after police officers had broken off their high-speed pursuit of the vehicle operated by appellant.

Appellant was subsequently charged in the Circuit Court of Pope County with theft by receiving in connection with the stolen vehicle; two counts of manslaughter for the deaths of Chisum and Gay; and second degree battery related to the injuries received by Sandra Chisum. A jury found appellant guilty of these offenses as charged, and appellant received sentences of ten years for theft by receiving; ten years for manslaughter connected with the death of Mrs. Chisum; six and one half years for manslaughter for the death of Mr. Gay; and, six years for second degree battery. The trial court ordered these sentences to be served concurrently, but consecutively to the period of incarceration that had recently been imposed in a probation revocation proceeding.

On appeal, appellant advances the following three issues for reversal: (1) the trial court erred in not ordering a mental evaluation pursuant to Ark. Code Ann. § 5-2-305 (Supp. 1991); (2) the trial court erred in failing to find that double jeopardy was a bar to further prosecution; and, (3) the court erred in failing to find that his course of conduct was uninterrupted such that he could only be convicted of one offense resulting from the wreck. We find no error, and affirm.

Appellant's first point is that the trial court erred in refusing to suspend the proceedings for appellant to undergo a psychiatric examination to determine his capacity to stand trial. For purposes of our review, it is necessary to set out the factual background relating to this issue. Appellant was also seriously injured in the collision. From the record, it appears that he sustained some form of head injury, as well as a badly broken leg. On March 20, 1990, appellant's counsel wrote a letter to the court in which he stated that appellant "presently lacks the capacity to understand the proceedings against him. I will advise the court when his incapacity ceases if it does." This letter prompted the court to enter an order excluding for speedy trial purposes the period between March 20th and July 2nd, "[a]s defendant is unable to

assist counsel and unable to proceed to trial."

Since appellant had yet to appear before the court for arraignment, the court held a hearing on May 23, 1990, to entertain the prosecutor's request that appellant be required to remain at the rehabilitation center in Hot Springs where he was recuperating from his injuries, or that he be placed in jail, or that he be released on bond. At this hearing, the court was generally informed of appellant's physical infirmities, and the court learned for the first time that appellant's mental difficulties involved the loss of memory. Specifically, the court was made aware of a letter written by a Dr. Michael Church which stated that appellant was "found to have a moderate impairment in his memory involving recent events as well as memory recall. He also has very severe impairment of his long-term memory." The court entered an order requiring that appellant remain in the Hot Springs Rehabilitation Center, and that the court be informed of his release from that facility. In this order, dated May 30, 1990, the court also stated:

> Defendant's counsel, in a letter dated March 20, 1990, notified the Court that his client lacks the capacity to understand the proceedings against him and effectively assist in his own defense. The Court has previously entered an order tolling the running of the speedy trial time.
>
> . . .
>
> The defendant's physicians at the Hot Springs Rehabilitation Center are hereby directed to provide this Court with a written report relating to the defendant's physical and mental condition. Also, the defendant's physician is to indicate in the report whether or not the defendant is able to appear before this Court for arraignment on July 2, 1990.

Thereafter, in June, the appellant appeared before the same trial judge for a revocation hearing held in Johnson County. There is no indication that appellant's incapacity to proceed was questioned at that hearing.

Appellant's trial was eventually scheduled for February 26, 1991. Five days before trial, appellant's counsel filed a pleading

entitled "Notice of Lack of Fitness to Proceed." In this notice, counsel requested that appellant be mentally evaluated based on the assertion that appellant was unable to provide assistance in preparing for trial because he "has no memory of the events involving the allegations of illegal conduct which have been made." At a hearing, appellant's counsel maintained that, by filing this notice, the trial court was required to suspend the proceedings for the purpose of obtaining a mental examination. Counsel further argued that an examination was necessary because the trial court had earlier found appellant unfit to proceed and had ordered that a report of appellant's mental condition be made. The trial court questioned the appellant who acknowledged that he understood the nature of the charges and the range of penalties that could be imposed, but said that he could not recall anything about the events surrounding the collision. Appellant also told the court that he had been in the rehabilitation center for treatment of his physical injuries, and stated that he had been advised that his memory would return over time, and that he had been given a memory notebook in which to write down things that he remembered. Appellant further stated that he was unaware that any doctor had recommended that he seek psychiatric counselling. The court also heard the testimony of a Pope County jailor, Jack Branch, who had known appellant prior to his incarceration. Mr. Branch stated that he had asked appellant why he was in jail and that appellant explained to him that he had stolen a white Trans Am and had been involved in an accident. Based on the conversations he had with appellant and his observation of appellant's interaction with other inmates, Mr. Branch did not believe appellant's assertion that he was suffering from a loss of memory.

The trial court denied appellant's request for a mental evaluation based on a finding that the notice, which spoke only of memory loss as the basis of appellant's incapacity, failed to put appellant's mental competency in issue. On appeal, appellant asserts that the trial court's ruling was in error.

It is recognized that the conviction of an accused while he is legally incompetent to stand trial violates due process. *Addison* v. *State*, 298 Ark. 1, 765 S.W.2d 566 (1989). Thus, Arkansas Code Annotated § 5-2-302 (1987) provides that no person who, as a result of mental disease or defect, lacks the

capacity to understand the proceedings against him or to assist effectively in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures. Arkansas Code Annotated § 5-2-305 (Supp. 1991) provides in pertinent part that "[w]henever a defendant charged in circuit court files notice that he will put in issue his fitness to proceed, or that there is reason to doubt his fitness to proceed, the court shall immediately suspend all further proceedings in the prosecution," and that, upon the suspension of the proceedings, the court shall enter an order directing the defendant to undergo examination and observation by one or more psychiatrists at a local regional mental health center; or appointing at least one qualified psychiatrist to make an evaluation and report; or directing the Director of the Arkansas State Hospital to examine and report on the mental condition of the defendant; or other suitable facility for the purpose of the examination. *See* Ark. Code Ann. § 5-2-305(a)(2) & (b)(1) (Supp. 1991). It is clearly the intent of this statute to prevent the trial of any person who is legally incompetent. *See Ball* v. *State*, 278 Ark. 423, 646 S.W.2d 693 (1983). However, a defendant in a criminal case is ordinarily presumed to be mentally competent to stand trial. *Deason* v. *State*, 263 Ark. 56, 562 S.W.2d 79 (1978). The test of competence to stand trial is whether an accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him. *Lipscomb* v. *State*, 271 Ark. 337, 609 S.W.2d 15 (1980).

In the case at bar, the nature of appellant's claim of incompetence was specifically identified in the notice as being his inability to recall the event surrounding the wreck. In at least two cases, our supreme court has held that amnesia or lack of memory is not an adequate ground for holding a defendant incompetent to stand trial. *Rector* v. *State*, 277 Ark. 17, 638 S.W.2d 672 (1982); *Deason* v. *State*, 263 Ark. 56, 562 S.W.2d 79 (1978). In light of these decisions, we share the trial court's view that appellant failed to put in issue his fitness to proceed under the statute in that the asserted ground is not recognized as a mental disease or defect for which an accused is considered incompetent to stand trial. Under the peculiar circumstances of this case, we perceive no

error in the trial court's refusal to halt the proceedings and order a mental evaluation based on the notice filed in this case. We also attach no significance to the previous orders entered by the trial court. We think that these two orders were simply responsive to counsel's letter of March 20, 1990, and that it is clear that the court was repeating what counsel had averred in the letter as opposed to the court's making a finding that appellant was not competent to proceed. Also, close inspection of counsel's letter and the letter written by Dr. Couch reveals no specific assertion that appellant was suffering from a mental disease of defect which affected his competency to proceed, but rather that it was his lack of recollection that was affecting his capacity to proceed, which, as stated above, is not a proper basis for declaring an accused unfit to stand trial. In addition, the trial judge specifically stated at the hearing that his concern at that time was appellant's physical ability to appear before the court, and not his mental condition. We also note that, after the entry of these orders, appellant participated in the revocation hearing without raising an issue of his mental competency. In sum, under the circumstances of this case, we find no error in the trial court's ruling. We add that, even though we consider the notice which was filed ineffective, there is otherwise nothing in the record which would have given the court "reason to doubt" appellant's fitness to proceed so as to trigger the requirements of Ark. Code Ann. § 5-2-305. *See Hudson* v. *State*, 303 Ark. 640-A, 801 S.W.2d 48 (1990) (supplemental opinion denying rehearing).

Appellant next argues that the trial court erred in not granting his motion to dismiss made on grounds of double jeopardy. In October of 1989, appellant pled guilty in the Johnson County Court to charges of burglary and theft of property, and was placed on probation for five years. After the present charges had been filed, the state initiated revocation proceedings alleging that appellant had violated the condition of his probation which required that he not commit any offense punishable by imprisonment. As reflected by a judgment entered in the Johnson County Circuit Court on June 27, 1990, the court revoked appellant's probation and sentenced him to concurrent terms of twenty and ten years, respectively, for burglary and theft of property. Appellant contends that he was twice placed in jeopardy because the charges for which he stood trial previously served as the basis

for the revocation of his probation.

The double jeopardy clause protects defendants in criminal proceedings against multiple punishments or repeated prosecutions for the same offense. *United States* v. *Dinitz*, 424 U.S. 600 (1976). Jeopardy denotes "risk," which in the constitutional sense, is traditionally associated with a criminal prosecution. *Breed* v. *Jones*, 421 U.S. 519 (1975). It has been held that the risk to which the double jeopardy clause refers is not present in proceedings that are not "essentially criminal." *Helvering* v. *Mitchell*, 303 U.S. 391 (1938); *see also Farris* v. *State*, 303 Ark. 541, 798 S.W.2d 103 (1990). The Supreme Court has observed that probation revocation, like parole revocation, is not a stage of a criminal prosecution, even though it does result in the loss of liberty. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); *see also Pyland* v. *State*, 302 Ark. 444, 790 S.W.2d 178 (1990). Consequently a person on probation is not entitled to the "full panoply of rights" afforded a defendant in a criminal prosecution. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972).

Our supreme court has dealt with the issue of double jeopardy in the context of revocation proceedings in the case of *Townsend* v. *State*, 256 Ark. 570, 509 S.W.2d 311 (1974). In *Townsend*, while the appellant was under a suspended sentence, he was charged with the offenses of burglary and grand larceny. Based on these charges, the state also filed a petition to revoke the appellant's suspended sentence. At trial, the appellant was granted a directed verdict of acquittal, as the trial court found that the testimony of an accomplice had not been sufficiently corroborated. At the subsequent revocation hearing, it was stipulated that the court could consider the accomplice's testimony taken at trial, and the trial court revoked the suspended sentence on the basis of that testimony. On appeal from the revocation, the appellant contended that he was placed in double jeopardy, arguing that the revocation hearing constituted a second trial on the charges for which he had been acquitted. The supreme court, however, did not agree that former jeopardy barred revocation after an acquittal on the underlying charges. In so holding, the court observed that "[a] revocation of a suspension is in the nature of a revocation of a privilege previously extended," and reasoned that "Townsend was not given an additional sentence following the revocation hearing; rather, the court only

directed that he be required to serve the full sentence that had been rendered several years earlier." Inasmuch as it is a fundamental concept that reprosecution of a defendant following an acquittal is barred by double jeopardy, *see Cozzaglio* v. *State*, 289 Ark. 33, 709 S.W.2d 70 (1986), it is implicit in the court's holding that former jeopardy does not apply to revocation proceedings. We consider the decision in *Townsend* instructive, even though the scenario differs in that there the revocation followed an acquittal, whereas here the revocation preceded the trial. We find this distinction immaterial for the reason that double jeopardy either applies to revocation proceedings, or it does not. If it does not apply to revocation, it makes little difference whether revocation precedes or follows a criminal prosecution. *See e.g. United States* v. *Miller*, 797 F.2d 336 (6th Cir. 1986).

A majority of courts which have specifically addressed this issue have also found that double jeopardy does not apply to revocation proceedings. *State* v. *Quarles*, 761 P.2d 317 (Kan. Ct. App. 1988). *See United States* v. *Miller*, 797 F.2d 336 (6th Cir. 1986); *Jonas* v. *Wainwright*, 779 F.2d 1576 (11th Cir. 1986); *Thompson* v. *Reivitz*, 746 F.2d 397 (7th Cir. 1984); *United States* v. *Whitney*, 649 F.2d 296 (5th Cir. 1981); *State* v. *Chase*, 588 A.2d 120 (R.I. 1991); *Davenport* v. *State*, 574 S.W.2d 73 (Tex. Crim. App. 1978); *State* v. *Eckley*, 579 P.2d 291 (Or. Ct. App. 1978). As said by the court in *State* v. *Quarles*, *supra*:

> With the exception of *Snajder* [246 N.W.2d 665 (Wis. 1976)], these courts uniformly hold that, although a defendant is at risk at a probation or parole hearing, the risk does not rise to the level of being 'put in jeopardy' in the constitutional sense because the revocation hearing is not equivalent to a criminal prosecution; in other words, the hearing is not a proceeding which could result in a conviction. The purpose of a revocation hearing is not to punish a criminal for violation of the law, but rather to determine whether he has violated the conditions of his probation. The court's authority to revoke probation does not depend on whether the defendant's probationary conduct is criminal. Rather, the function of the court at the probation revocation hearing is to determine whether to

> impose or execute a sentence for an offense of which the defendant has already been convicted and for which probation was granted.

State v. *Quarles*, 761 P.2d at 320. Based on the guidance offered in *Townsend* v. *State*, *supra*, and the authorities mentioned above, we conclude that appellant was not placed in double jeopardy.

As his final issue, appellant contends that the trial court erred in not granting his motion to dismiss the charge of second degree battery and one of the counts of manslaughter. It is the appellant's contention that the conduct upon which the charges of manslaughter and second degree battery, the car wreck, was a single, continuous and uninterrupted act out of which he could only be prosecuted for one offense.

In making this argument, appellant relies on Ark. Code Ann. § 5-1-110(a)(5) (1987), which provides:

> (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:
>
> (5) The conduct constitutes an offense defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

The supreme court has held, however, that in order for this subsection of the statute to be applicable, the prohibited "conduct must be *defined* as a continuing course of conduct crime." *Smith* v. *State*, 296 Ark. 451, 757 S.W.2d 554 (1988). *See also Rhodes* v. *State*, 293 Ark. 211, 736 S.W.2d 284 (1987); *Rowe* v. *State*, 271 Ark. 20, 607 S.W.2d 657 (1980). In reference to the offenses here, a person commits manslaughter if he recklessly causes the death of another person, Ark. Code Ann. § 5-10-104(a)(3) (1987), while a person commits second degree battery if he recklessly causes serious physical injury to another person by means of a deadly weapon. Ark. Code Ann. § 5-13-202(a)(3) (1987). Thus, neither manslaughter nor second degree battery is specifically defined as a continuing course of conduct. Therefore,

this statute is of no benefit to appellant and does not prohibit his being tried and convicted of these charges as separate offenses. Moreover, appellant's argument is not consistent with the supreme court's decision in *Holder* v. *Fraser*, 215 Ark. 67, 219 S.W.2d 625 (1949). There, the court held that former jeopardy did not bar successive prosecutions for charges of involuntary manslaughter that were based on the deaths of three persons in a single traffic accident. Focusing on the "reckless" element of intent contained in the former statute, Ark. Stat. Ann. § 41-2209 (1947), the court concluded the "[p]etitioner risked a violation of the statute as to each person whose life he imperiled and may be held separately responsible for each death proximately resulting from the prohibited conduct."

Affirmed.

Dewey MAGAR *v.* STATE of Arkansas

CA CR 91-323 836 S.W.2d 385

Court of Appeals of Arkansas
Division I
Opinion delivered September 16, 1992

William R. Simpson, Jr., Public Defender, *Llewellyn J. Marczuk*, Deputy Public Defender, by: *Llewellyn J. Marczuk*, Deputy Public Defender.

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

JOHN E. JENNINGS, Judge. Dewey Magar was convicted in Pulaski County Circuit Court of the sexual abuse of an eight-year-old child. He was sentenced to thirty years imprisonment. The primary argument on appeal is that the trial court erred in refusing to suppress a statement, disclosing his age, made by the defendant to police officers shortly after his arrest. We find no error and affirm.

Janice Jensen, a North Little Rock police officer, testified that she filled out a fact sheet on Mr. Magar in the detention center. She testified that the fact sheet is "basically an identification form" and is separate from the arrest report. She obtained from Mr. Magar his name, date of birth, address, and "some contacts." She did not advise the defendant of his *Miranda* rights before the interview.

One element of sexual abuse in the first degree is that

the defendant be eighteen years of age or older. Ark. Code Ann. § 5-14-108(a)(3) (1987). Here Jensen testified that the defendant gave his date of birth as June 30, 1957. The argument is that the use of this "unmirandized" statement at trial was error. We hold that the questions asked by Officer Jensen fall within the "routine booking question" exception to the *Miranda* rule. *Pennsylvania* v. *Muniz*, 496 U.S. 582 (1990). Questions that are asked to secure biographical data necessary to complete booking or pretrial services and which are reasonably related to the administrative concerns of the police fall outside the protections of *Miranda. Muniz*, 496 U.S. at 601. The answers to such questions are admissible even if they should turn out to be incriminating, *United States* v. *Sims*, 719 F.2d 375 (11th Cir. 1983), *cert. denied*, 465 U.S. 1034 (1984); and even when, as here, they establish an element of the offense charged. *State* v. *Banks*, 322 N.C. 753, 370 S.E.2d 398 (1988); *State* v. *Herrin*, 562 So.2d 1 (La. Ct. App. 1990). The circuit judge did not err in admitting Jensen's testimony.

At trial there was evidence that the defendant had been convicted on four other occasions of the sexual abuse of children. In closing argument the prosecutor said, "Ladies and gentlemen, Dewey Magar has had many chances. And I don't know how many more small children we are going to allow him to. . . ." Appellant objected and moved for a mistrial. The court overruled the motion for a mistrial but admonished the jury to disregard the prosecutor's remarks about what the defendant might do in the future.

A mistrial is an extreme and drastic remedy that should only be resorted to when there has been an error so prejudicial that justice could not be served by continuing the trial. *Wingfield* v. *State*, 303 Ark. 291, 796 S.W.2d 574 (1990). The decision whether to grant or deny a motion for mistrial lies within the sound discretion of the trial court. *See Brewer* v. *State*, 269 Ark. 185, 599 S.W.2d 141 (1980). We will reverse only when an abuse of that discretion is shown. *Vasquez* v. *State*, 287 Ark. 468, 701 S.W.2d 357 (1985). In the case at bar, we believe the court's admonition was sufficient. *See Ronning* v. *State*, 295 Ark. 228, 748 S.W.2d 633, *cert. denied*, 489 U.S. 1040 (1988).

Appellant's related argument that the precise language

the trial court used in its admonition simply made the matter worse cannot succeed. We do not consider arguments made for the first time on appeal. *Finn* v. *State*, 36 Ark. App. 89, 819 S.W.2d 25 (1991). Appellant cannot acquiesce in the court's admonition and then complain of it on appeal.

Finally, appellant argues that the trial court erred in permitting the State to close the argument during the penalty phase of the trial. This argument was clearly rejected in *Duncan* v. *State*, 291 Ark. 521, 726 S.W.2d 653 (1987).

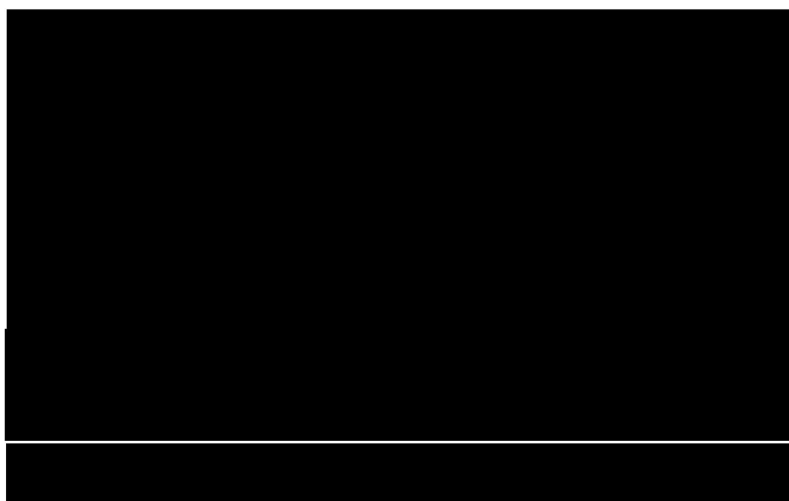
Affirmed.

CRACRAFT, C.J., and DANIELSON, J., agree.

Willie Joe WHITE *v.* STATE of Arkansas

CA CR 91-196 837 S.W.2d 479

Court of Appeals of Arkansas
Division I
Opinion delivered September 23, 1992



Gibson & Deen, by: *Thomas D. Deen*, for appellant.

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

James R. Cooper, Judge. The appellant in this criminal case was convicted by a jury of delivery of a controlled substance under Ark. Code Ann. § 5-64-401(a) (Supp. 1991). He was sentenced to thirty years in the Arkansas Department of Correction and was subsequently denied post-conviction relief based upon his assertion that he received ineffective assistance of counsel. On appeal, he contends that the trial court erred in (1) denying his motion for a directed verdict, (2) overruling his objection to hearsay statements, and (3) denying his petition for post-conviction relief. We affirm.

Other than the chemist who verified that the substance sold

was cocaine, the State called only one witness, Vernal Spears, the undercover officer participating in the transaction. He stated that on September 16, 1989, he went to the appellant's residence at the request of Sheriff Tommy Free. He had been told that the appellant was known by the name of "Lula Boy," and that upon opening the door, the appellant identified himself as Lula Boy. He stated that they went down a hallway to a bedroom where Gary Davis, known as "Pluto," gave him three rocks of cocaine and was told it would cost $100.00. Officer Spears gave the money to the appellant who was standing in the doorway of the room.

He stated that at that point in time, he knew the appellant only as Lula Boy, that he did not confuse Lula Boy and Pluto, and that he considered Lula Boy, the appellant, to be the main culprit and to be in control of the residence. He positively identified the appellant as the man he had known as Lula Boy. On this evidence, the jury found that the appellant was guilty of delivery of a controlled substance.

The appellant's first argument is that the court erred in denying his motion for a directed verdict. A motion for a directed verdict constitutes a challenge to the sufficiency of the evidence. *Duncan* v. *State*, 38 Ark. App. 47, 828 S.W.2d 847 (1992). In reviewing the sufficiency of the evidence on appeal, the court must look at the evidence in the light most favorable to the State and affirm the judgment if there is any substantial evidence to support the jury's verdict. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984); *Alford* v. *State*, 33 Ark. App. 179, 804 S.W.2d 370 (1991). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other inducing the mind to pass beyond mere suspicion or conjecture. *Duncan*, *supra*. In determining whether there is substantial evidence to support the jury's verdict, it is permissible to consider only the testimony that tends to support the verdict of guilt. *Tarentino* v. *State*, 302 Ark. 55, 786 S.W.2d 584 (1990).

The appellant contends that Officer Spears' testimony was rendered incredible due to discrepancies which arose each time he restated the facts. He contends these discrepancies resulted in three different versions of the transaction being told; however, the excerpts from the officer's testimony that the appellant presented in his brief demonstrate only two versions. The first was that the

appellant asked the officer for the money, and the second was that Pluto told him to give the money to the appellant.

As the appellant concedes, discrepancies in testimony are for the jury to resolve; the jury is free to accept or reject all of the testimony or any part thereof that it believes to be true or false. *Larue* v. *State*, 34 Ark. App. 131, 806 S.W.2d 35 (1991). We disagree that this variance was of such degree as to render the testimony of the undercover officer incredible, and we find substantial evidence to support the appellant's conviction.

The appellant's second argument is that the court erred in overruling his objections to statements made by Officer Spears which the appellant considers to be hearsay. He objected when the prosecutor asked Officer Spears who he was expecting to see when going to this residence. The judge ruled that the witness could testify as to whom he was going to see. Officer Spears then stated "We were under the impression that Lula . . . ." The appellant objected based on Officer Spears' earlier testimony that he had never seen this man and the only way he could form this impression was from information supplied by another person. The trial judge ruled that the witness could testify as to what was his impression. The third statement by Officer Spears was that the sheriff "had described him and gave me his name and told me that he was going by the name of Lula Boy." The trial judge ruled that this was not elicited to prove the matters stated. The appellant again objected after Officer Spears responded to the question "what was your understanding as to the sheriff's knowledge of Lula Boy White?" The trial judge overruled the objection, stating the officer could testify as to whether Sheriff Free directed him to go to the residence.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Arkansas Rule of Evidence Rule 803(c). Out-of-court statements are not hearsay if offered to show the basis of action. *Nottingham* v. *State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989). Officer Spears was working undercover at the request of Sheriff Free, and the information given to him was necessary in conducting the investigation. Thus, we cannot say that the admission of these statements to show the basis of Officer Spears' action was error.

The appellant's third and final argument on appeal is that the trial court erred in denying his petition for post-conviction relief, filed pursuant to Ark. R. Crim. P. 36.4, alleging that he was provided ineffective assistance of counsel. The basis of his argument is that he was represented by Thomas Brown, a part-time assistant public defender, and Gary Davis, his co-defendant, was represented by Timothy Bunch, the public defender. It is undisputed that there was an obvious conflict of interest between the two defendants as the appellant denied guilt of anything but being present during the transaction and Mr. Davis also denied guilt claiming that he was only present to purchase cocaine himself.

When a conflict of interest exists, the issue is whether or not the conflict adversely affected counsel's performance. The appellant contends that Mr. Brown's performance was so affected because he refused to call Mr. Davis as a witness at the appellant's trial.

At the hearing on the appellant's post-conviction petition, Mr. Brown, the appellant's attorney, testified that the appellant asked him to subpoena Mr. Davis to court; that he had talked to Mr. Davis twice; that the information elicited from Mr. Davis was detrimental to his client; and that as a matter of trial strategy, he elected not to call Mr. Davis as a witness. He further stated that he would have refused to call Mr. Davis as a witness regardless of who represented him.

Mr. Bunch testified that after speaking with Mr. Davis, and determining that a potential conflict existed, he assigned the appellant's case to Mr. Brown. He stated that Mr. Brown's office was in another city; that the cases were severed, though he did tell Mr. Brown that Gary Davis' testimony would be harmful to the appellant's case; that he had no part in negotiations with the prosecuting attorney concerning the appellant; and that the only participation by his office in the appellant's case was some secretarial work.

It is well-settled that one attorney may be appointed to represent two or more defendants without such representation constituting a per se violation of the Sixth Amendment right to effective assistance of counsel. *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978). The Supreme Court, in *Burger* v. *Kemp*, 483

U.S. 776 (1987), acknowledged that there is a possibility that prejudice will result when two partners represent co-defendants, and that the risk is increased when the two lawyers cooperate with one another in the planning and conduct of trial strategy. Nevertheless, the Court maintained that this does not justify an inflexible rule presuming prejudice in all cases. Rather, the Court stated, prejudice is presumed "only if the defendant demonstrates that counsel 'actively represented conflicting interest' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Burger*, 483 U.S. at 650; *Ingle* v. *State*, 294 Ark. 353, 742 S.W.2d 939 (1988).

In the case at bar, the State correctly points out that whether Mr. Bunch and Mr. Brown may be considered "partners" is debatable. They worked together only part-time, their offices were in two different cities, they made a conscious effort to sever the cases, and they worked independently for their respective clients. Nevertheless, even if they are considered "partners," we cannot say that any conflict affected the performance of Mr. Brown by his failure to call Mr. Davis as a witness. As both attorneys stated, Mr. Davis' testimony would have been detrimental to the appellant's defense, and the decision to call certain witnesses and reject other potential witnesses is largely a matter of trial strategy and counsel must use his own best judgment to determine which witnesses will be beneficial to his client. *Mays* v. *State*, 303 Ark. 505, 798 S.W.2d 75 (1990). We find no error, and we affirm.

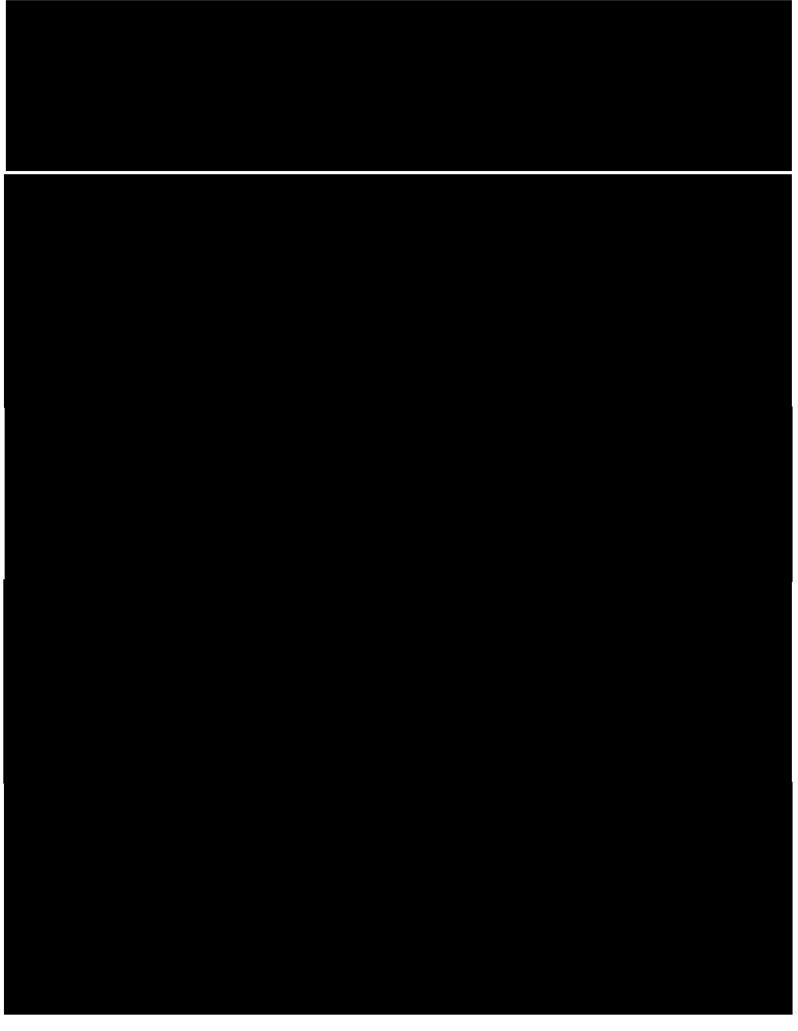
Affirmed.

CRACRAFT, C.J., and ROGERS, J., agree.

Walter HEDLUND and Leone Hedlund *v.* Charles O. HENDRIX and Norma S. Hendrix

CA 92-106 837 S.W.2d 488

Court of Appeals of Arkansas
Division I
Opinion delivered September 30, 1992



Ridgeway & Breckenridge, by: *Robert D. Ridgeway, Jr.*, for appellant.

Hargraves & McCrary, by: *Robert S. Hargraves*, for appellee.

George K. Cracraft, Chief Judge. Walter and Leone Hedlund appeal from an order dismissing their complaint, contending that the trial court erred in finding that their cause of action showed on its face that it was barred by the statute of limitations. We affirm.

On August 2, 1991, appellants filed their complaint alleging that on February 7, 1985, appellee Charles O. Hendrix guaranteed payment of a promissory note payable to appellants in the amount of $143,500.00. Appellants alleged that they subsequently released appellee from his guaranty in consideration of Martha J. Vest and Jerry C. Husley executing an agreement substituting themselves for appellee as guarantors of the note. The complaint alleged that the substituted guaranty was null and void in that the signature of Martha J. Vest was a forgery and that Jerry C. Husley had subsequently been discharged in bankruptcy by the United States Bankruptcy Court. It further alleged that the release of appellee from his guaranty was likewise null and void because of a lack and failure of the consideration for the substitution of the new guaranty, and that appellee therefore remained liable as guarantor of the note. Appellants prayed for judgment against appellee for the full amount of the note with accrued interest.

Appellee filed a timely motion to dismiss the complaint on grounds that it failed to state facts upon which relief could be granted and that it showed on its face that the cause of action against him was barred by the statute of limitations. On Septem-

ber 24, 1991, the court entered its order of dismissal. It concluded that the release dated June 21, 1986, constituted an absolute bar to the cause of action on the note, because appellants had failed to bring an action to cancel that document within the time permitted by law, and that the complaint therefore failed to state facts on which relief could be granted.

Appellants contend that the court erred in holding that their cause of action was barred by the statute of limitations. They argue that the suit was one to collect on the note and not for cancellation of the release, and that the proper statute of limitation to apply would be five years from the date the note became due rather than five years from the date on which the release was executed. We do not agree.

On June 21, 1986, appellants executed a written document releasing appellee from all obligations as guarantor of the note. Until voided or cancelled, the document releasing appellee from his guaranty would constitute a complete defense to an action on the guaranty. The initial issue for the chancellor to determine was whether the appellants' attack on that release for failure of consideration had been asserted within the period of limitation.

It is well settled that a statute of limitations begins to run when a complete and present cause of action first arises. *Hunter* v. *Connelly*, 247 Ark. 486, 446 S.W.2d 654 (1986); *Holloway* v. *Morris*, 182 Ark. 1096, 34 S.W.2d 750 (1931). The true test in determining when a cause of action arises or accrues is to establish a time when a plaintiff could have first maintained the action to a successful conclusion. *Davenport* v. *Pack*, 35 Ark. App. 40, 812 S.W.2d 487 (1991). A cause of action to cancel a written instrument arises when the ground for its cancellation first occurs. *Burns* v. *Burns*, 199 Ark. 673, 135 S.W.2d 670 (1940).

As the alleged forgery in this case existed on the date that the release was executed, the cause of action for cancellation arose when the release was executed, which was more than five years prior to the commencement of this action. Unless the period of limitations was tolled or otherwise suspended, the action to cancel the release was barred by limitations.

Appellants contend that they did not know they had a

cause of action for cancellation until after they obtained the affidavit of Ms. Vest that her signature on the substituted guaranty was not genuine. However, it is well settled that one's ignorance of the existence of his cause of action does not prevent the statute of limitations from running, unless his ignorance is due to fraudulent concealment or misrepresentation on the part of the one seeking to invoke the statute. *Courtney* v. *First National Bank*, 300 Ark. 498, 780 S.W.2d 36 (1989); *Hunter* v. *Connelly*, *supra*; *Smith* v. *Olin Industries*, 224 Ark. 606, 275 S.W.2d 429 (1955). Here, there was no allegation that appellee was aware of the alleged forgery, in any way attempted to conceal the facts, or was a party to any fraud practiced on appellants in the procurement of either the substituted guaranty or his release.

Appellants additionally contend that, as the complaint also prayed for a judgment against appellee as guarantor of the note, the court should consider the statute of limitations as running only from the date the note became due. In support of their position, they rely on those cases holding that where there is a reasonable doubt as to which of two statutes of limitations applies to a particular cause of action or proceeding, it will generally be resolved in favor of the statute containing the longer period of limitations. *See Dunlap* v. *McCarthy*, 284 Ark. 5, 678 S.W.2d 361 (1984); *Broadhead* v. *McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986).

Although this is a well-established rule, it is applied only in those cases where two or more statutes of limitations may be applicable to the same cause of action. The rule has no application to the case at bar. Here, appellants' complaint contained two separate causes of action — one to cancel the instrument releasing appellee from his guaranty and a second seeking judgment for the amount of the promissory note for which appellee was the original guarantor. *See* Ark. R. Civ. P. 18(c). Appellants could not prevail on the second cause of action unless they were first successful in cancelling the release that otherwise constituted a complete defense to the second cause. Although there were two causes of action, there is only one statute of limitations applicable to the cancellation issue. That statute began to run from the date that cause of action first arose.

We conclude that the trial court correctly ruled that the

statute of limitations had run on appellants' cause of action to cancel the release. The release remained and was a complete bar to any action on the guaranty, and appellants' complaint, therefore, failed to state facts on which relief could be granted.

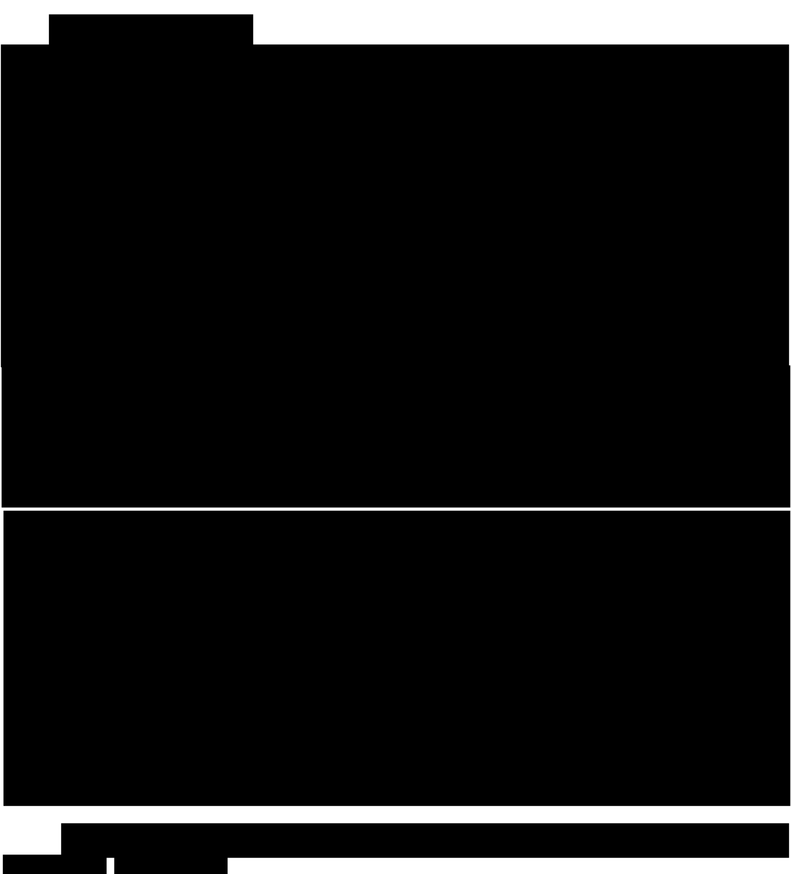
Affirmed

JENNINGS and DANIELSON, JJ., agree.

DEATH & PERMANENT TOTAL DISABILITY TRUST FUND *v.* WHIRLPOOL CORPORATION

CA 91-512 837 S.W.2d 293

Court of Appeals of Arkansas
Division I
Opinion delivered September 30, 1992



David L. Pake, for appellant.

Jones, Gilbreath, Jackson and Moll, by: *Robert L. Jones, III,* for appellee.

JAMES R. COOPER, Judge. The claimant in this workers' compensation case sustained two successive permanent injuries in the employ of the appellee, Whirlpool Corporation. The claimant's first injury took place in 1979, and resulted in payment of $5,174.26 in permanent partial disability benefits. The claimant returned to work at Whirlpool and was continuously employed there until he suffered a second compensable injury in 1985, which resulted in additional permanent anatomical impairment and a finding of permanent total disability. Subsequently, a

dispute arose between the appellant Trust Fund and the employer concerning the employer's assertion that it was entitled to take credit for the $5,174.26 paid to the claimant for permanent partial disability arising from the 1979 injury. The Commission concluded that the employer was entitled to credit for those permanent partial disability payments. From that decision, comes this appeal.

For reversal, the Trust Fund contends that the Commission erred in allowing the appellee employer credit for the permanent partial disability benefits paid for the 1979 injury. We affirm.

The Commission concluded that the employer was entitled to credit for the prior payment of permanent partial disability benefits pursuant to Ark. Stat. Ann. § 81-1313(f)(1) (Repl. 1976), which provides that:

> (f) Second injury: In cases of permanent disability arising from a subsequent accident, where a permanent disability existed prior thereto:
>
> (1) If an employee receives a permanent injury after having previously sustained another permanent injury in the employ of the same employer, for which he is receiving compensation, compensation for the subsequent injury shall be paid for the healing period and permanent disability by extending the period and not by increasing the weekly amount. When the previous and subsequent injuries received result in permanent total disability, compensation shall be payable for permanent total disability as provided in Section 10(a) [§ 81-1310] of this Act.
>
> In determining when Fifty Thousand Dollars ($50,000) in weekly benefits has been paid for permanent total disability awarded under Section 10(a) [§ 81-1310] of this Act, *the weekly benefits paid for the prior injury shall be added to the weekly benefits paid for the subsequent injury.* (Emphasis supplied).

The appellant argues that Ark. Stat. Ann. § 81-1313(f)(1) was superseded by Act 290 of 1981, which established the Second Injury Fund. Specifically, the appellant asserts that § 81-1313(f)(1) was superseded by the language in Act 290 providing that:

> Commencing January 1, 1981, all cases of permanent disability or impairment where there has been previous disability or impairment shall be compensated as herein provided.

Ark. Stat. Ann. § 81-1313(i) (now codified at Ark. Code Ann. § 11-9-525(b)(1) (1987)). However, the Arkansas Supreme Court has held that Act 290 did not repeal Ark. Stat. Ann. § 81-1313(f)(1) either specifically or by implication. *Riceland Foods, Inc.* v. *Second Injury Fund*, 289 Ark. 528, 715 S.W.2d 432 (1986). The Court held that, because the claimant in *Riceland* was permanently and totally disabled, and because both injuries occurred while the claimant was in Riceland's employment, Riceland, rather than the Second Injury Fund, was responsible for all the compensation and benefits due the claimant. *Id.* at 532. The Supreme Court reached this conclusion by reading the two statutes together; after so construing the statutes, the Court reconciled them by stating that:

> If successive injuries in the same employment cause total and permanent disability the employer or his insurance carrier is responsible to the employee for all benefits. If the previous disability or impairment did not arise out of the employment by the same employer, the Second Injury Fund must pay the benefits.

Riceland Foods, Inc., supra, at 532.

Moreover, it is clear that Ark. Stat. Ann. § 81-1313(f)(1) was not superseded by Act 290 with respect to cases subsequent to January 1, 1981, because the claimant's injury in the Supreme Court's *Riceland* case occurred in March 1981. *Second Injury Fund* v. *Riceland Foods, Inc.*, 17 Ark. App. 104, 704 S.W.2d 635 (1986) (*aff'd sub nom Riceland Foods, Inc.* v. *Second Injury Fund, supra*).

Finally, it should be noted that Ark. Stat. Ann. § 81-1313(f)(1) was not included in the Arkansas Code of 1987. Section 1-2-103 of the Code repealed "[a]ll acts, codes, and statutes, and all parts of them and all amendments to them of a general and permanent nature in effect on December 31, 1987 . . . ." Specifically excepted from this repeal, however, were statutes omitted "improperly or erroneously" from the Code.

Ark. Code Ann. § 1-2-103(a)(2) (1987). In the absence of any specific repeal of Ark. Stat. Ann. § 81-1313(f)(1), and given its continued validity under the *Riceland* cases cited *supra*, we hold that Ark. Code Ann. § 81-1313(f)(1) was improperly or erroneously omitted from the Code, and therefore remains in effect pursuant to Ark. Code Ann. § 1-2-103(b) (1987).

Next, the appellant contends that § 1313(f) cannot apply because it imposes on the employer the duty to pay only $50,000 in weekly benefits; here, however, the employer has stipulated that it is liable for $75,000 in weekly benefits. The appellant argues that this stipulation by the employer is a "tacit admission" that § 81-1313(i) applies. We do not agree.

Although the appellee did concede that it was liable for $75,000 in weekly benefits, that figure was derived not from subsection (a), but instead from Ark. Code Ann. § 11-9-502(b) (1987), which provides that:

> (b)(1) For injuries occurring on and after March 1, 1981, the first seventy-five thousand dollars ($75,000) of weekly benefits for death or permanent total disability shall be paid by the employer or his insurance carrier in the manner provided in this chapter.
>
> (2) An employee or dependent of an employee who receives a total of seventy-five thousand dollars ($75,000) in weekly benefits shall be eligible to continue to draw benefits at the rates prescribed in this chapter, but all benefits in excess of seventy-five thousand dollars ($75,000) shall be payable from the Death and Permanent Total Disability Trust Fund.

The question of whether the $50,000 limit on an employer's liability provided for in § 81-1313(f)(1) has been superseded by the $75,000 limit provided for in Ark. Code Ann. § 11-9-502 is not properly before us in this case; the employer stipulated to its liability to the extent of $75,000 before the Commission; this stipulation, as reflected in the Commission's opinion, was strictly to the advantage of the appellant, who will not be heard to object to it for the first time on appeal. *See Kelley* v. *Kelley*, 253 Ark. 378, 486 S.W.2d 5 (1972).

Although the issue is therefore not properly before us, we

nevertheless note that we believe that the Commission's decision was correct. In its opinion, the Commission cited its prior opinion in *Wennberg* v. *Sparks Regional Medical Center*, Ark. W. Comp. Commn. D109279, D40586 (op. del. February 2, 1989), where it decided the precise question which is presented by the case at bar:

> Notwithstanding the clear implication of subsection 502(b)(2), the employer insists that its own liability ceases after $50,000 has been paid, relying on the references to that amount in former Ark. Stat. Ann. § 81-1313(f)(1). That statute was not carried forward into the new Code, but it is still effective to impose liability on the employer (rather than the Second Injury Fund) where disability results from successive injuries in the same employment. *Riceland Foods, Inc.* v. *Second Injury Fund*, 289 Ark. 528, 715 S.W.2d 432 (1986). It is patently obvious to us that the General Assembly merely failed to amend § 13(f)(1) to conform with §502 through oversight and did not intentionally retain the employer's maximum liability at $50,000. If an employer stopped paying after $50,000 in benefits, but the Bank Fund became liable only after $75,000 in benefits had been paid, a claimant would never collect anything from the Bank Fund. That would be an absurd result. Common sense tells us that the legislature intended a reasonable result and one which allows a worker to receive all the benefits to which he is entitled. We also note that §502(b)(2) is immediately preceded by §502(b)(1), which states that, '[T]he first seventy-five thousand dollars ($75,000) of weekly benefits for death or permanent total disability shall be paid by the employer or his insurance carrier . . . .' Notwithstanding the omission to make the disputed section consistent, the legislative intent that the employer shall pay the first $75,000 of permanent total disability benefits is manifest and needs no further discussion.

We think that the Commission correctly concluded that the $75,000 limit applies to cases brought under Ark. Stat. Ann. § 81-1313(f)(1). Given the Supreme Court's holding in *Riceland*, *supra*, it is clear that § 81-1313(f)(1) remains in effect. Although the provision for a $75,000 limit on an employer's liability in Ark. Code Ann. § 11-9-502(b) creates an ambiguity,

such conflicts and ambiguities in the statutes must be resolved in favor of the claimant due to the remedial nature of the legislation. *Noggle* v. *Arkansas Valley Elect. Co-op.*, 31 Ark. App. 104, 788 S.W.2d 497 (1990). The Commission's opinion in *Wennberg*, *supra*, does so in a manner that ensures claimants access to the Bank Fund once the employer's limits of liability have been reached.

The appellant next contends that there is no substantial evidence to support the Commission's finding that the claimant's 1979 injury and 1985 injury combined to result in permanent total disability. We do not address this issue because the appellant has failed to provide us with an abstract of the medical evidence it relies upon for reversal. Therefore, we cannot determine the sufficiency of the evidence without going to the record. We will not do so to determine whether reversible error occurred. *See Farmers Bank* v. *Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990).

Finally, the appellant contends that permanent partial disability cannot be credited against the employer's obligation under Ark. Code Ann. § 11-9-502(b)(1) because that statute permits credit only for benefits for "death or *permanent* total disability." (Emphasis supplied). However, we think that the applicable provision regarding benefits which may be credited is found in Ark. Stat. Ann. § 81-1313(f)(1), which permits the weekly benefits paid for the prior injury to be credited in determining whether the employer's statutory limit of liability has been met. The "weekly benefits" referred to in the statute do not include temporary disability payments, and are limited to benefits for permanent disability. *See Sparks Regional Med. Center* v. *Death and Permanent Total Disability Bank Fund*, 22 Ark. App. 204, 737 S.W.2d 463 (1987). Given that only permanent disability benefits may be credited, we must hold that § 81-1313(f)(1) permits credit for permanent partial disability payments. To hold otherwise would be to reach the absurd result of allowing credit only for benefits paid for a permanent total disability which is followed by continued employment by the same employer and a second injury resulting in another permanent total disability. The legislature will not be presumed to have done a vain or useless thing. *Phillips Petroleum Co.* v. *Heath*, 254 Ark. 847, 497 S.W.2d 30 (1973).

Affirmed.

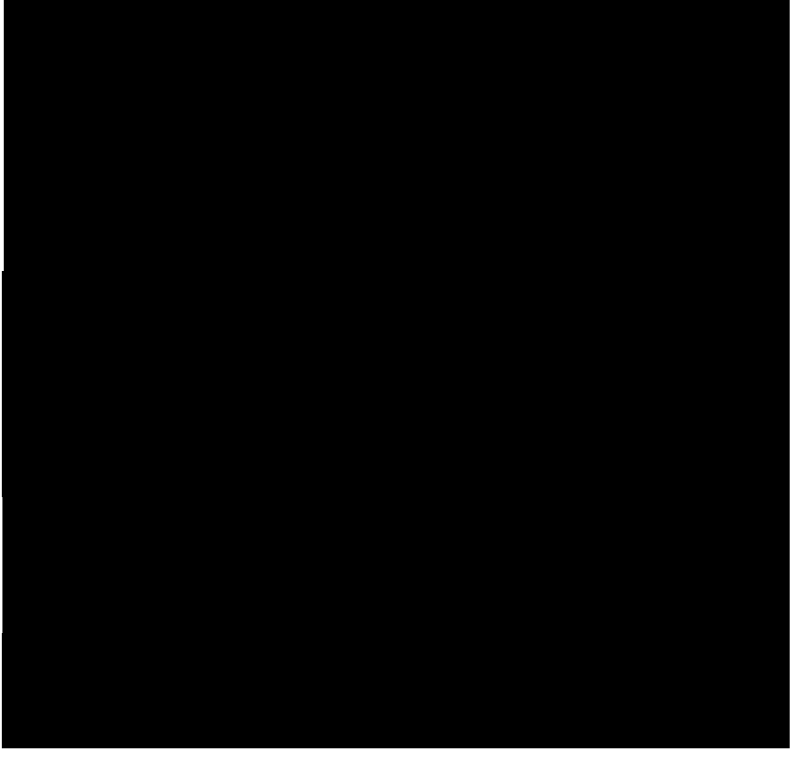
JENNINGS, J., agrees.

ROGERS, J., concurs

John M. HUITT *v.* STATE of Arkansas

CA CR 91-185 837 S.W.2d 482

Court of Appeals of Arkansas
En Banc
Opinion delivered September 30, 1992
[Rehearing denied November 4, 1992.*]



*Mayfield, J., would grant rehearing.

Wells Law Offices, by: *Bill G. Wells*, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was tried in the Bradley County Municipal Court on October 3, 1990, on charges of driving while under the influence of alcohol, running a stop sign, driving left of center, failure to signal a turn, and refusing to submit to a breathalyzer test. By a municipal court judgment entered on October 24, 1990, the appellant was found not guilty of driving while under the influence of alcohol, running a stop sign, and driving left of center. The record is silent regarding the charge of failing to signal a turn. The judgment reflects that the appellant was found guilty only of refusing to submit to a breathalyzer test. The appellant appealed the municipal court judgment to the Bradley County Circuit Court, and after a non-jury trial on November 19, 1990, he was found guilty only of refusal to submit to a breathalyzer test and his driver's license was suspended for a period of six months. From

that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in denying his pretrial motion to dismiss because of the acquittals in municipal court, and that the trial court erred in finding that he refused to take a requested breathalyzer test. We affirm.

The record shows that Officer Gary Hibbard of the Warren Police Department issued the citations to the appellant on September 9, 1990. At trial, Officer Hibbard testified that he observed the appellant fail to stop at a stop sign; that he followed the appellant's vehicle in his patrol car; observed the appellant turn left without a signal; and observed the appellant turn right and stop the vehicle in front of a house. Officer Hibbard did not turn on his blue lights or otherwise signal the appellant to stop. After the appellant had stopped his vehicle, Officer Hibbard approached him, questioned him, and administered field sobriety tests. When he was asked if he would walk a straight line, the appellant refused, stating that he would submit to no more tests. The appellant was then taken into custody, charged with the offenses enumerated above, and acquitted of all charges except refusing the breathalyzer test.

The appellant argues that his motion to dismiss should have been granted because the state failed to show that circumstances existed under which the appellant was deemed to have given his consent to the breathalyzer test under Ark. Code Ann. § 5-65-202 (Supp. 1991). We do not agree.

Arkansas Code Annotated, § 5-65-202(a) (Supp. 1991) provides, in pertinent part, that:

> Any person who operates a motor vehicle or is in actual physical control of a motor vehicle in this state shall be deemed to have given consent, subject to the provisions of 5-65-203, to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of his or her blood if:
>
> (1) The driver is arrested for any offense arising out of acts alleged to have been committed while the person was driving while intoxicated or driving while there was one-tenth of one percent (0.10%) or more of alcohol in the person's blood; or

(2) The person is involved in an accident while operating or in actual physical control of a motor vehicle; or

(3) The person is stopped by a law enforcement officer who has reasonable cause to believe that the person, while operating or in actual physical control of a motor vehicle, is intoxicated or has one-tenth of one percent (0.10%) or more of alcohol in his or her blood.

We agree with the appellant's argument that subsection (3) does not apply; the evidence does not show that the appellant was stopped by a law enforcement officer who had reasonable cause to believe that the appellant was intoxicated. Instead, as Officer Hibbard testified, he approached the appellant's auto only to warn him about speeding and running a stop sign. Likewise, as the State concedes, subsection (2) does not apply because the appellant was not involved in an accident. However, we find that subsection (1) is applicable under the circumstances presented by the case at bar. Here, the appellant was arrested for running a stop sign, driving left of center, and failure to signal a turn, in addition to driving while intoxicated and refusing to submit to a breathalyzer test. Subsection (1) provides that a driver who is arrested for "any offense arising out of acts alleged to have been committed" while driving while intoxicated shall be deemed to have given consent to a blood alcohol test; this subsection does not, however, provide that a defendant must be found guilty of driving while intoxicated as a prerequisite to being found guilty of violating the implied consent law. We agree with the State's argument that *Gober* v. *State*, 22 Ark. App. 121, 736 S.W.2d 18 (1987), was wrongly decided in this particular, and we overrule *Gober* to the extent that it holds a DWI conviction is a prerequisite to a conviction for refusing a blood alcohol test pursuant to Ark. Code Ann § 5-65-202(a)(1) (Supp. 1989). Given our view of this issue, we hold that the trial court did not err in denying the appellant's motion to dismiss. *Accord*, *State* v. *Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992).

We next address the appellant's contention that the evidence is insufficient to support his conviction for refusal to take a blood alcohol test. In a criminal case, whether tried by judge or jury, we review the evidence in the light most favorable to the

State, and affirm if the finding of guilt is supported by substantial evidence. *Turner* v. *State*, 24 Ark. App. 102, 749 S.W.2d 339 (1988). Substantial evidence is evidence which induces the mind to go beyond mere suspicion or conjecture, and is of sufficient force or character to compel a conclusion one way or the other with reasonable certainty. *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990).

Viewed in the light most favorable to the State, the evidence shows that the appellant appeared intoxicated when approached by the police officer. The officer asked the appellant to perform a field sobriety test by holding one leg out while standing on the other foot; the appellant attempted to perform this test but lost his balance. When the officer asked the appellant to perform other field sobriety tests, the appellant refused, stating that he would not take any more tests. When asked by the police officer if he would take the gaze nystagmus test, the appellant refused and stated that "he wasn't going to take any more tests or going to blow in any tube or anything." Officer Hibbard testified that the appellant was asked more than once if he would like to take the breathalyzer test, and that Officer Ferrell read the appellant his rights concerning the taking of a breathalyzer test; nevertheless, the appellant refused, stating that he was not going to take any test at all. Although, as the appellant asserts, the testimony of Officer Hibbard is self-contradictory at times, the officer's credibility is a matter which is left to the trier of fact. *Mann* v. *State*, 291 Ark. 4, 722 S.W.2d 266 (1986). We hold that the appellant's conviction is supported by substantial evidence.

Finally, we note that the appellant asserts that the trial court employed an improper standard of proof in determining that the appellant refused to take a breath test. After the close of the evidence, the appellant's attorney asserted that the "standard is a reasonable doubt," and argued that "there was not probable case to ask him to take a breathalyzer test." In response, the trial judge stated as follows:

> THE COURT: Well, reasonable doubt, I don't know. The code says that the law enforcement officer had reasonable cause to believe the arrested person had been driving while intoxicated or while there was one-tenth of one percent or more alcohol in the person's blood. So reasonable doubt,

this is not a reasonable doubt situation.

Our reading of the record leads us to the conclusion that, although the trial judge's remarks are somewhat confusing, especially when taken out of context, his statement was addressed to the standard for determining whether the request for a chemical test was lawful. Arkansas Code Annotated § 5-65-205(c) (Supp. 1991) provides that a judge shall order a person's driver's license revoked or suspended if the judge determines, among other things, "that the law enforcement officer had reasonable cause to believe the arrested person had been driving while intoxicated. . . ." We conclude that the trial judge correctly paraphrased the law, and we find no error.

Affirmed.

CRACRAFT, C.J., concurs.

MAYFIELD, J., dissents

MELVIN MAYFIELD, Judge, dissenting. Before a person who drives a motor vehicle in this state is deemed to have given consent to a chemical test to determine the alcoholic content of his or her blood, one of the conditions set out in Ark. Code Ann. § 5-65-202(a) (Supp. 1991) must exist. The majority opinion concedes that the only condition that could exist in this case is the one set out in condition (1) of § 5-65-202(a). In order to reach its result, the majority has decided to overrule our prior decision in *Gober* v. *State*, 22 Ark. App. 121, 736 S.W.2d 18 (1987). That decision was based on our understanding of *Roberts* v. *State*, 287 Ark. 451, 701 S.W.2d 112 (1985), and was handed down on September 16, 1987. The Arkansas General Assembly has met two times since that decision and has not changed condition (1) of subsection (a). It still reads today exactly like it did when *Gober* was decided. It has long been held that "a court's construction of a statute becomes a part of that law." *Thompson* v. *Sanford*, 281 Ark. 365, 370, 663 S.W.2d 932, 935 (1984). It has also been said that "it is necessary as a matter of public policy to uphold prior decisions unless great injury or injustice would result." *Independence Federal Bank* v. *Paine Weber*, 302 Ark. 324, 331-32, 789 S.W.2d 725 (1990) (citing *Thompson* v. *Sanford*).

Therefore, I would not overrule *Gober*. I think that decision was correct, and I see no great injury or injustice resulting from it.

Moreover, the General Assembly apparently sees no great injury or injustice resulting from that decision. At least we know that by Act 75 of 1987, the General Assembly amended what is now Ark. Code Ann. § 5-65-202; however, it did not change condition (1) of subsection (a) of that statute. In my opinion, the failure to amend condition (1) in either of the two sessions of the legislature that have occurred since our decision in *Gober* strongly indicates that the *Gober* decision was in keeping with the intent of the legislature.

Furthermore, I think there is good reason for such a view. Under condition (2) of Ark. Code Ann. § 5-65-202(a), a person who is involved in an accident while operating or in actual physical possession of a motor vehicle in this state shall be deemed to have given consent to a blood alcohol test. The same consent is deemed to have been given under condition (3) of the statute when a law enforcement officer stops a person (who is operating or in actual physical control of a vehicle) with reasonable cause to believe that the person is intoxicated. But under condition (1) the consent to a blood alcohol test is deemed to have been given only when a "driver" is arrested for an offense arising out of acts alleged to have been committed by the driver while intoxicated.

As I understand the law as enacted by the legislature, if an officer stops a driver for a traffic violation (but not because he has reason to believe the driver is intoxicated) and discovers, after the stop, probable cause to arrest the driver for driving while intoxicated, or if an officer discovers such cause to arrest a driver after the officer has approached a motor vehicle that has been stopped at the driver's own volition (but not because of an accident) the officer, in either situation, may arrest the driver for driving while intoxicated and may request the driver to submit to a blood alcohol test. It is obvious that if the driver is not found guilty of driving while intoxicated, he cannot be punished for driving while intoxicated, and I do not believe he can be punished for refusing to submit to a blood alcohol test. The latter proposition results from the fact that the driver of a vehicle is not, under the legislative acts of the State, deemed to have given consent to a blood alcohol test simply because he is arrested by a law enforcement officer who *alleges* the driver was arrested for an act committed while driving while intoxicated. The law requires, in my opinion, that the driver must have been, *in fact*, driving while

intoxicated, or he will not be deemed to have given consent to the blood alcohol test under condition (1) of subsection (a) of the statute. To hold otherwise requires us to legislate.

This does not mean that the driver *must be convicted* of driving while intoxicated in order to be convicted, under subsection (a)(1) of the statute, for refusing to submit to a blood alcohol test. It does mean, however, that it must be *established* that the driver was, in fact, driving while intoxicated. But in the present case, the appellant has been found *not guilty* of driving while intoxicated. Thus, the *question* of whether he was, in fact, driving while intoxicated has been decided in his favor. Therefore, based upon the circumstances discussed above, I dissent from the majority opinion and would reverse appellant's conviction.

After the above was written, but before it was handed down, the Arkansas Supreme Court decided the case of *State* v. *Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992). We then requested letter briefs from the parties for their views on *Schaub's* application to the present case, and after these briefs were received this case was reconferenced. The reliance of the majority opinion upon the *Schaub* decision makes it necessary that I add my view of that opinion's relation to the present case.

First, I think the majority's reliance on *Schaub* is misplaced. That opinion states that the trial judge in that case read our case of *Gober* v. *State* "to stand for the broad-based proposition that in all circumstances a defendant must be convicted of DWI before he can be convicted of refusing to submit to a blood test." The opinion in *Schaub* then states: "We do not read the case so broadly." 310 Ark. at 78, 832 S.W.2d at 845. I agree that our holding in *Gober* should not be read so broadly, and in my view *Schaub* is not in conflict with this dissenting opinion.

To understand the law as it exists today, it is necessary to take a close look at *Roberts* v. *State*, 287 Ark. 451, 701 S.W.2d 112 (1985). There, the Arkansas Supreme Court affirmed the DWI conviction of a man the police officer found asleep "behind the wheel of a car which was lodged against a building in a parking lot." The court affirmed the DWI conviction under Ark. Stat. Ann. § 75-2503(a) (Supp. 1985). That statute is now codified as Ark. Code Ann. § 5-65-103 (1987). It reads now just like it did when *Roberts* v. *State* was decided and clearly states

that it is unlawful and punishable as provided in the act for any person to operate or be in actual physical control of a motor vehicle who (a) is intoxicated, or (b) has one-tenth of one percent (0.10%) or more by weight of alcohol in his blood. Applying that statute, the court in *Roberts* affirmed the DWI conviction of that appellant who "smelled of intoxicants, was unsteady on his feet, spoke in a slurred manner, and had to be 'wrestled' from his position behind the steering wheel." 287 Ark. at 453. However, the court in *Roberts* reversed the appellant's conviction for refusing to take a blood test because neither of the three conditions of subsection (a) of Ark. Stat. Ann. § 75-1045 (Supp. 1985) applied. *Id.* at 454. Those conditions are now (after the amendment by Act 75 of 1987) codified in Ark. Code Ann. § 5-65-202 (Supp. 1991).

The obvious purpose of Act 75 of 1987, and so stated in its emergency clause, was to remedy what the opinion in *Roberts* said "may have been a mere legislative oversight to have failed to include in the implied consent provisions reference to persons found in physical control of vehicles while intoxicated." 287 Ark. at 454. Thus Act 75 of 1987 states that it amends subsection (a) of Ark. Stat. Ann § 75-1045 (now Ark. Code Ann. § 5-65-202(a) (Supp. 1991)). The amendment added the words "or in actual physical control of a motor vehicle" to subsection (a) and to conditions (2) and (3) but did not add those words or make any change at all to the language of condition (1) of subsection (a). That is the condition involved in this case, and the failure of the legislature to change that condition in the two sessions since 1987 strongly indicates that our *Gober* decision is in keeping with legislative intent. Just as the Arkansas Supreme Court refused to legislate in *Roberts*, I think the Court of Appeals should refuse to legislate in the present case.

I also want to comment upon the last two paragraphs of the majority opinion. The appellant's second point argued that the State did not prove beyond a reasonable doubt that the appellant refused to take the breathalyzer test and that the trial court did not apply that standard to the determination of that issue. While I would not reverse on appellant's second point, I do want to point out that the first point (upon which I would reverse) is not concerned with whether "the law enforcement officer had reasonable cause to believe" the appellant was driving while intoxicated

or with one-tenth of one percent (0.10%) or more of alcohol in his blood. This provision in Ark. Code Ann. § 5-65-205(c) (Supp. 1991) is referred to in the majority opinion. That, however, is not the issue in the appellant's first point. Subsection (a) of Ark. Code Ann. § 5-65-205 provides that "if a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency, *as provided in § 5-65-202*, none shall be given." The section goes on to add that under these circumstances the person's driver's license shall be seized by the officer who shall give the person a temporary driving permit, and section (c) provides that if the judge determines the officer had "reasonable cause to believe" the person was driving while intoxicated or with 0.10% or more alcohol in the blood then the penalties for refusing to take the test would apply.

It is clear, however, that Ark. Code Ann. § 5-65-202 provides three conditions only upon which consent for a chemical test for blood alcohol shall be implied. This case is concerned with condition (1) only. The reasonable belief of the officer referred to in Ark. Code Ann. § 5-65-205(c) is a requirement that is *in addition* to the three conditions for implied consent set out in § 5-65-202.

Finally, I note that Ark. Code Ann. § 5-65-203 (Supp. 1991) also provides that the chemical tests shall be administered at the direction of an officer "having reasonable cause" to believe that the person to be tested was driving or in actual physical control of a motor vehicle while intoxicated or while having 0.10% or more of alcohol in the person's blood. This section simply codifies the last paragraph of the first section of Act 75 of 1987. That paragraph begins with the words "Such chemical test or tests" and clearly applies to the tests which a person consents to when he drives or is in actual physical control of a motor vehicle in this State. Thus it is obvious that these are the same tests referred to in Ark. Code Ann. § 5-65-203(a) (Supp. 1991). The "having reasonable cause to believe" clause which follows the reference to "chemical test or tests" only adds an additional requirement to conditions (1) (2) and (3) set out in the three implied consent conditions of Act 75 of 1987 (now codified as Ark. Code Ann. § 5-65-202 (Supp. 1991)).

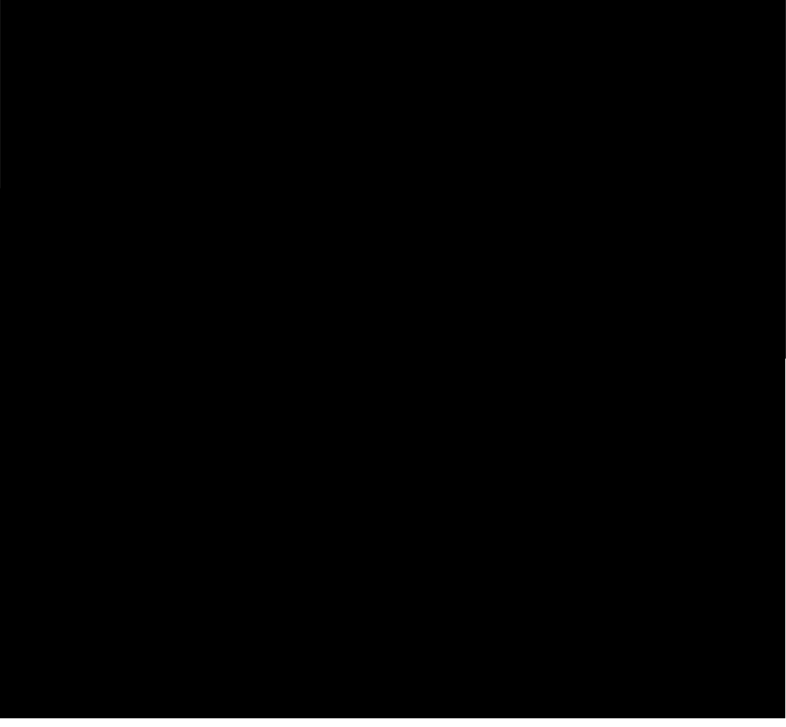
In summary, I believe that condition (1) of § 5-65-202(a)

(which is the only condition relied upon by the majority opinion in this case) does not apply to impose upon the appellant in this case implied consent for a blood alcohol test. Thus, the refusal to take such a test was not a violation of Ark. Code Ann. § 5-65-205 (Supp. 1991).

EAGLE SAFE CORPORATION *v.* John EGAN

CA 92-42 842 S.W.2d 438

Court of Appeals of Arkansas
Division I
Opinion delivered October 7, 1992
[Rehearing denied November 12, 1992.]



Roy & Lambert, by: *John D. Copeland*, for appellant.

Jennifer Morris Horan, for appellee.

George K. Cracraft, Chief Judge. Eagle Safe Corporation appeals from an order of the Workers' Compensation Commission awarding death benefits to the minor child of John Egan, deceased. Appellant contends that the findings and decision of the Commission are not supported by substantial evidence. We find no error and affirm.

When the sufficiency of the evidence is challenged in workers' compensation cases, this court is required to review the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative value in favor of those findings. The Commission's decision will be upheld if supported by substantial evidence. 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 will, with reasonable and material certainty and precision,

compel a conclusion one way or another. The issue is not whether the evidence would support a finding contrary to the one made, but whether it supports the finding made by the Commission. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988).

When the evidence is viewed in this light, it discloses that on Friday, March 6, 1987, John Egan sustained a painful injury to his right foot. Dr. Leopold H. Garbutt testified that, although Egan was in great pain, he could not perform corrective surgery on the date of the injury because of the swelling. The surgery was not scheduled, therefore, until the following Monday morning. The doctor prescribed Empirin #4, a pain killer containing codeine, and instructed Egan to take one capsule every four hours. Although Egan was cautioned against ingesting any alcohol or other drugs while taking the Empirin, he was not advised of the danger of taking more than four capsules a day. There was evidence that he was in intense pain over the weekend. He was unable to sleep, and the pain seemed to be worse on Sunday. On Monday morning, Egan could not be awakened. He was taken to the hospital and subsequently pronounced dead. There was testimony that Egan had not been depressed or otherwise unhappy, and the witnesses knew of no reason why he would have taken his own life. Although the number of pills in the prescription bottle was subject to question, it was clear from the evidence that Egan had ingested a number significantly in excess of the number that should have been taken had the doctor's instructions been followed.

An autopsy was performed by Dr. Fahmy Malak, who testified without objection that "in view of the presence of the injury to the right foot with fracture of the metatarsal bone, in my opinion, the pain killer Empirin #4 accidentally caused [Egan's] death." Dr. Malak's opinion that the overdose was accidental was based on his finding "only a minimal" amount of codeine residue in Egan's stomach. Malak stated that there was no evidence that Egan had taken one massive dose. Malak stated that his findings were more indicative of a reasonable response to pain by the decedent.

The Commission found that there was a causal connection between Egan's death and the work-related injury to his foot. The

Commission also found that the overdose of the prescribed drug was not such an intentional act as would constitute an independent intervening cause. The Commission concluded as follows:

> To deny death benefits in this case, we would have to find that decedent acted unreasonably in taking the medication and intended to overdose. There is simply insufficient evidence to support such a finding. Based on the lack of a credible explanation as to why [decedent] would intentionally overdose, or why decedent would take excessive amounts of the medication (other than due to pain) plus Dr. Malak's opinion that claimant did not intentionally overdose or necessarily act unreasonably, we find that claimant has proven by a preponderance of the evidence that decedent's death was causally related to the compensable injury.

In awarding benefits, the Commission relied on our decision in *Preway, Inc.* v. *Davis*, 22 Ark. App. 132, 736 S.W.2d 21 (1987). There, the worker sustained a compensable back injury for which additional medical treatment was necessary. While en route from her home in Paragould to her doctor's office in Memphis, Tennessee, she sustained a broken ankle in an automobile accident. In upholding the Commission's determination that the ankle injury was compensable, we applied the concept of "quasi-course of employment" discussed in 1 Larson, *Workmen's Compensation Law*, § 13.11(d) (1985). The concept includes as compensable those injuries resulting from activities undertaken by the employee following a compensable injury which, although the activities take place outside the time and space limits of the workplace, are nevertheless related to the employment in the sense that they are necessary or reasonable activities undertaken only because of the compensable injury. We also held in *Preway* that when an injury arises from such an activity, the chain of causation should not be broken by mere negligence in the performance of that activity, but only by intentional conduct that may be regarded as expressly or impliedly prohibited by the employer. *See* 1 Larson, § 13.11(d).

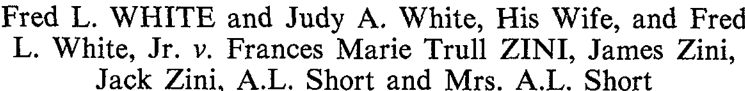
Although the taking of the pills in this case was not directly connected with Egan's employment, it was related to his compensable injury in that the doctor had prescribed the medica-

tion as part of the treatment for his work-related injury. From our review of the record, we cannot conclude that the Commission's finding of a causal connection is not supported by substantial evidence.

Appellant's argument that the evidence is insufficient to support the Commission's finding that the overdose was not an intentional act on the part of the decedent is also without merit. It was not necessary for appellee to prove by direct evidence that the death was accidental. A person's intent ordinarily cannot be proven by direct evidence, but may be established by circumstantial evidence aided by any legitimate inferences that may arise from it. Moreover, the Commission's finding in this case is aided by the statutory presumption that an injury is not occasioned by the willful intention of the employee. *See* Ark. Code Ann. § 11-9-707(3) (1987). While this presumption is a rebuttable one, the issue of whether it was overcome by the evidence was a question of fact for the Commission to determine. We cannot conclude that the Commission's finding is not supported by substantial evidence.

Affirmed.

COOPER and ROGERS, JJ., agree.



Fred L. WHITE and Judy A. White, His Wife, and Fred L. White, Jr. *v.* Frances Marie Trull ZINI, James Zini, Jack Zini, A.L. Short and Mrs. A.L. Short

CA 91-480 838 S.W.2d 370

Court of Appeals of Arkansas
En Banc
Opinion delivered October 7, 1992

Homer Tanner, for appellants.

Gregg, Hart, Farris & Rutledge, by: *Keith Rutledge*, for appellees.

GEORGE K. CRACRAFT, Chief Judge. Appellants appeal from a decree establishing an easement across their land in favor of land owned by appellees. Appellants contend that the trial court erred in holding that a written instrument executed by the parties' predecessors in 1959 was a valid conveyance of an easement and that it further erred in holding that the easement had been established by prescription. On May 12, 1992, we certified this case to the Arkansas Supreme Court pursuant to Ark. Sup. Ct. R. 29(4)(a). The supreme court declined to accept the case and remanded it to this court for decision. Jurisdiction to determine the issues presented on this appeal is therefore in the court of appeals. We find merit in appellants' first contention, but affirm the trial court's determination on the issue of prescription.

Appellants are the present owners of a tract of land which borders on Highway 10 in Pulaski County. Appellees are the present owners of tracts that are contiguous to each other and abut that of appellants on the north. For many years, access to the appellees' tracts had been obtained by use of a "10-to-12-foot" roadway across appellants' land to appellees' property. In 1959, appellees' contracted to purchase their land from Paul and Louise Gossage. One of the title requirements places upon appellees' purchase was that the right-of-way theretofore used by Gossage be evidenced by a written document. On August 13, 1959, Paul and Louise Gossage, Nellie May Monday, Chester A. White, and Alice White, the owners of the tracts in question, signed the following instrument:

ROADWAY EASEMENT AGREEMENT

KNOW ALL MEN BY THESE PRESENTS:

That we, Paul A. Gossage and Louise E. Gossage, his wife, as owners of the E½ of the NE¼ SW¼, and the E½ of the North 10 acres of the SE¼ SW¼, Section 23, Town-

ship 3 North, Range 16 West, and,

That we, Chester J. White and Alice Pearl White, his wife, as owners of the South 30 acres (except 2 acres lying West of Bringle Creek) in the SE¼ SW¼, Section 23, Township 3 North, Range 16 West, and,

That I, Nellie Marie Monday, as owner of the W½ of the NE¼ SW¼, and the W½ of the North 10 acres of the SE¼ SW¼, Section 23, Township 3 North, Range 16 West,

for and in consideration of the benefits to accrue jointly and severally to each of us and to assure lasting right-of-way from Highway #10 to property described as the E½ of the North 10 acres of the SE¼ SW¼, said Section, Township and Range described above, do jointly and severally *agree* as to r/w over and through said lands described as follows:

Beginning at a point on the North r/w line of State Highway #10, a strip of land 25 feet in width shall run northerly along the East side of Bringle Creek to a point where branch meets said Bringle Creek; thence Northerly along the east side of said branch to the South line of property owned by Nellie Marie Monday (being the W½ of the North 10 acres of said SE¼ SW¼, said line being also North line of the property owned by White); thence turning East, said r/w shall be described as the South 25 feet of the North 10 acres of said SE¼ SW¼ and running to the West line of Gossage property, being the E½ of the North 10 acres of said SE¼ SW¼, said Section 23, Township 3 North, Range 16 West,

and that this easement for road r/w shall continue to remain in effect until such time as owners of said lands, or heirs and/or assigns, shall enter into written *agreement* to cancel same.

And I, Louise E. Gossage, wife of the said Paul A. Gossage, and I, Alice Pearl White, wife of the said Chester J. White, do hereby release and relinquish all my right of dower and homestead in and to the said lands for and in consideration of the benefits to accrue.

IN WITNESS WHEREOF, we hereunto set our hands in mutual agreement on this *13th* day of August, 1959.

(This instrument prepared by Hal Moore, 307 Center Street, Little Rock Arkansas.)	/s/ Paul A. Gossage /s/ Louise E. Gossage /s/ Nellie Marie Monday /s/ Chester J. White /s/ Alice Pearl White

(Emphasis added.) This document was duly acknowledged and recorded in Pulaski County.

The access road to appellees' property was never enlarged to 25 feet as provided in the document but continued to be by way of the existing passageway. In 1989, appellants interfered with appellees' use of the roadway by erecting barriers and gates. On October 12, 1990, appellees brought this action alleging that they had acquired an easement under the written agreement and, in the alternative, pled that they had acquired the easement by prescriptive use for more than the statutory period. They prayed for injunctive relief from further interference with their use of the road. The chancellor concluded that the document was a valid conveyance of an easement in favor of appellees' lands, and in any event the continued use of the roadway by appellees and their predecessors had ripened into an easement by prescription.

Appellants first argue that the chancellor erred in holding that the 1959 document was a valid express grant of the right-of-way. In holding that the writing was a valid conveyance of the easement the chancellor stated: "[T]he failure of the agreement to set out granting words is not fatal since it is clear form the four corners of the instrument that the granting of an easement was intended." We agree with appellants that this was an erroneous statement of the law.

An easement or right-of-way is an interest in land and must be conveyed by deed in the same manner as land is conveyed. *Fulcher* v. *Dierks Lumber & Coal Co.*, 164 Ark. 261, 261 S.W. 645 (1924); *Hatfield* v. *Arkansas Western Gas Co.*, 5 Ark. App. 26, 632 S.W.2d 238 (1982). *See also Johnson* v. *Lewis*, 47 Ark. 66, 2 S.W. 329 (1885); *Wynn* v. *Garland*, 19 Ark. 23 (1857). As a general rule, the requisites of a valid deed are

competent, identifiable parties and subject matter, a valid consideration, effective words expressing the fact of transfer or grant, and formal execution and delivery. Appellants contend that the document in issue did not meet several of those qualifications.

We first address their contention that the writing did not contain the required words expressing the fact of sale or transfer or conveyance. We agree that it did not.

In *Griffith* v. *Ayer-Lord Tie Co.*, 109 Ark. 223, 230, 159 S.W. 218, 220 (1913), in dealing with transfer of standing timber, the court stated:

> The timber, until the same was severed from the soil, was real estate, and, in order to convey Leffler the legal title thereto, it was *absolutely necessary* that somewhere in the instrument there should be words expressing the facts of a sale or transfer of the title to him; that is, the words "grant, bargain, or sell," or words of the same purport. Kirby's Digest, § 731.
>
> The transfer of the timber growing on the land must be by deed. Any other attempted mode of transfer would be within the statute of fraud and void. [Emphasis added.]

In *Penney* v. *Long*, 210 Ark. 702, 197 S.W.2d 470 (1946), the court held that "release, relinquish and quitclaim" were words sufficient to convey an interest in land. In *Davis* v. *Griffin*, 298 Ark. 633, 770 S.W.2d 137 (1989), the court declared that mineral rights were an interest in land that must also be conveyed as land itself is conveyed. The court there reaffirmed its earlier statements in *Griffith* v. *Ayer-Lord Tie Co. supra*, that, although no particular words are required, it is necessary that there be some operative words expressing the fact of sale or transfer in order to convey legal title to interests in land.

Though we find no case involving the transfer of an easement expressly so holding, we must conclude that, as an interest in land, and easement must be conveyed in the same manner as standing timber, mineral rights, or any other interest in realty. The instrument in this case contains only words of agreement. As there are no operative words of sale or transfer, it was ineffective as a conveyance by deed of a right-of-way. We therefore find it unnecessary to address appellants' other argu-

ments for holding the document invalid.

The chancellor also found appellees acquired an easement by use under claim of right for more than the statutory period. The court restricted this easement to the area actually used by the parties during that period. Appellants argue that this finding was not supported by the evidence. We do not agree.

It was undisputed that appellees and their predecessors had used the passageway for over forty years. As the usage began before any of the parties acquired ownership of their tracts, there was no evidence of when or under what circumstances use by appellees' predecessors began. Appellees contended that their use of the road had at all times been under the claim of right, free from interference by anyone. Appellants argue that there is no evidence that the appellees or any of their predecessors ever asserted a claim to use the roadway as a matter of right, but merely continued a permissive use of the road given by the 1959 document.

Although we have held the written document to be invalid as a conveyance of a present interest in the lands, it is cogent evidence of appellees' claim that they and their predecessors used the road under claim of right. There was evidence that appellees would not have bought the land without the good-faith belief that they had acquired the right to use that easement and that their use thereafter was under that belief and claim.

Even where the initial usage is shown to have begun permissively, where it is also shown that the usage continued openly for the statutory period after the landowner knows that it is being used adversely, or under such circumstances that it is to be presumed that the landowner knew it was adverse to his own interest, the use may ripen into an easement by prescription. *Fullenwinder* v. *Kitchens*, 223 Ark. 442, 266 S.W.2d 281 (1954). In *Weigel* v. *Cooper*, 245 Ark. 912, 920, 436 S.W.2d 85, 90 (1969), the court stated:

> As to the argument that the use of the land was permissive, *Fullenwinder* v. *Kitchens*, (heretofore cited) makes it clear that, even if the use was begun under permission, that fact is immaterial if it continues openly for seven years under circumstances that the landowner would be presumed to

> know that this long continued practice was adverse. The long length of time that the road was used by many persons is, in itself, pertinent evidence of adverse use; actually it appears from the record that this adverse use was established long before Frank Weigal, Jr., had any propriety interest in the land on which the road is located.

See also Stahl v. *Thompson*, 6 Ark. App. 275, 641 S.W.2d 721 (1982).

Here, the use of the road continued for thirty years after the execution of the document without any interference from anyone. The evidence discloses that the use had begun more than ten years prior to the execution of the document and before any of the witnesses who testified in this proceeding had a proprietary interest in the properties involved. In the briefs, both parties indicate that this usage may have begun as early as 1940. From our *de novo* review of the record, we cannot conclude that the finding of the chancellor that an easement had been acquired by prescription was clearly erroneous.

Nor can we agree with appellants' argument that the trial court erred in not requiring appellees to make an election between the claim of express grant and the claim of acquisition by prescription, which appellants argue are inconsistent. As the supreme court stated in *Westark Specialties, Inc.* v. *Stouffer Family Ltd. Partnership*, 310 Ark. 225, 232, 836 S.W.2d 354 (1992):

> [T]he doctrine of election of remedies applies to remedies and not to causes of action. . . . This is simply a prohibition against more than one recovery on inconsistent remedies and not a requirement that a plaintiff choose only one cause of action. There is no such requirement.

That portion of the decree holding that the writing was a valid conveyance of an easement is reversed. That part of the decree holding that a prescriptive easement, confined to the use made of it during the statutory period, has been established is affirmed.

JENNINGS, J., concurs in part and dissents in part.

JOHN E. JENNINGS, Judge, dissenting in part; concurring in

part. My only disagreement with the majority is with its holding that the language of the "Roadway Easement Agreement" was inadequate to operate as a present conveyance. Even as to this point I agree with the general principles of law that the majority relies on — we disagree only on the application of that law to the facts of the case.

It is true that an easement may only be conveyed by deed. And in order to be a deed an instrument must contain "words expressing the fact of a sale or transfer of the title." *Davis* v. *Griffin*, 298 Ark. 633, 770 S.W.2d 137 (1989). American Jurisprudence Second fairly summarizes the holdings of the courts on this issue:

> In order to transfer title, an instrument must contain apt words of grant which manifest the grantor's intent to make a present conveyance of the land by his deed, as distinguished from an intention to convey it at some future time.
>
> The absence of words of conveyance cannot be supplied, and if no words importing a grant can be found in the deed, it is void although in other respects formal and regular. However, no particular verbal formula is required to effect a present conveyance, nor is it essential that technical terms be used. If an intention to pass the title is disclosed, the court will give effect to such intention notwithstanding inaccuracy of expression or inaptness of the words used.

23 Am. Jur. 2d *Deeds* § 19 (1983). This is what the supreme court is talking about in *Davis* v. *Griffin, supra*, when it says "formal words are not required." *Davis*, 298 Ark. at 635.

The instrument in issue here is either a deed or an executory contract.

> A deed, as the term is used with reference to the conveyance of property, is distinguishable from an instrument which contemplates that transfer of title is to be effected by a subsequent deed and which is therefore executory in its nature. However, technical words of grant are not essential in order to make an instrument operate as a deed if it contains words showing an intent to transfer

> title by the instrument; an instrument may be construed and operate as a present conveyance, that is, as a deed, although it does not contain technical words of conveyance. On the other hand, the presence of technical words of conveyance will not constitute an instrument a deed if it is plainly intended as an executory contract. The determination of this question is largely a matter of the ascertainment of the intention of the parties as derived from the contract or instrument and the surrounding circumstances where the instrument leaves their intention in doubt, or from the instrument itself read in the light of a contemporaneous agreement.

23 Am. Jur. 2d *Deeds* § 6 (1983).

It is perhaps an understatement to say that the instrument here is inartfully drawn, but it is clear to me that the parties intended that the instrument operate as a present conveyance rather than as an executory contract. This view is consistent with the release, in the instrument, of the wives' dower rights. The instrument does not reflect that the parties contemplated the necessity of any further action to create the easement, which has now been in existence since 1959.

Although the parties' use of the words "agree" and "agreement" might ordinarily lead to the conclusion that the instrument is an executory contract, there is authority for the view that they may be adequate to constitute a present conveyance of land. *See Carman* v. *Athearn*, 77 Cal. App. 2d 585, 175 P.2d 926 (1947).

I would hold that the instrument in question is a valid easement and would affirm the chancellor's decree in its entirety.

DEFFENBAUGH INDUSTRIES and Travelers Insurance Company *v.* Earl ANGUS

CA 91-247 837 S.W.2d 297

Court of Appeals of Arkansas
En Banc
Opinion delivered October 7, 1992

Michael Ryburn, for appellants.

Edward Schieffler, for appellee.

PER CURIAM. Appellee's motion for attorney's fee is granted. *See Cagel Fabricating and Steel, Inc.* v. *Patterson*, 37 Ark. App. 85, 827 S.W.2d 661 (1991).

MELVIN MAYFIELD, Judge, dissenting. The majority of this court has today granted the appellee's motion for attorney's fee in the above styled case. I dissent.

This case was appealed from the Arkansas Workers' Compensation Commission. In an en banc decision handed down on July 8, 1992, we affirmed the Commission's decision. *See Deffenbaugh Industries* v. *Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992).

Appellee's motion is based upon Ark. Code Ann. § 11-9-715(b)(1) (1978), which provides:

> In addition to the fees provided in subdivision (a)(1) of this section, if the claimant prevails on appeal, the attorney for the claimant shall be entitled to an additional fee at the full commission and appellate court levels, the additional fee to be paid equally by the employer or carrier and by the injured employee or dependents of a deceased employee, as provided above and set by the commission or appellate court.

My problem with appellee's motion at this time is the fact that the Arkansas Supreme Court granted review of our decision on September 14, 1992. Under the plain terms of the above statute "if the claimant prevails on appeal" his attorney is entitled to an additional fee "at the full commission and appellate court

levels." What if the Supreme court reverses our decision and finds for the employer? In that event, did the claimant prevail at the "appellate court" level?

This same problem has arisen before, and I dissented then for the same reason, and in almost the same words, as I dissent today. *See Cagle Fabricating and Steel, Inc.* v. *Patterson*, 37 Ark. App. 85, 827 S.W.2d 661 (1991). We granted an attorney's fee to the appellee in that case, and the Arkansas Supreme Court accepted review, reversed our decision, and remanded the matter to the Commission for a new decision. *See Cagle Fabricating & Steel, Inc.* v. *Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992). In that court's proceedings of May 26, 1992, Cagle's motion to review our award of attorney's fee was denied, but no opinion was written on the denial. Therefore, I do not know the basis of that decision.

Because the proper resolution of the issue is still unclear to me, I dissent from the allowance of an attorney's fee by this court under the circumstances involved. I would certify the motion to the Arkansas Supreme Court so the motion could be acted upon by that court at the same time it reviews our decision on the merits of the Commission's decision.

Jack Piel HOLMES *v.* STATE of Arkansas

CA CR 91-275 839 S.W.2d 226

Court of Appeals of Arkansas
Division II
Opinion delivered October 14, 1992

Daniel D. Becker and *Terri Harris*, for appellant.

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

Elizabeth W. Danielson, Judge. Appellant entered a contingent plea of guilty to manufacturing a controlled substance, methamphetamine, with intent to deliver, reserving the right to appeal the trial court's denial of his motion to suppress. He was sentenced to six years in the Arkansas Department of Correction and fined $100. We affirm.

Since sufficiency of the evidence is not argued, we will give a summation of the facts. An investigator working for the 18th Judicial District East Drug Task Force had a confidential informant purchase cocaine from appellant during the third week of February 1991. The informant was provided with recorded currency and was under the visual surveillance of the investigator when he entered and exited appellant's residence. The substance purchased from appellant was immediately relinquished to the investigator and was identified as cocaine. The informant observed additional quantities of the substance inside appellant's residence which were represented to be cocaine. This information along with the belief that appellant was involved in heavy trafficking of controlled substances prompted the investigator to file an affidavit for a warrant to search appellant's home. The affidavit requested permission to execute the warrant at any time day or night so as to prevent the further loss of evidence. The

judicial officer issuing the warrant found there was probable cause to search appellant's home for the reasons set forth in the affidavit. The search of appellant's home was executed at 9:40 p.m., at which time drugs and drug paraphernalia were seized.

Appellant contends that it was error for the trial court to deny his motion to suppress the evidence obtained from his home. Specifically, appellant argues that it was unnecessary to execute the search at nighttime. Arkansas Rules of Criminal Procedure 13.2(c) provides that:

> Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:
>
> (i) the place to be searched is difficult of speedy access; or
>
> (ii) the objects to be seized are in danger of imminent removal; or
>
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;
>
> the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

Our cases have consistently held that a factual basis must be stated in the affidavit, or in sworn testimony, before a nighttime search warrant may be validly issued. *Coleman* v. *State*, 308 Ark. 631, 826 S.W.2d 273 (1992). In *Coleman*, the supreme court upheld the trial court's finding that a nighttime search warrant had been validly issued. The appellant in *Coleman* argued, as does the appellant in this case, that the affidavit contained only conclusory, not factual, statements. There the affiant specified that after dark on that night an informant had purchased cocaine from appellant, that the purchase was made inside appellant's residence, that the cocaine purchased was packaged in a clear plastic bag, that cocaine was being concealed at the residence, that appellant was in possession of and distributing cocaine from

the residence, and that drugs located there were packaged and maintained in a manner that their destruction or removal could be easily accomplished. The court found that even though the last phrase was a computer generated phrase and there were several additional facts the affiant could have specified but did not, he did set out a number of pertinent facts from which the issuing judge could reasonably believe at that time there were drugs inside appellant's residence that could easily be removed or destroyed.

The affidavit in this case sets forth information as to the presence of cocaine and drug paraphernalia, such as scales, pipes, baggies, and cutting agents, in appellant's home; the presence of records, documents, and U.S. currency believed to be associated with the distribution of controlled substances; that appellant had sold cocaine in his home to a reliable confidential informant; that the confidential informant had observed additional quantities of cocaine in addition to that purchased by the informant; that appellant was believed to be involved in heavy trafficking of the controlled substance; and that permission to execute a search of appellant's home at any time of the day or night was requested to prevent the further loss of evidence. The issuing judge stated in the search warrant that he was satisfied that, based on all the information in the affidavit, there was probable cause to issue a search warrant that could be executed at any time, day or night.

In reviewing a trial court's ruling on a motion to suppress because of an alleged insufficiency of the affidavit, we make an independent determination based upon the totality of the circumstances and reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *State* v. *Blevins*, 304 Ark. 388, 802 S.W.2d 465 (1991). Here, as in *Coleman*, the affiant set out a number of pertinent facts regarding the presence of drugs and the possibility of their removal or destruction. The issuing judge clearly stated that he relied on this information in deciding the warrant could be executed at anytime. We cannot say the trial court erred in its denial of appellant's motion to suppress.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Lowell FARNSWORTH *v.* WHITE COUNTY and Township of Cypert, et al.

CA 92-59 839 S.W.2d 229

Court of Appeals of Arkansas
Division I
Opinion delivered October 14, 1992
[Rehearing denied December 2, 1992.]

Anthony W. Bartels, for appellant.

Richard S. Smith, for appellee Township of Cypert.

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

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the administrative law judge's decision finding that Lowell Farnsworth was not an employee of either of the appellees within the meaning of the Workers' Compensation Law. On appeal, appellant contends that the full Commission erred in affirming the administrative law judge's decision that the appellant was not an

employee of either appellee within the meaning of the Arkansas Workers' Compensation Law. Because we agree with appellant's argument that he is a county official and thus entitled to workers' compensation, we reverse and remand.

Appellant was duly elected as constable for Cypert Township, White County, Arkansas. While acting as constable on September 13, 1986, appellant approached someone riding a three wheeler (ATV) on a county road to inform the individual that this was an unlawful act. The individual and appellant argued and a struggle ensued when appellant tried to arrest the individual. During the altercation, appellant sustained a gunshot wound to his abdomen. From this injury arose a workers' compensation claim. Appellant argues that he is entitled to workers' compensation under Ark. Code Ann. § 14-26-101 (1987) which requires all counties "to provide workers' compensation coverage for their officials, employees, and municipal volunteer fire fighters."

The Commission found that appellant did not fall within any of the three categories for whom the county is required to furnish workers' compensation.[1] It was also noted that the definition of "employee" cited by appellant in Ark. Code Ann. § 14-14-1202 and § 14-14-1206 did not relate to coverage for workers' compensation purposes but rather involved personnel matters. We agree with the Commission that appellant was not an employee of the county as that term has been defined in Ark. Code Ann. § 14-14-1206 (19878) due to the fact he was not receiving a salary. However, we disagree in regard to the finding that appellant was not an "official" of the county.

Title 14 of Arkansas Code Annotated is entitled "Local Government". Subtitle 2 under title 14 is entitled "County Government". This subtitle is divided into chapters 13 through 26. The provisions regarding workers' compensation are found in chapter 26, which provides workers' compensation coverage for all county "*officials*, employees and municipal volunteer fire

---

[1] The Commission also found that appellant was not entitled to temporary total disability benefits due to the fact he was not receiving any wages upon which an award could be based. This finding has not been challenged in this appeal; therefore, we express no opinion on the validity of this finding.

fighters." Ark. Code Ann. § 14-26-101 (1987)(emphasis supplied). The term "officials" is not defined in this specific chapter; however, chapter 14, subchapter 13 is named "Officers Generally". Pertinent to this case is Ark. Code Ann. § 14-14-1301(b) which is entitled, "County, quorum court district, and township officers", and states:

> (b) There shall be elected in each township, as preserved and continued in § 14-14-401, one (1) constable who shall have the qualifications and perform such duties as may be provided by law.

Also, this section includes other elected officials such as county judges, county clerks and sheriffs.

The first step in interpreting a statute is to construe it just as it reads by giving words their ordinary and usually accepted meaning. *City of Fort Smith* v. *Tate*, 38 Ark. App. 172, 832 S.W.2d 262 (1992). When interpreting an act, it is permissible to examine its title; parts of statutes relating to the same subject matter must be read in the light of each other. *Reeder* v. *Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992). The workers' compensation chapter is within the same subtitle, county government, as the chapter referring to "officers generally". Constables are included within this designation. The election of officers, and the term of years a constable shall hold office are set out in Ark. Code Ann. § 14-14-1302 (1987). All of these statutes involve the same subject matter. Based on the plain meaning of the words, the titles of the sections and the subject matter involved we find that appellant, as a constable, is an official of the county and thus covered by workers' compensation. We therefore reverse and remand for an award of benefits not inconsistent with this opinion.

Appellant has advanced other points in support of his argument; however, based on this finding we need not address them.

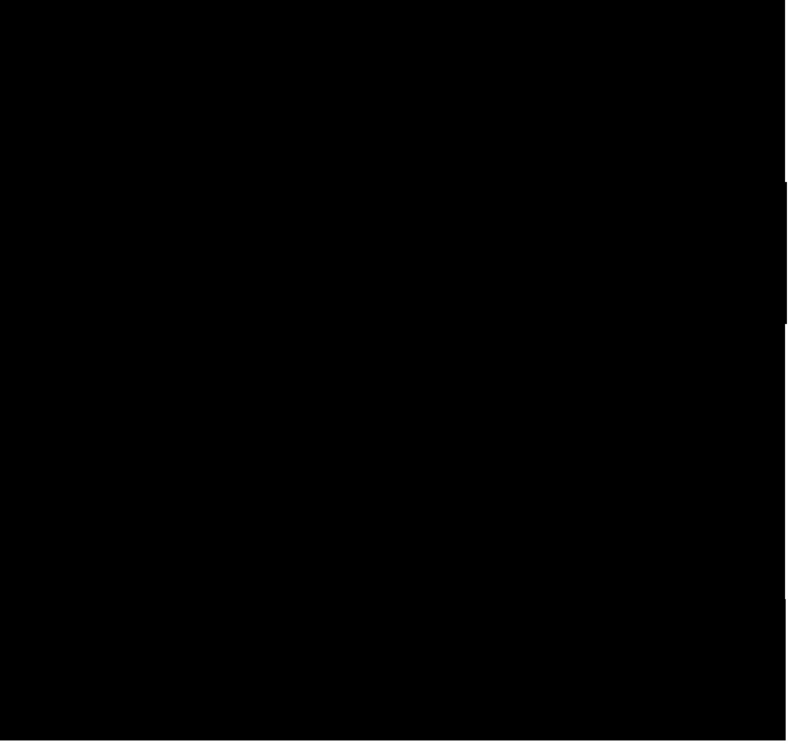
Reversed and Remanded.

CRACRAFT, C.J., and COOPER, J., agree.

Frank GIACONA *v.* STATE of Arkansas

CA CR 91-267 839 S.W.2d 228

Court of Appeals of Arkansas
Division I
Opinion delivered October 14, 1992
[Supplemental Opinion on Denial of Rehearing
December 23, 1992.*]



John Wesley Hall, Jr., for appellant.

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

*Mayfield, J., would grand rehearing.

JUDITH ROGERS, Judge. In a jury trial, the appellant, Frank Giacona, was convicted of manslaughter, a violation of Ark. Code Ann. § 5-10-104(a)(3) (1987), and was sentenced to a term of five years in prison. On appeal, appellant contends that the trial court erred in denying his motion for a new trial in which he alleged ineffective assistance of counsel. Because we find that appellant's notice of appeal was untimely, we dismiss the appeal.

The trial court entered its judgment and commitment order on July 13, 1989. A motion for a new trial on grounds of ineffective assistance of counsel was filed on August 10, 1989. However, the trial court struck the motion from the record by order of August 29, 1989, for the reason that the attorney who had presented the motion had not been properly substituted as appellant's counsel. Appellant then sought a writ of mandamus before the supreme court. On September 15, 1989, the supreme court issued its mandate denying the writ without prejudice, giving appellant leave to petition the trial court to reconsider his motion for a new trial. On September 22, 1989, the trial court allowed the substitution of counsel, and on September 28, 1989, the trial court entered an order reinstating appellant's motion for a new trial. The trial court entertained appellant's motion at a hearing held on October 23, 1989. The court entered an order denying appellant's motion on April 10, 1991; appellant's notice of appeal was filed on April 26, 1991.

Rule 4(c) of the Arkansas Rules of Appellate Procedure provides that when post-trial motions are filed, the time for appeal runs from the entry of the order granting or denying the order provided, "that if the trial court neither grants nor denies the motion within thirty days of its filing, the motion will be deemed denied as of the 30th day." The rule also provides that a notice of appeal must be filed in thirty days from the entry of the order disposing of the motion or, in the event that the motion is deemed denied after thirty days, a notice of appeal must be filed in thirty days from that denial. Ark. R. App. P. 4(d).

In recent weeks, the State submitted motions to dismiss the criminal appeals of *Clay* v. *State*, CACR92-547, and *Stuart* v. *State*, CACR92-533. These motions were based on the contention that the notices of appeals had not been timely filed from the denial of the appellants' post-trial motions for a new trial. Rule 4

of the Rules of Appellate Procedure was cited by the State as authority for dismissal. We certified these motions pursuant to Rule 29(1)(c) of the Rules of the Supreme Court and Court of Appeals, noting an apparent conflict between Rule 4 and Rules 36.9 and 36.22 of the Rules of Criminal Procedure. On September 21, 1992, the supreme court granted the State's motions to dismiss in both cases.

In this case, pursuant to Rule 4(c), appellant's motion for a new trial was deemed denied on October 30, 1989[1], thirty days after the reinstatement of appellant's motion for a new trial. Under Rule 4(d), appellant had thirty days from that date in which to file a notice of appeal. As it happens, appellant's notice of appeal was not filed until April 26, 1991, some eighteen months later. Consequently, the notice of appeal was untimely. The timely filing of a notice of appeal is, and always has been, jurisdictional. *Larue* v. *Larue*, 268 Ark. 86, 593 S.W.2d 185 (1980). Additionally, whether the question is raised by the parties or not, it is not only the power, but the duty, of a court to determine whether it has jurisdiction of the subject matter. *Hawkins* v. *State Farm Fire & Casualty Co.*, 302 Ark. 582, 792 S.W.2d 307 (1990). We dismiss the appeal without prejudice for appellant to petition the supreme court for permission to file a belated appeal.

Dismissed.

COOPER, and JENNINGS, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
DECEMBER 23, 1992

844 S.W.2d 381

John Wesley Hall, Jr., for appellant.

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

---

[1] The thirty-day period expired on Saturday, September 28, 1989. According to Rule 9 of the Rules of Appellate Procedure, the period was extended to Monday, October 30.

Per Curiam. Petition for rehearing is denied.

Melvin Mayfield, Judge. This court has today denied appellant's petition for rehearing in the above case. I do not agree. I think the petition for rehearing should be granted, and we should certify the case to the Arkansas Supreme Court based upon the following considerations:

First: On September 28, 1989, after petitioner was given leave by our supreme court to petition the trial court to reconsider his motion for new trial, the trial court entered an order reinstating petitioner's motion. The trial court heard the motion on October 23, 1989. For reasons unknown to us, an order denying petitioner's motion was not entered until April 10, 1991, some eighteen months later. Petitioner filed a notice of appeal to this court on April 26, 1991, and on October 14, 1992, we dismissed the appeal finding that petitioner had not filed a notice of appeal within 30 days after his motion for new trial and that, pursuant to Appellate Procedure Rule 4(c), appellant's motion for new trial was deemed denied 30 days after the reinstatement of his motion.

Second: Appellate Procedure Rule 4 provides in section (a) that, except as otherwise provided in subsequent sections of the rule, a notice of appeal must be filed within 30 days from the entry of the judgment, decree, or order appealed from. Sections (b) and (c), when considered together provide, among other things, that the time for filing notice of appeal shall be extended upon the filing in the trial court of a motion for a new trial under Civil Procedure Rule 59(b).

Third: Civil Procedure Rule 59(b) provides that a motion for a new trial shall be filed not later than 10 days after the entry of judgment. Civil Procedure Rule 1 provides that the civil procedure rules govern the procedure in all suits or actions of a *civil* nature.

Fourth: Criminal Procedure Rule 1.2 provides that the criminal procedure rules shall govern the proceedings in all criminal cases. Criminal Procedure Rule 36.9 provides that a person desiring to appeal a judgment or order shall file a notice of appeal within 30 days from the date of sentence and entry of judgment or order denying post-conviction relief by the trial judge. Criminal Procedure Rule 36.22 provides a person convicted of either a felony or misdemeanor may file a motion for new

trial prior to the time fixed to file a notice of appeal (30 days under Rule 36.9). This rule does not specify a limitation on the time a trial court must dispose of a motion for new trial and does not contain the "deemed denied" provision contained in Appellate Procedure Rule 4(c).

Fifth: I do not believe Criminal Procedure Rule 36.22 should be read in conjunction with the "deemed denied" provision of Appellate Procedure Rule 4(c). This is inconsistent in that Rule 4(b) is specific in listing only three post-trial motions that extend the time for filing notice of appeal; had our supreme court intended this rule to apply to criminal cases, I believe it would have said so. The "deemed denied" provision of Rule 4(c) specifically states "if a timely motion listed in section (b) of this rule is filed in the trial court" and the trial court neither grants nor denies the motion within 30 days of its filing the motion will be "deemed denied." Moreover, Civil Procedure Rule 59(b) requires a motion for new trial to be filed within 10 days after entry of judgment; whereas, under Criminal Procedure Rule 36.22 a person convicted of a felony or misdemeanor may file a motion for new trial within 30 days after entry of judgment. Thus not only does Appellate Procedure Rule 4 conflict with Criminal Procedure Rule 36.22, but Civil Procedure Rule 59(b), one of the motions listed in Appellate Procedure Rule 4, also conflicts with Criminal Procedure Rule 36.22.

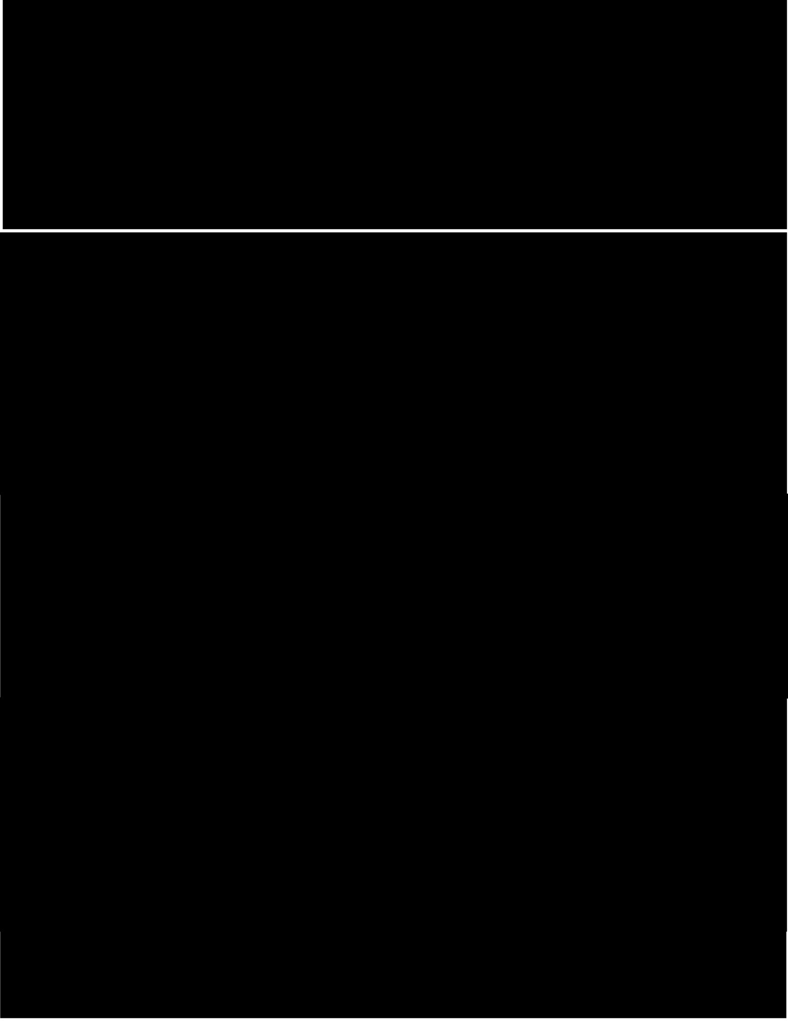
Therefore, I would grant the petition for rehearing and certify this case to our supreme court under Rule 29(1)(c) of the Rules of the Arkansas Supreme Court and Court of Appeals.

I also note that our opinion in this case cited two nonpublished decisions. This appears to conflict with Arkansas Supreme Court and Court of Appeals Rule 21(4). *See also Aaron* v. *Everett*, 6 Ark. App. 424, 426, 644 S.W.2d 301, 302 (1982).

AMERICAN TRANSPORTATION CORP. *v.*
DIRECTOR, Employment Security Department

E 91-216 840 S.W.2d 198

Court of Appeals of Arkansas
Division I
Opinion delivered October 21, 1992



Wright, Lindsey & Jennings and *Robert L. Thacker*, for appellant.

Ronald A. Calkins, for appellee.

GEORGE K. CRACRAFT, Chief Judge. American Transportation Corporation appeals from a decision of the Arkansas Board of Review holding that a number of drivers hired by appellant to deliver school buses assembled at appellant's plant were employees for whom contributions were required under the Arkansas Employment Security Act. Appellant contends that the drivers were exempt as independent contractors within the meaning of Ark. Code Ann. § 11-10-210(e) (1987), which provides:

> (e) Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the Director that:
>
> (1) Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; *and*
>
> (2) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; *and*
>
> (3) Such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

(Emphasis added.) The Board found that appellant did not meet the criteria for any of the three prongs of the test provided in this section and was liable for contributions required by the Act. We affirm.

In order to obtain the exemption contained in the Act, it is necessary that the employer show to the satisfaction of the Director that the requirements of all three subsections have been met. *Morris* v. *Everett*, 7 Ark. App. 243, 647 S.W.2d 476 (1983). Therefore, if there is sufficient evidence to support a finding that any one of the three requirements were not met, the case must be affirmed. In reviewing decisions of the Board of Review, this court views the evidence in the light most favorable to the Board's findings, giving them the benefit of every legitimate inference that can be drawn from the testimony, and will affirm the determination of the Board if its findings are supported by substantial evidence. *Haig* v. *Everett*, 8 Ark. App. 255, 650 S.W.2d 593 (1983). The issue to determine is not whether the evidence would support some different finding, but whether it supports the finding actually reached by the Board. *Shipley Baking Co.* v. *Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986).

Appellant first contends that the Board's finding that the drivers were not free from appellant's control and direction is not supported by substantial evidence. We cannot agree. As a full recitation of the evidence presented to the Board would serve no useful purpose, we refer only to those facts essential to an understanding of our opinion.

Appellant introduced into evidence its contract with the drivers which purported to require the drivers to assume all responsibility for the "means and manner" of delivering the buses. Appellant's president testified to the effect that the company followed the provisions of the contract and did not exercise control over the activities of the drivers.

However, despite the terms of the contract, there was evidence that the drivers were not in fact free from appellant's control and direction in connection with the performance of the services. Even though the drivers were referred to as "independent contractors," they were required to take a physical examination by a doctor designated by appellant before undertaking any duties. James Smith, a former driver, testified that the drivers were not permitted to negotiate the terms of the contract. Despite the provisions of the contract to the contrary, payment for services was based on a fixed fee of thirty-four cents a mile. All assignments for deliveries were made by the company's represen-

tative and the driver had no input into which deliveries he would make. There was no bidding on jobs, and they were all assigned on a "take-it or leave-it" basis. Smith testified that he was of the impression that the assignment made by Mr. Kirby, the company's representative, was the one he had to take. Smith stated that it was his belief that if a driver refused a job he would be fired on the spot or have some other punitive action taken against him.

Smith also testified that drivers had been fired for transporting passengers who had been picked up on the highway while in distress. Drivers were not allowed to use the bus to transport other materials for delivery. There were verbal instructions not to eat or drink in the bus, that the bus be clean when it was delivered, that the drivers be showered and shaved before delivering the bus because they were the corporation's personal contact with the dealer. Drivers were not allowed to smoke on the bus. They were required to check the oil, all fuel levels, and make minor repairs on the bus before delivery. Smith further testified that, in addition to these duties, they were expected by appellant to furnish services at civic functions in Faulkner County. He stated that if a driver did not perform those services, he would receive no further assignments.

From our review of the record, including the evidence that the drivers' activities, assignments, routes, and rate of wages were dictated by appellant, we conclude that there is substantial evidence to support the Board's finding that the drivers were not free from appellant's control and direction.

Appellant also contends that the Board erred in making this finding because it was based on hearsay contained in the testimony of James Smith, a former contract driver. Appellant argues that the Board of Review was not entitled to consider any hearsay as a basis for these conclusions, as "it does not qualify as substantial evidence." Although some of Smith's testimony was based on hearsay, we do not agree that it could not constitute substantial evidence.

The Board of Review is not bound by common law or statutory rules of evidence. Hearsay evidence can constitute substantial evidence in unemployment compensation cases, but the opposing party must be given an opportunity to subpoena and cross-examine adverse witnesses at some stage of the proceeding

if he requests it. *Haynes* v. *Director of Labor*, 19 Ark. App. 71, 719 S.W.2d 437 (1986). Where, as here, the party does not request the right to cross-examine witnesses whose hearsay statements have been received in evidence, he effectively waives his right of cross-examination, and due process requirements are not violated. *Edwards* v. *Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988).

As we conclude that the Board's finding that appellant failed to satisfy the first prong of the test of § 11-10-210(e) is supported by substantial evidence, we need not discuss the Board's findings on the remaining two prongs.

Affirmed.

COOPER and ROGERS, JJ., agree.

Paul BUSBY *v.* Toby BUSBY

CA 91-493 840 S.W.2d 195

Court of Appeals of Arkansas
Division II
Opinion delivered October 21, 1992

Butler, Hickery & Long, by: *Fletcher Long, Jr.*, for appellant.

W. Frank Morledge, P.A., for appellee.

JOHN E. JENNINGS, Judge. On May 14, 1990, Toby Busby filed a suit seeking a divorce from Paul Busby, her husband of twenty-seven years. On May 16, 1991, the St. Francis Chancery Court entered a decree of divorce which divided the property of the parties and awarded Mrs. Busby alimony of $35.00 per week. Mr. Busby appeals, arguing that the court erred in awarding his wife an interest in land he acquired by inheritance during the marriage; in awarding her alimony; and in entering an order nunc pro tunc for the payment of temporary alimony pending the hearing on the merits. We must reverse on the first point.

The land in issue is a 110 acre tract that Mr. Busby inherited from his parents long after the parties married. Its estimated value is $80,000.00. Apparently based primarily on evidence that Mrs. Busby helped in refinancing a loan on the property, the court awarded her an equitable interest in the property in the amount of $5,500.00.

Mr. Busby argues that the chancellor was without authority to award his wife an interest in property acquired by inheritance during the marriage, relying on *Hale* v. *Hale*, 307

Ark. 546, 822 S.W.2d 836 (1992). We agree that *Hale* controls. There, the court said:

> The appellant is correct that Ark. Code Ann. § 9-12-315(a)(2) provides for an equitable division of non-marital property given prior to marriage but does not make the same provision for gift property received during marriage. Were we to hold that the statute authorized a chancellor to divide non-marital gift property, we would be adding words to the statute that simply are not there. In prior cases, we have specifically refused to expand the property-division statute judicially to authorize the chancellor to divide non-marital property acquired by gift during marriage. Rather, we have limited the discretion of the chancellor under the statute to the division of property acquired prior to marriage, as the statute provides. *See Williford* v. *Williford*, 280 Ark. 71, 655 S.W.2d 398 (1983); *see also Smith* v. *Smith*, 32 Ark. App. 175, 798 S.W.2d 443 (1990); *Yockey* v. *Yockey*, 25 Ark. App. 321, 758 S.W.2d 421 (1988). We have previously held that property received by descent, apparently during marriage, is not subject to division in a divorce action. *See Farris* v. *Farris*, 287 Ark. 479, 700 S.W.2d 371 (1985).

Hale, 307 Ark. at 551, 822 S.W.2d at 839.

Under the holding in *Hale* the 110 acre tract inherited by Mr. Busby during the marriage was not subject to division by the chancellor.

A hearing on the issue of temporary alimony was held on May 31, 1990. On June 1, 1990, the chancellor wrote to the parties:

> Gentlemen: As you know by now, I did not return from Cross County today in time to take the testimony of Mr. Hood, the CPA of Mr. Busby. As I stated yesterday, I would try to take his testimony this afternoon so that I could decide the issue of temporary support for Mrs. Busby. I also stated that if I could not take this testimony, I would rule on the issue until such time as we could take his testimony. I will have another day of regular court in St. Francis County on June 21st. At that time, we will take

> Mr. Hood's testimony. Until that time, it is my opinion that Mr. Busby should pay Mrs. Busby $75.00 per week.

In the final decree the special chancellor who heard the case on the merits stated:

> By letter dated June 1, 1990, Judge Bentley E. Story directed the Defendant pay to the Plaintiff the sum of $75.00 per week, until he had the opportunity to hear additional testimony, which was to have been on June 21st. The Court's opinion was never specifically reduced to an Order. Subsequent to the Court's opinion the Defendant apparently made some payment of the amount directed by Judge Story's letter. It is the determination of the Court that the judgment of alimony/support directed by Judge Story's letter of June 1, 1990, is entered nunc pro tunc by the Court.

██ Judgments not entered in a record book or noted on a docket are not void but may be entered nunc pro tunc, if it is clearly shown that the judgment of the court has been announced in open court or otherwise actually rendered. *O'Dell* v. *O'Dell*, 247 Ark. 635, 447 S.W.2d 330 (1969). Strict formality in language is not required; a judgment is to be tested by substance not form. *Thomas* v. *McElroy*, 243 Ark. 465, 420 S.W.2d 530 (1967). Mr. Busby's argument is that the chancellor's letter of June 1 should be interpreted to mean that the order for temporary alimony would expire on June 21, 1990, whether or not a hearing was held on that date. The special chancellor interpreted Judge Story's letter to mean that temporary alimony should be paid until such time as a subsequent hearing might be held, and we cannot say that that interpretation was wrong.

█ Finally, Mr. Busby argues that it was error to require him to pay $35.00 per week in alimony. An award of alimony lies within the sound discretion of the chancellor, whose decision will not be reversed absent a clear abuse of that discretion. *Aldridge* v. *Aldredge*, 28 Ark. App. 175, 773 S.W.2d 103 (1989). In the case at bar Mrs. Busby has bone cancer. By the time of the hearing her employment with Farm Credit Services had been terminated because of her illness. She received $673.00 per month in social security and $560.00 per month in private insurance benefits. Her medical expenses have been and will be substantial, although

many of her expenses will be covered by insurance.

Mr. Busby is a partner with his brother in a trucking business. By the time of the last hearing no tax return had been filed for the year 1989, but in 1988 the partnership had a gross income of $186,000.00. Mr. Busby's accountant testified that appellant netted $140.00 per week from the business.

The argument for reversal focuses on a comparison of the parties' net income as reflected in the testimony. This, however, is not the only factor which the court was entitled to consider. The court could also consider the earning ability and capacity of each party, the property each received in the divorce, and Mrs. Busby's ill health. *See Bolan* v. *Bolan*, 32 Ark. App. 65, 796 S.W.2d 358 (1990); *Franklin* v. *Franklin*, 25 Ark. App. 287, 758 S.W.2d 7 (1988); *Boyles* v. *Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980). On the facts of this case we cannot say that the chancellor abused his discretion in awarding Mrs. Busby $35.00 per week in alimony.

That portion of the decree which awards Mrs. Busby an equitable interest in land inherited by her husband during the marriage is reversed. In all other respects the decree of the chancellor is affirmed.

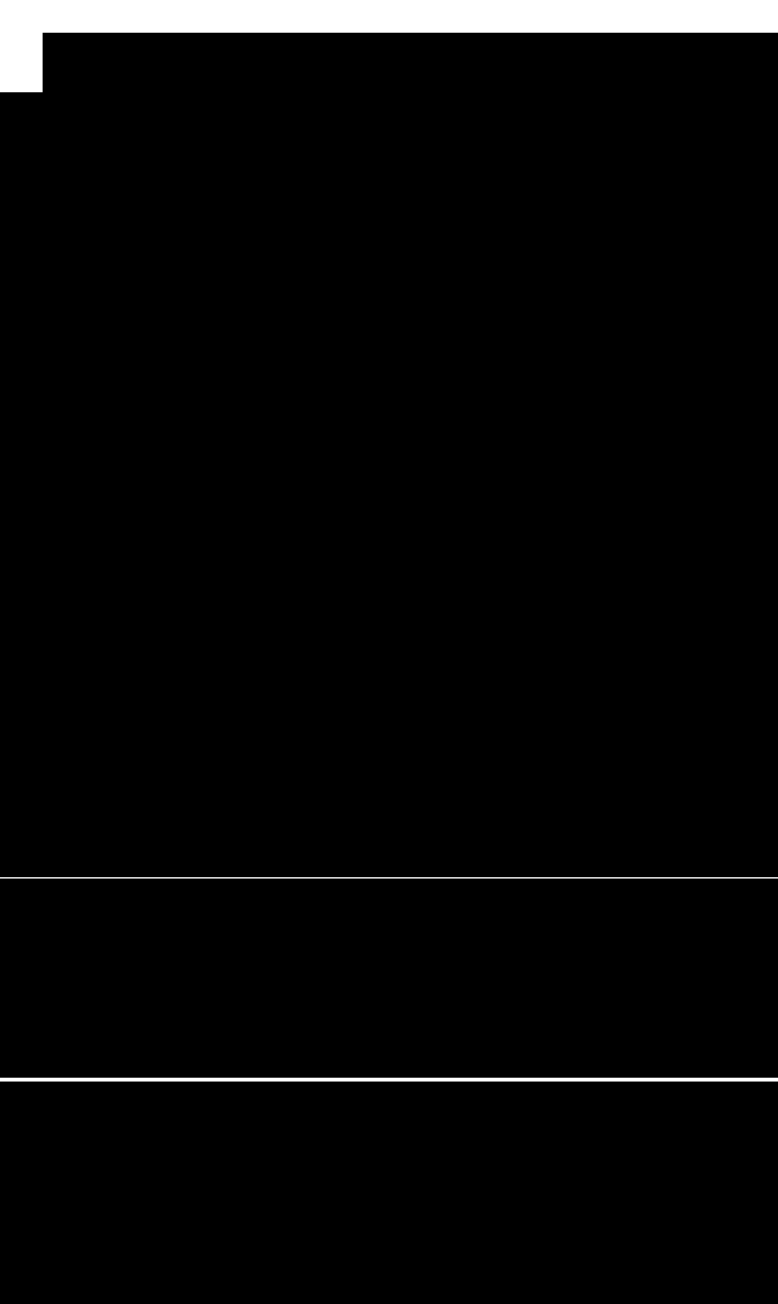
Reversed in part and affirmed in part.

DANIELSON and MAYFIELD, JJ., agree.

ARKANSAS DEPARTMENT OF HUMAN SERVICES
v. Rita W. GRUBER, Chancellor

CA 91-517 S.W.2d

Court of Appeals of Arkansas
Division II
Opinion delivered October 21, 1992



Ed Wallen, for appellant.

Winston Bryant, Att'y Gen., by: *Sarah H. Harberg*, Asst. Att'y Gen., for appellee.

ELIZABETH W. DANIELSON, Judge. The Arkansas Department of Human Services (DHS) was found to be in contempt and assessed a $150 fine by the chancellor when its representative failed to appear at a placement hearing for a juvenile offender. For reversal, DHS raises three points. We affirm in part and reverse and remand in part.

A juvenile offender was being held in detention pending an August 29, 1991, disposition hearing. At the request of the court probation officer, DHS was contacted since the placement of the child at Youth Home, Inc., had not yet been approved and the child's parents refused to allow him to return home.

Maurice Shirley, a DHS caseworker, was present at the August 29 hearing along with the prosecuting attorney and the public defender. It was necessary to continue the proceedings until September 3 because the juvenile's application for placement at Youth Home, Inc., had not yet been approved. The public defender requested that Mr. Shirley return for the September 3 hearing in case the services of DHS were needed. The chancellor agreed and stated, "All right, we will give Mr. Shirley a copy of the order to appear."

At the September 3 hearing, because placement at Youth Home, Inc., had not been finalized, the state requested that the juvenile be released to the custody of DHS immediately until placement could be obtained. Neither Mr. Shirley nor any other representative from DHS was present for the hearing. After the chancellor reviewed her notes of the August 29 hearing, which reflected that Mr. Shirley was present at the earlier hearing and was personally served with a notice to appear in court on September 3, the chancellor found DHS in contempt for failing to appear as ordered.

For its first point, DHS contends that the court lacked

the jurisdiction necessary to find it in contempt of court. Disobedience of any valid judgment, order, or decree of a court having jurisdiction to enter it may constitute contempt; punishment for such contempt is an inherent power of the court. *Gatlin* v. *Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991); *Hilton Hilltop, Inc.* v. *Riviere*, 268 Ark. 532, 597 S.W.2d 596 (1980). Even one not a party to an action, who has been served with an order, or who has notice of it, may be held in contempt of the order. *Id.* Before a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties imposed upon him and the command must be expressed rather than implied. *Id.*

According to the record, the representative from DHS was given notice in open court, as well as in writing, of the date and time to appear for the placement hearing of the juvenile. One who has full knowledge of a court order and its import, as DHS did, cannot flout it with impunity. *Dennison* v. *Mobley, Chancellor*, 259 Ark. 216, 515 S.W.2d 215 (1974). It is one of DHS's functions and responsibilities to cooperate with, assist, and solicit the cooperation and assistance of all public or private agencies or organizations involved in or dedicated to providing services to youth. Ark. Code Ann. § 9-28-205(2) (1987). The Department of Human Services cannot fulfill its statutory responsibility to the youth of our state without the department's full cooperation with the juvenile courts throughout the state.

The Department of Human Services next contends that it was denied procedural due process because it was not provided with notice of the accusation and a reasonable time to make its defense as required by Arkansas law and the Fourteenth Amendment of the United States Constitution. Although the chancellor did not designate whether she was holding DHS in criminal or civil contempt, the record reveals that the $150 was punishment for not obeying the court's order to appear on September 3, rather than a fine imposed to compel DHS to act. Hence, this was criminal contempt. *See Fitzhugh* v. *State*, 296 Ark. 137, 752 S.W.2d 275 (1988). Arkansas Code Annotated § 16-10-108(a)(3) (1987) states that every court of record shall have the power to punish, as for criminal contempt, persons guilty of willful disobedience of any process or order lawfully issued or made by it. Under Ark. Code Ann. § 16-10-108(c), contempts committed in the immediate view and presence of the court may

be punished summarily, and in other cases, the party charged shall be notified of the accusation and shall have a reasonable time to make his defense. *See Fitzhugh*, 296 Ark. 137. Notice of the charge of contempt and the nature thereof were not given to DHS in this case. Therefore, we reverse and remand on this point so that the chancellor can conduct a show cause hearing and afford DHS the opportunity to answer why it should not be found in contempt of the court's order.

Next, appellant contends that there is insufficient evidence to support a finding of contempt, arguing that it did not willfully disobey Chancellor Gruber's order to appear. We consider the evidence in the record in the light most favorable to the trial court's decision concerning the contempt and affirm if there is substantial evidence to support its decision. *Henry* v. *Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992). There is evidence in the record that DHS was given notice to appear at the September 3 hearing and failed to appear. The absence of DHS from the hearing is evidence of their disobedience of the chancellor's order. There was, therefore, substantial evidence to support the initial finding of contempt.

Affirmed in part.

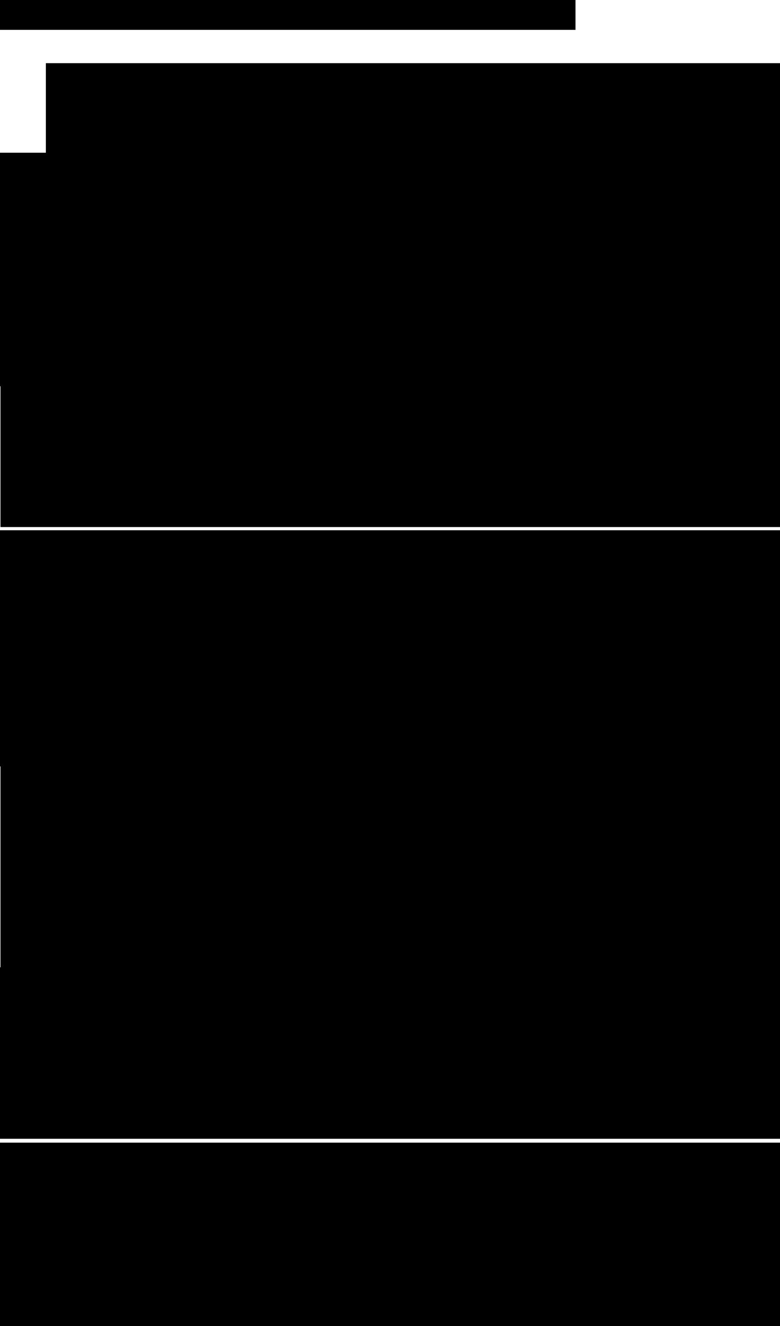
Reversed and remanded in part.

JENNINGS and MAYFIELD, JJ., agree.

IN THE MATTER OF THE ADOPTION OF D.J.M.

CA 91-396 839 S.W.2d 535

Court of Appeals of Arkansas
Division II
Opinion delivered October 21, 1992
[Rehearing denied November 25, 1992.]



Mapels & Reed, by: *Cheryl K. Maples*, for appellant.

William H. McKimm, for appellee.

ELIZABETH W. DANIELSON, Judge. The appellant in this case, Jett Paul, is the biological father of D.J.M., a minor. On May 22, 1991, the Montgomery County Probate Court granted a petition for adoption of D.J.M. that was filed by Johnny and Murphia Moore, the appellees herein. Appellant was a party to the adoption proceeding below and now seeks to have the decree set aside.

D.J.M. was born on July 10, 1987. Her biological parents were not married. The biological mother consented to the adoption of the child by the Moores, who took D.J.M. home with them the day after she was born. At that time, the identity of the natural father was unknown to the Moores.

A review of the procedural history of the case is necessary given the issues on appeal. The Moores first filed their petition for adoption in Pulaski County Probate, and an interlocutory decree of adoption was entered in October 1987. In January 1988, appellant filed a paternity action in the County Court of Pulaski County, by which he sought to have himself established as the natural father of D.J.M. The interlocutory decree of adoption from Pulaski County Probate became final in April 1988. In May 1988, the final decree was set aside and the interlocutory decree reinstated during pendency of the paternity action. In July 1988, the county court found Jett Paul to be the natural father of D.J.M. While the paternity matter was on appeal, the Moores dismissed their adoption petition in Pulaski County Probate and refiled in Montgomery County Probate in August 1989. The Moores and D.J.M. have lived in Montgomery County at all times pertinent to this appeal.

In March 1990, an order was entered by the Eighth Division Chancery Court of Pulaski County finding Jett Paul to be the

natural father of D.J.M. In May 1991, the Montgomery County Probate Court entered the adoption decree that is the subject of this appeal.

Appellant's first argument is that the Montgomery County Probate Court lacked subject matter jurisdiction over the adoption matter and that the order of adoption is therefore void. As support for his argument, appellant cites Ark. Code Ann. § 9-27-306 (Repl. 1991), which states in pertinent part:

> (a) The juvenile court shall have exclusive original jurisdiction of and shall be the sole court for the following proceedings governed by this subchapter:
>
> (3) Proceedings for establishment of paternity . . . .
>
> (b) The juvenile court shall have exclusive jurisdiction of the following matters governed by other law which arise during pendency of original proceedings under subsection (a) of this section and involve the same juvenile.
>
> (1) Adoptions under the Revised Uniform Adoption Act, as amended, § 9-9-201 et seq.

Appellant argues that because the paternity proceeding was on appeal to the juvenile court when the adoption petition was filed in Montgomery County Probate, the adoption matter should have been heard in the juvenile court in Pulaski County along with the paternity matter. At the trial below, appellant never sought to have the adoption matter transferred to juvenile court nor did he object to the probate court's jurisdiction over the matter.

Subject matter jurisdiction of adoption proceedings has been vested in the probate court by statute. *See* Ark. Code Ann. § 28-1-104(a)(5) (1987) and *Poe* v. *Case*, 263 Ark. 488, 565 S.W.2d 612 (1978). While we agree that under the provisions of § 9-27-306(b)(1) the adoption matter should have been filed in or transferred to juvenile court, we do not agree that § 9-27-306 operated to oust from the probate court subject matter jurisdiction of the adoption proceeding so that the judgment was void. In *Banning* v. *State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987), we stated:

> The rule of almost universal application is that there is a

> distinction between want of jurisdiction to adjudicate a matter and a determination of whether the jurisdiction should be exercised. Jurisdiction of the subject matter is power lawfully conferred on a court to adjudge matters concerning the general question in controversy. It is power to act on the general cause of action alleged and to determine whether the particular facts call for the exercise of that power. Subject matter jurisdiction does not depend on a correct exercise of that power in any particular case. If the court errs in its decision or proceeds irregularly within its assigned jurisdiction, the remedy is by appeal or direct action in the erring court. . . . Failure to follow the statutory procedure in the exercise of its power constitutes reversible error but does not oust the jurisdiction of the court.

22 Ark. App. 144 at 149. The supreme court has said that unless the trial court has no tenable nexus whatever to the claim in question, the appellate court will consider the issue of whether the claim should have been heard there to be one of propriety rather than subject matter jurisdiction. Where the issue is one of propriety, the appellate court will not raise the issue *sua sponte*, and will not permit a party to raise it unless it was raised in the trial court. *Horne Brothers, Inc.* v. *Ray Lewis Corp.*, 292 Ark. 477, 731 S.W.2d 190 (1987), citing *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986).

Because it certainly cannot be said that the probate court has "no tenable nexus" to adoption matters, we consider the issue of whether the Montgomery County Probate Court should have exercised jurisdiction in this instance to be one of propriety, not one of the existence of subject matter jurisdiction. The probate court's failure to transfer the case to the juvenile court was but an irregularity in proceedings to which appellant failed to object. While the failure to transfer would constitute reversible error had appellant objected or brought it to the court's attention, the court was not acting without jurisdiction in hearing the matter. Appellant's failure to request a transfer of the case or otherwise question the propriety of the probate court hearing the case waived the issue and it may not be raised for the first time on appeal.

Appellant's second argument on appeal is that the probate

court erred in finding that appellant's consent was not necessary and in finding that appellant had failed without justifiable cause to contact or support his minor child for a period of at least one year. *See* Ark. Code Ann. § 9-9-207(a)(2) (Repl. 1991). Appellant argues that because the interlocutory decree of adoption was in effect prior to the filing in Montgomery County, he was precluded from communicating with or providing for the care and support of his minor child. At the time of the hearing, the child was 3½ years old and had been with the Moores since her birth. The judge noted that appellant's mother testified that she had known of the adoption proceedings since September 1987. Appellant admitted that during those 3½ years he had never seen nor attempted to see the child. He also admitted he had not attempted to communicate with or support her in any way. Although he filed a paternity action, he never requested visitation with the child in the juvenile court or in any other court. Appellant suggested that fraud was perpetrated upon him in the adoption matter, but never challenged the interlocutory decree on these grounds.

Although we review probate proceedings *de novo* on the record, it is well settled that the decision of a probate judge will not be disturbed unless it is clearly erroneous. In making that determination, we give due regard to the opportunity and superior position of the trial judge to judge the credibility of the witnesses. *In the Matter of the Adoption of Titsworth*, 11 Ark. App. 197, 669 S.W.2d 8 (1984). The probate judge stated that the mere existence of an interlocutory decree of adoption would not operate to prevent the father from attempting to see his child and to support her in some manner. Under the particular circumstances of this case, we cannot say the probate judge erred in finding appellant's consent was not necessary because he had failed significantly without justifiable cause to communicate with the child or to provide for the care and support of the child for a period of at least one year.

Appellant's third argument is that the probate court violated his constitutional right to due process in its finding that custody of the minor child should lie with the adopting parents in the event the adoption was overturned. Since we are affirming the adoption, we need not address this argument.

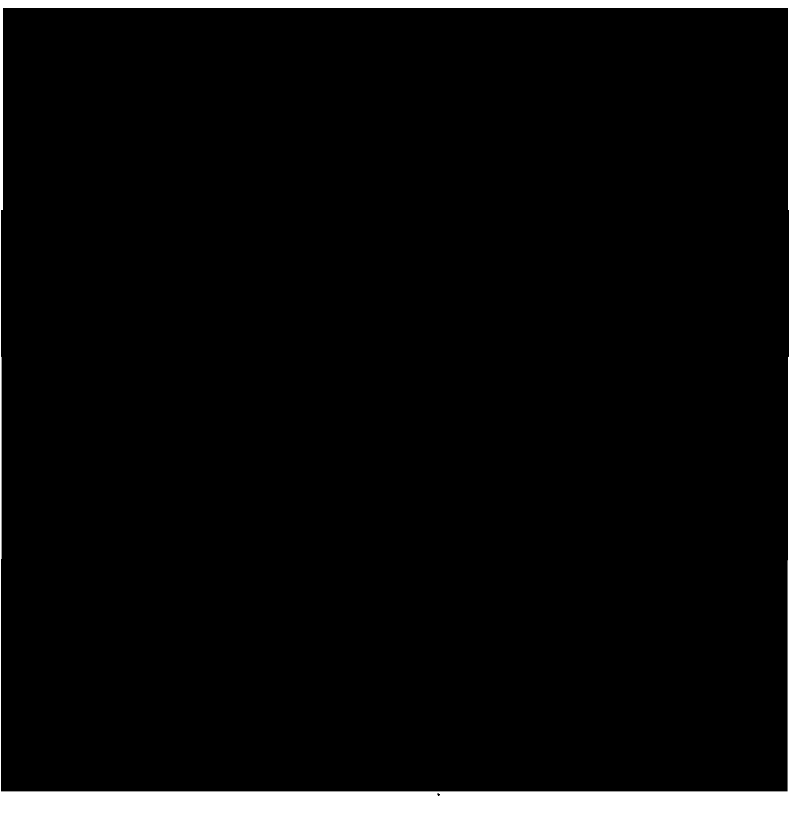
Affirmed.

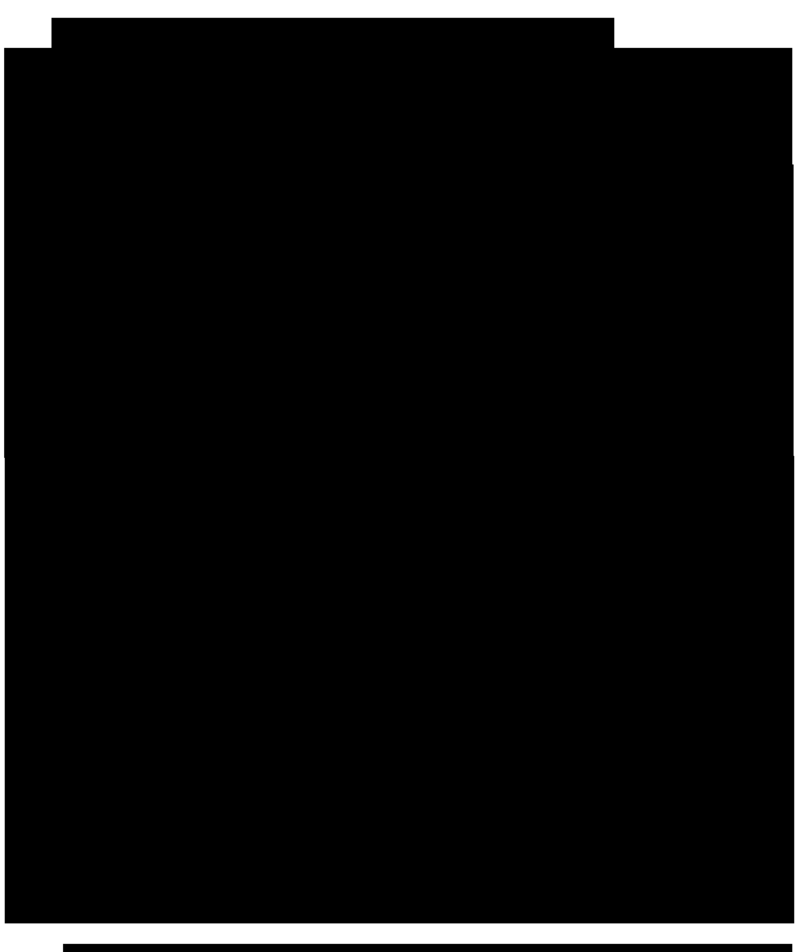
JENNINGS and MAYFIELD, JJ., agree.

Ken MORAN and Rita S. Moran *v.* BOMBARDIER CREDIT, INC.

CA 92-233 839 S.W.2d 538

Court of Appeals of Arkansas
Division I
Opinion delivered October 21, 1992





Baxter, Wallace, Jensen & McCallister, by: *Terence C. Jensen* and *Bobby D. McCallister*, for appellants.

Rose Law Firm, by: *Charles W. Baker*, and *Brian Rosenthal*, for appellee.

JUDITH ROGERS, Judge. Ken and Rita Moran, Louisiana residents, appeal from an order of the circuit court of Garland County that denied their motion to dismiss for lack of personal jurisdiction an action brought by appellee, Bombardier Capital,

Inc. (formerly Bombardier Credit, Inc.), a Massachusetts corporation with its principal place of business in Vermont.

The facts in this case are not disputed. In January 1986, Taylor's Marine, Inc., of Garland County, by its officers, Kevin and Lori Taylor, entered into a financing agreement with appellee. A provision directed that any disputes regarding the agreement would be governed by the laws of New York State. In 1987, to "induce [appellee] to extend credit to [Taylor's Marine, Inc.,]" appellants signed a guaranty for up to $50,000.00 in loans. Subsequently, appellee provided the additional financing. When Taylor's Marine defaulted on the loan, appellee brought this action in Garland County to secure payment from appellants. Appellants alleged the court lacked *in personam* jurisdiction and moved to dismiss the complaint.

In his letter opinion, the trial judge addressed the jurisdictional issue as follows:

> The Defendants' guaranty of the Arkansas debt is substantial. It would appear that no stronger contact could be imagined than Plaintiff would refuse an extension of credit "but for" Defendants' guaranty [this is true, whether Defendants physically entered the State and signed, mailed or "faxed" the guaranty]. Accordingly the Court finds that there is personal jurisdiction.

Subsequently, the court granted appellee's motion for summary judgment and awarded appellee $50,000.00.

On appeal, appellants contend that the trial court erred in exercising *in personam* jurisdiction over them. We agree and reverse the trial court's decision.

To determine whether a court has *in personam* jurisdiction over a nonresident defendant, we must undertake a two-part analysis. First, we must consider whether the nonresident defendant's actions satisfy the requirements of the Arkansas long-arm statute. Second, we consider whether the exercise of personal jurisdiction is consistent with due process. *Szalay* v. *Handcock*, 307 Ark. 232, 235, 819 S.W.2d 684, 685 (1991); *Capps* v. *Roll Service, Inc.*, 31 Ark. App. 48, 53, 787 S.W.2d 694, 697 (1990).

The Arkansas long-arm statute states what is required

for Arkansas to exercise jurisdiction with respect to the transaction of business by a nonresident defendant:

> 1. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's:
>
> (a) Transacting any business in this state.

Ark. Code Ann. § 16-4-101(C)(1) (1987). The supreme court has stated that the purpose of the "transacting business" provision is to permit Arkansas courts to exercise the maximum *in personam* jurisdiction allowable by due process. *Szalay* v. *Handcock*, 307 Ark. at 236, 819 S.W.2d at 686; *CDI Contractors, Inc.* v. *Goff Steel Erectors, Inc.*, 301 Ark. 311, 312, 783 S.W.2d 846 (1990).

Any decision whether or not to exercise judicial jurisdiction over a transaction must also address the due process requirements embodied in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). Under *International Shoe, supra*, and its progeny, the well-recognized test is whether such "minimum contacts" exist between the nonresident defendant and the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)).

This court has considered the following factors in deciding whether or not a nonresident's contacts with the forum state were sufficient to impose jurisdiction: (1) the nature and quality of the contacts with the forum state; (2) the quantity of the contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. *Capps* v. *Roll Service, Inc.*, 31 Ark. App. at 53, 787 S.W.2d at 697; *Jagitsch* v. *Commander Aviation Corp.*, 9 Ark. App. 159, 163, 655 S.W.2d 468, 470 (1983). Whether the "minimum contacts" requirement has been satisfied is a question of fact, *Jagitsch* v. *Commander Aviation Coro.*, 9 Ark. App. at 163, 655 S.W.2d at 470, and each question of jurisdiction must be decided on a case-by-case basis. *Capps* v. *Roll Service, Inc.*, 31 Ark. App. at 53, 787 S.W.2d at 697.

The United States Supreme Court held in *McGee* v. *International Life Insurance co.*, 355 U.S. 220 (1957), that for purposes

of due process, a single contract could provide the basis for the exercise of jurisdiction over a nonresident defendant if the contract had "substantial connection with [the forum] State." *Id.* at 223. This court previously has exercised *in personam* jurisdiction in cases involving a single contract such as a guaranty agreement; however, the facts in these cases are distinguishable from the case at bar.

In *Meachum* v. *Worthen Bank & Trust Co., N.A.*, 13 Ark. App. 229, 682 S.W.2d 763 (1985), *cert. denied*, 474 U.S. 844 (1985), a resident of Texas challenged an Arkansas court's exercise of jurisdiction. In affirming the trial court's exercise of jurisdiction, we held that although the appellant's contacts with Arkansas were few, they were substantial in nature and quality, stating:

> Knowing that the appellee would require his individual guaranty, the appellant sent his financial statement to the appellee in Arkansas and then signed the guaranty agreement which was contained in the lease of personal property between two Arkansas corporations, and admits that he knew the lease would be sent to the appellee in Arkansas, that the property was in Arkansas, and that the payments would be made in Arkansas. . . .
>
> . . . . The cause of action is directly related to the appellant's signing as guarantor of an Arkansas contract, and then failing to carry out his promise to guarantee; the Arkansas courts are obviously interested in providing a forum for Arkansas citizens to resolve disputes over contracts executed in Arkansas; and considering the fact that most of the parties were residents of this state, we think the convenience of the parties was best served by the hearing of the case in Arkansas.

13 Ark. App. at 233-34, 682 S.W.2d at 766. We also noted that the appellant was extensively involved with the debtor company as director, officer, and general counsel and that the company was directly responsible for the formation of the Arkansas lessee corporation. *Id.* at 232, 682 S.W.2d at 765.

We also found jurisdiction over a Texas resident in *Akin* v. *First National Bank*, 25 Ark. App. 341, 758 S.W.2d 14 (1988).

In that case, the court found evidence that the appellant had delivered a signed loan application, a financial statement, and a personal guaranty to a bank in Conway to induce the bank to loan money to an Arkansas resident for the purpose of buying land in Arkansas. The evidence at trial indicated the appellant's intention to go into business on that property and, subsequently, he took deed to it. We concluded that the evidence, taken as a whole, provided support for the theory that the Arkansas resident was acting as a "front" for the appellant. *Id.* at 347, 758 S.W.2d at 18.

However, in *CDI Contractors, Inc.* v. *Goff Steel Erectors, Inc.*, 301 Ark. 311, 783 S.W.2d 846 (1990), the supreme court held a single contract was insufficient to confer jurisdiction. There, an Arkansas corporation, acting as general contractor for a Mississippi project, subcontracted with a foreign corporation. Although the subcontractor submitted his bid by telephone to the Arkansas contractor, the contract was formalized in Mississippi and mailed to the contractor's Arkansas business address. The contract provided for payment requests to be mailed to Arkansas, but it contained no provision concerning jurisdiction or applicable law for dispute resolution. Based on these facts, the supreme court held that the foreign corporation's telephone and mail transactions did not, standing alone, satisfy the minimum contacts required by due process to confer jurisdiction on the Arkansas court. *Id.* at 314, 783 S.W.2d at 847.

In the case at bar, both appellants and appellee argue that the holding in *Arkansas Rice Growers Cooperative Association* v. *Alchemy Industries, Inc.*, 797 F.2d 565 (8th Cir. 1986), supports their position in this appeal. In that case, the Eighth Circuit Court on appeal reversed the finding of liability against the individual defendants for lack of personal jurisdiction. Alchemy Industries, Inc. (Alchemy) and Arkansas Rice Growers Cooperative Association, d/b/a Riceland Foods (Riceland), had entered into a contract for the construction of a factory in Stuttgart. Alchemy was required to provide financial assurances either in the form of personal guaranties or in the form of a line of credit from a bank. Several California residents executed personal guaranties to a California bank, which then issued a letter to Riceland guaranteeing Alchemy's performance of the contract. Although the Eighth Circuit Court assumed for argument that the guaranties ran in favor of both the bank and Riceland, it held

that the mere fact that the individual defendants guaranteed an obligation to the Arkansas corporation did not subject the guarantors to jurisdiction in Arkansas. 797 F.2d at 573, citing *Arkansas Poultry Cooperative Inc.* v. *Red Barn System, Inc.*, 468 F.2d 538, 540-41 (8th Cir. 1972).

Appellee here argues that, although the Eighth Circuit found there were insufficient contacts to sustain jurisdiction, its opinion implies that it would have found jurisdiction if there had been additional facts, including evidence that the beneficiaries of the guaranties would not have entered into the transaction without the guaranties of specific individuals. The Eighth Circuit stated:

> In concluding that the assertion of jurisdiction over the guarantors would not offend due process, the district court also relied on the fact that Alchemy had provided Riceland with the financial statements of the prospective guarantors in August 1972 and that Riceland entered into the construction and marketing contracts with Alchemy in reliance on this information. The evidence shows, however, that the financial statements Riceland received in August 1972 were those of the Structural partners. Riceland thus had the financial statements of only nine of the eventual twenty-two guarantors when it entered into the construction and marketing contracts. Furthermore, not until April 1973, after Riceland had executed the contracts, did Riceland receive a list of the prospective guarantors.
>
> Under these circumstances, we hold that there are insufficient contacts between the guarantors and Arkansas to subject the guarantors to the jurisdiction of the Arkansas courts. The mere fact that the individual defendants guaranteed an obligation to an Arkansas corporation does not subject the guarantors to jurisdiction in Arkansas. *See Arkansas Poultry Cooperative, Inc.* v. *Red Barn System, Inc.*, 468 F.2d 538, 540-41 (8th Cir. 1972). . . . It is true that the guarantors stood to profit if the construction contract, the performance of which they guaranteed, was successful. This has been, in part, the basis for finding that the assertion of jurisdiction over nonresident guarantors comports with due process in some cases. *See, e.g., Na-*

> *tional Can Corp.* v. *K. Beverage Co.*, 674 F.2d 1134, 1137 (6th Cir. 1982); *Marathon Metallic Building Co.* v. *Mountain Empire Construction Co.*, 653 F.2d 921, 923 (5th Cir. 1981) (per curiam). In these cases, however, there has been substantive identity of the guarantors and the corporation whose obligation they guarantee, *National Can*, 674 F.2d at 1138, evidence that the beneficiary of the guarantee contract would not have entered into the transaction without the guarantees of specific individuals, *id.*, or a provision in the guarantee contract or the underlying contract stating that the law of the forum state would control, *Marathon Metallic*, 653 F.2d at 923. We have found no case in which a court has asserted jurisdiction over a nonresident guarantor merely because the guarantor is a passive investor in the corporation whose debt the guarantor assures.

797 F.2d at 573-74. Appellee concludes that, because there is evidence in the case at bar that appellee relied upon appellants' guaranties in extending credit to Taylor Marine, its reliance is sufficient to establish jurisdiction. The trial court here apparently accepted appellee's interpretation of the Eighth Circuit Court's opinion; however, we do not agree that it supports a finding of jurisdiction in the case at bar.

In applying the long-arm statute and due process requirements to the facts in the case at bar, we find insufficient contacts to sustain personal jurisdiction over appellants. Appellants' single act has been to guarantee a debt between an Arkansas company and a nonresident corporation. There is no evidence that appellants interjected themselves into the contractual negotiations or that appellants had a close identity with or an economic interest in the Arkansas company. The record is devoid of evidence of even mail or telephone transactions to bring appellants within this state's jurisdiction. Neither appellants nor appellee are residents of Arkansas. Although a plaintiff is not required to have minimum contacts with the forum state, the plaintiff's residence is not completely irrelevant to the jurisdictional inquiry, as plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises, *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1983). In addition, the plaintiff's residence is relevant to the court's consideration of

the interest of the forum state in providing a forum and the convenience of the parties. A provision in the underlying contract in the case at bar directed that any disputes regarding the agreement would be governed by the laws of New York State. Although this has not been presented as a choice of forum case, we recognize that we have enforced such clauses that are fair and reasonable and meet the due process test for the exercise of judicial jurisdiction. *See Nelms* v. *Morgan Portable Building Corp.*, 305 Ark. 284, 808 S.W.2d 314 (1991). Finally, we cannot say that the appellants' conduct and connection with the forum state is such that they should reasonably have anticipated being "haled into court" in Arkansas. *See World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). We reverse the judgment against appellants for lack of personal jurisdiction.

Reversed.

JENNINGS and DANIELSON, JJ., agree.