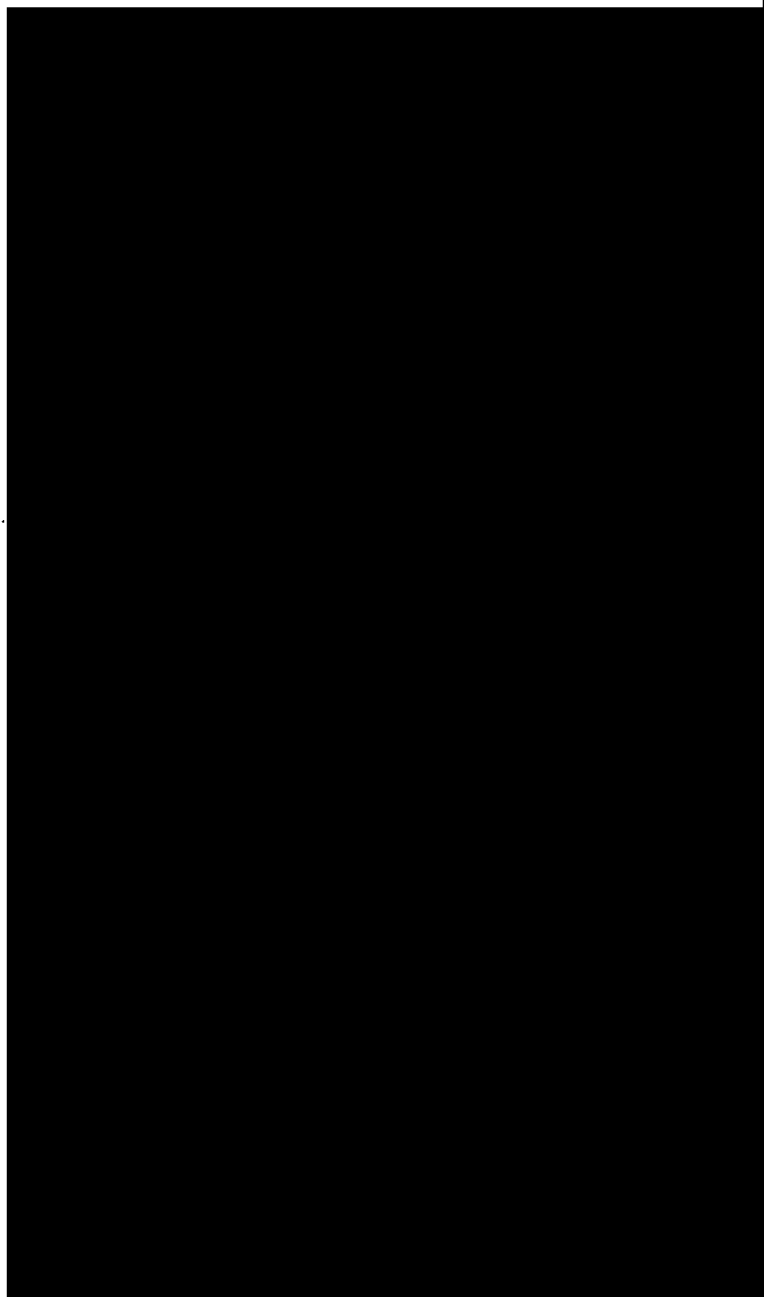

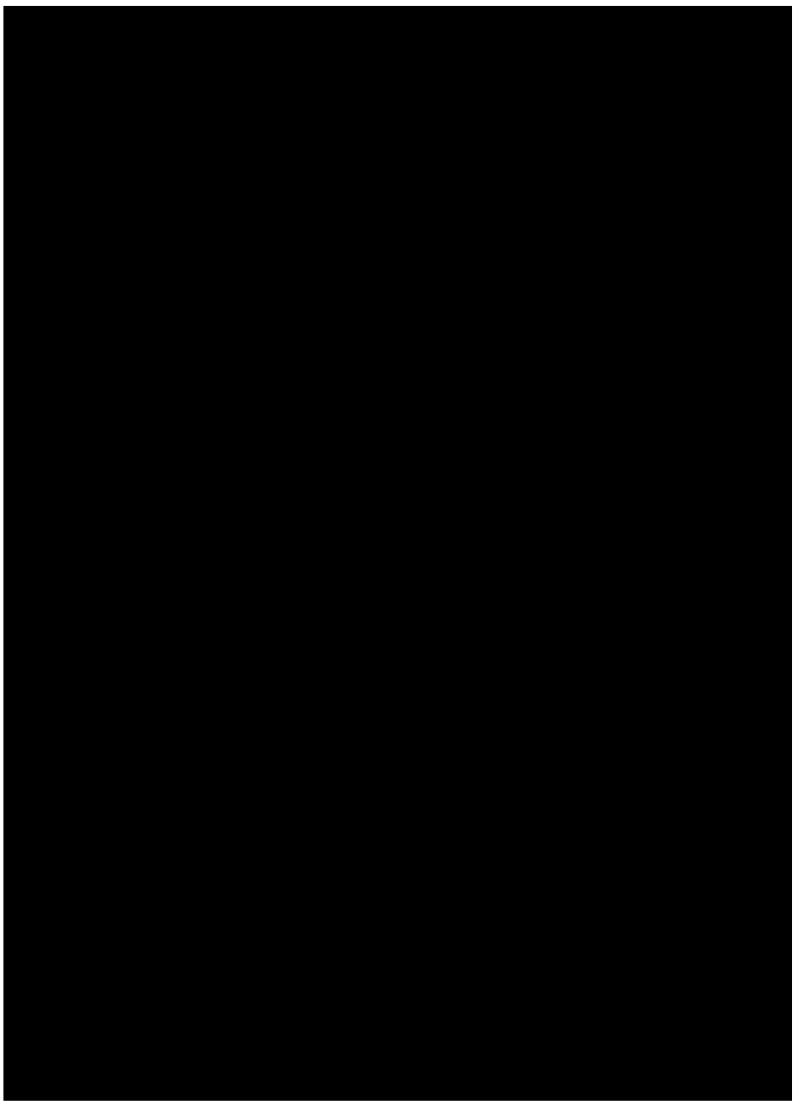

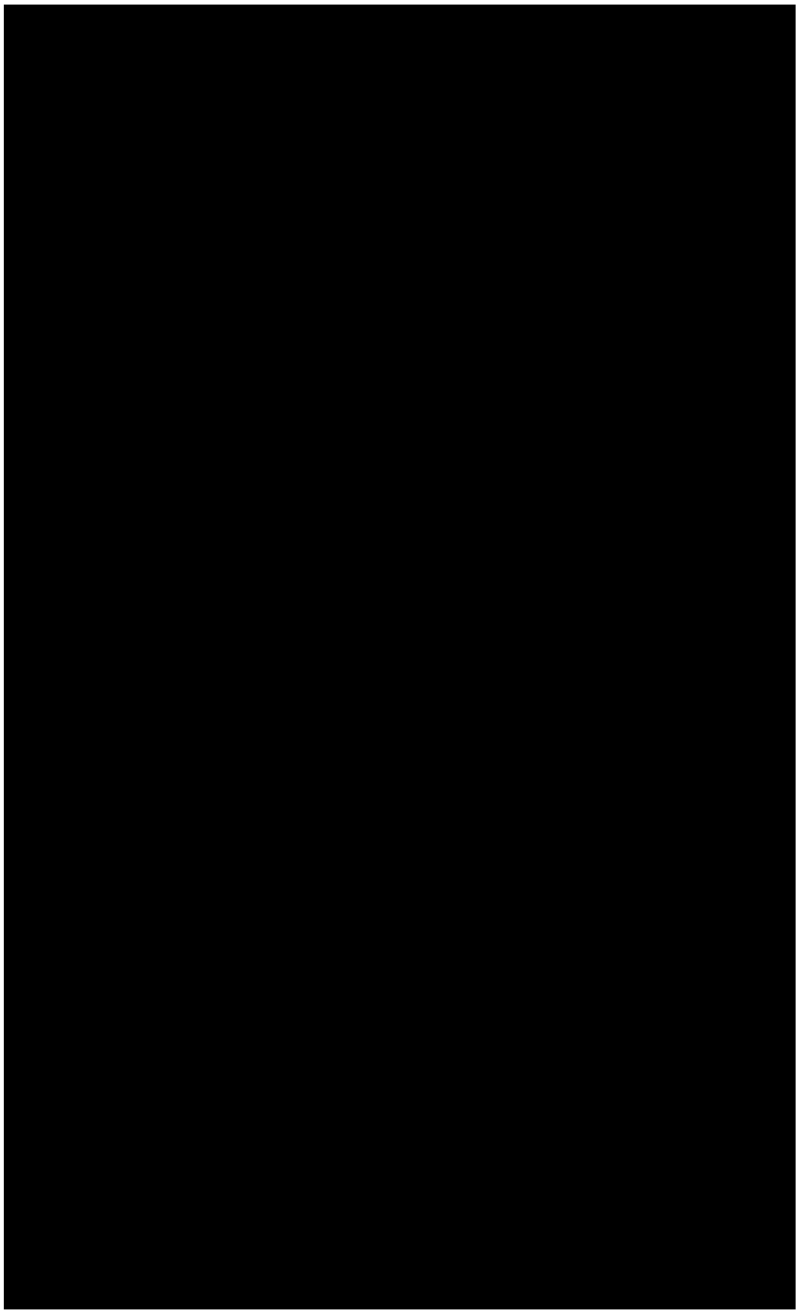

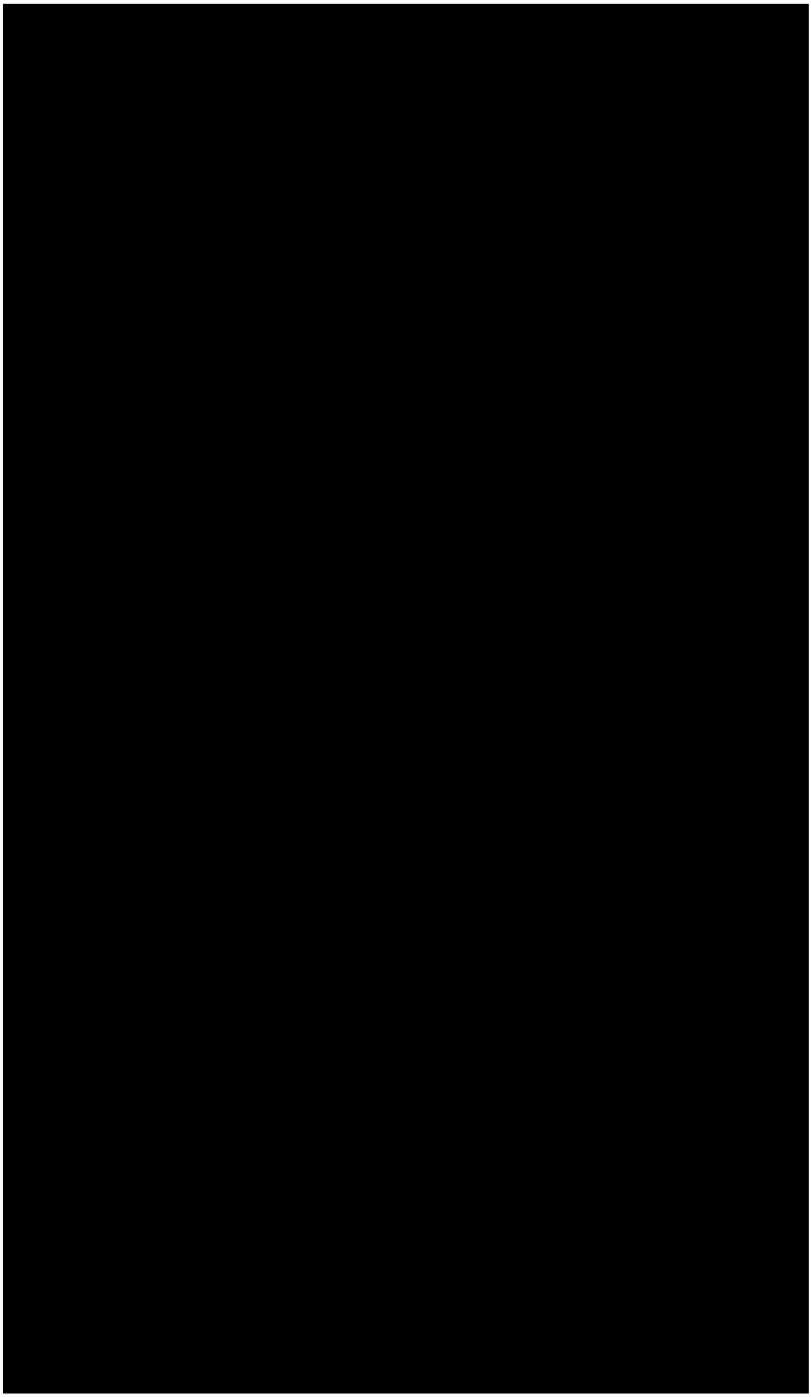

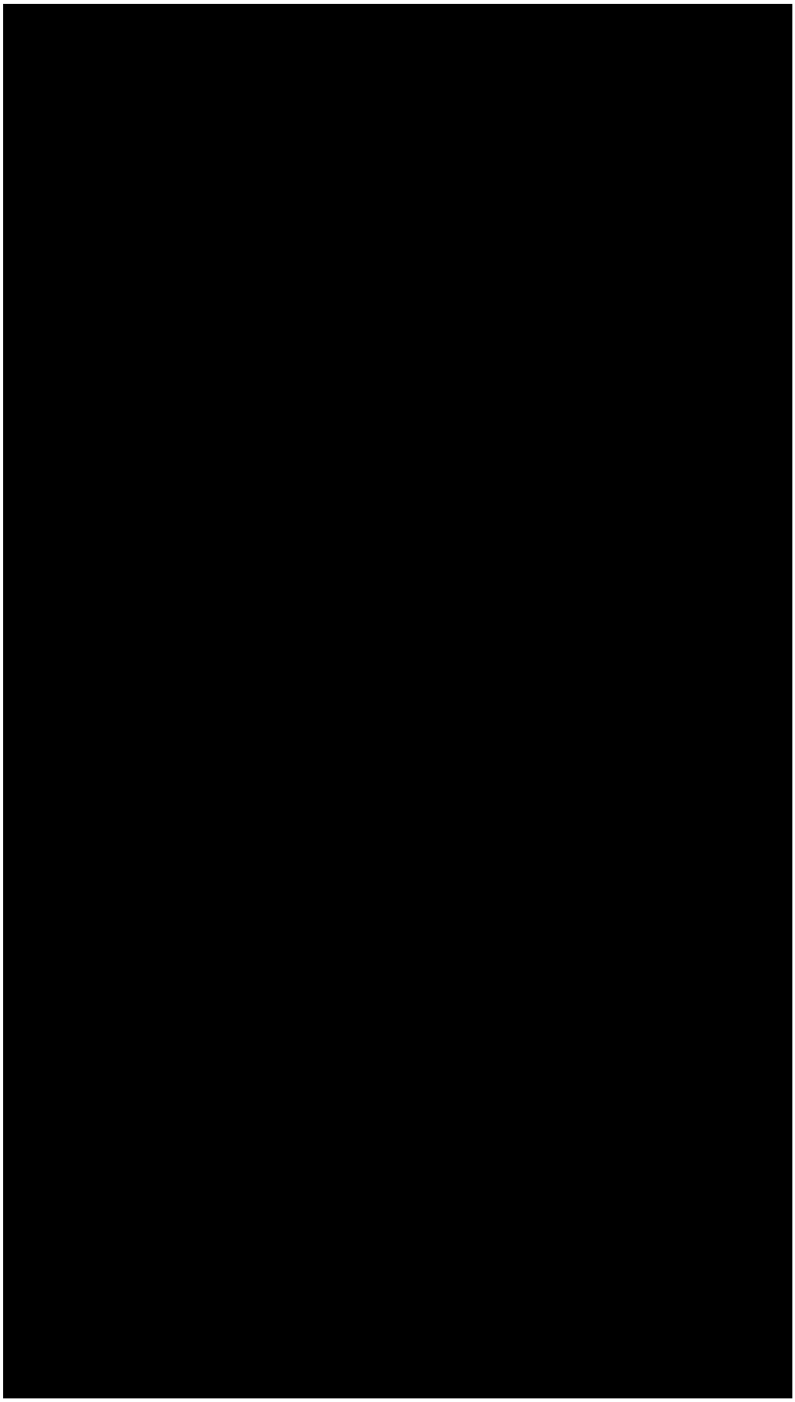

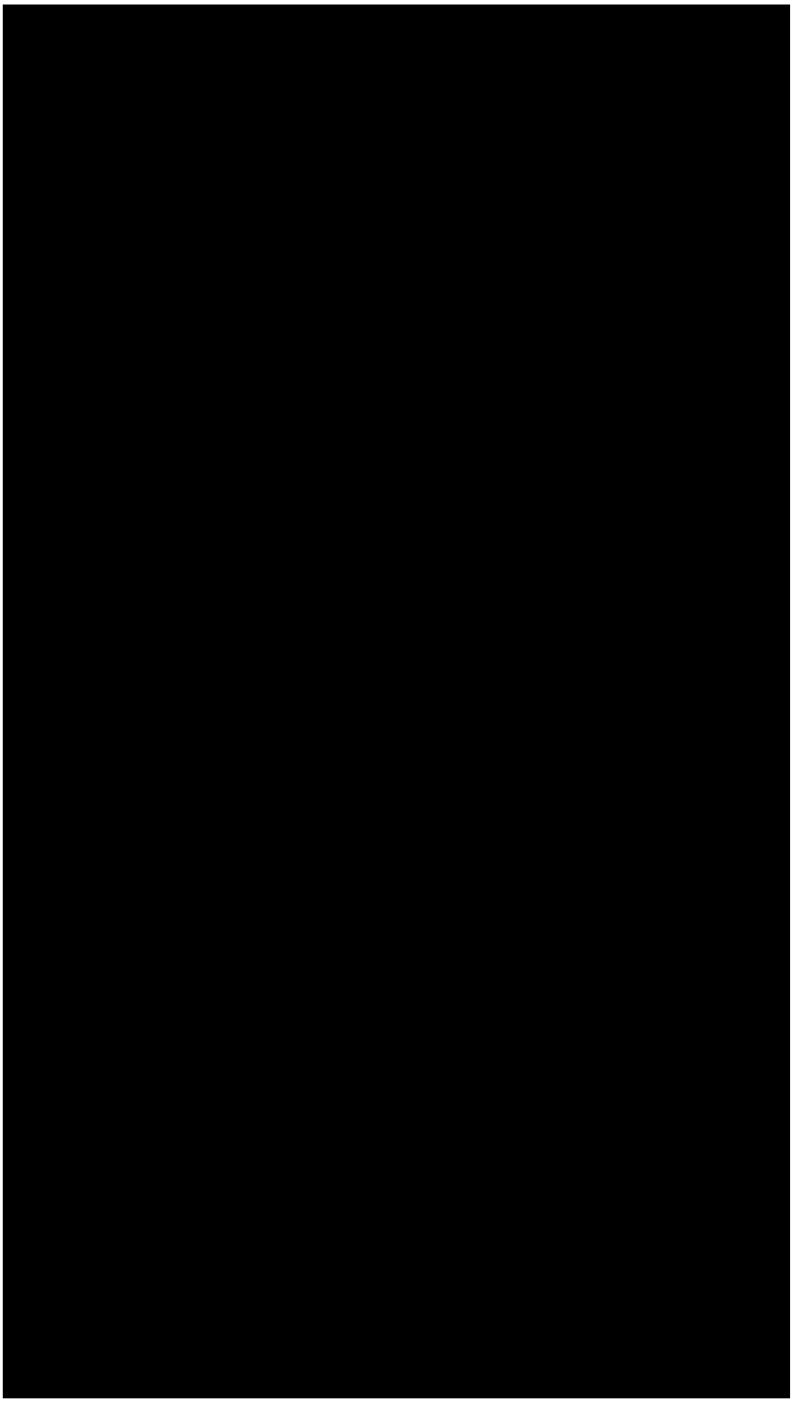

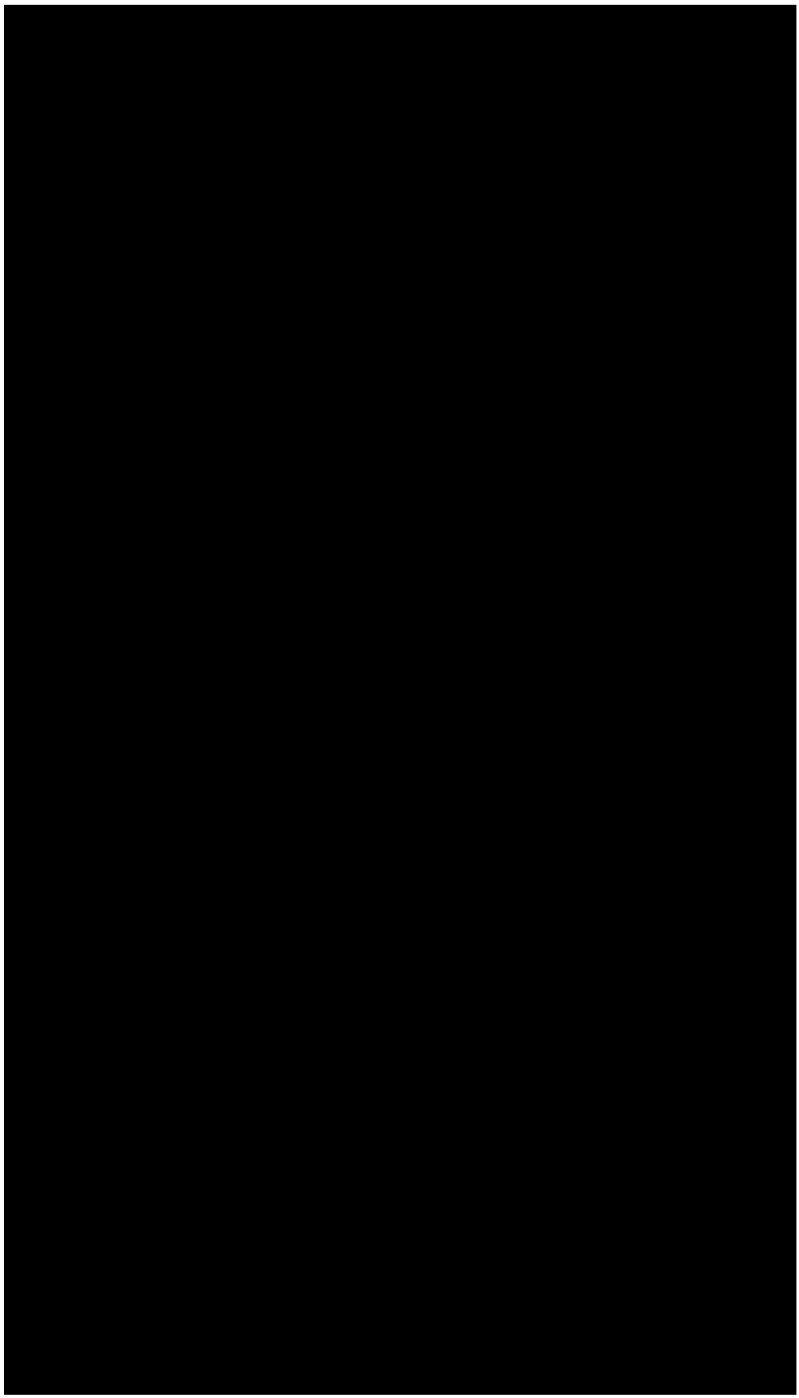

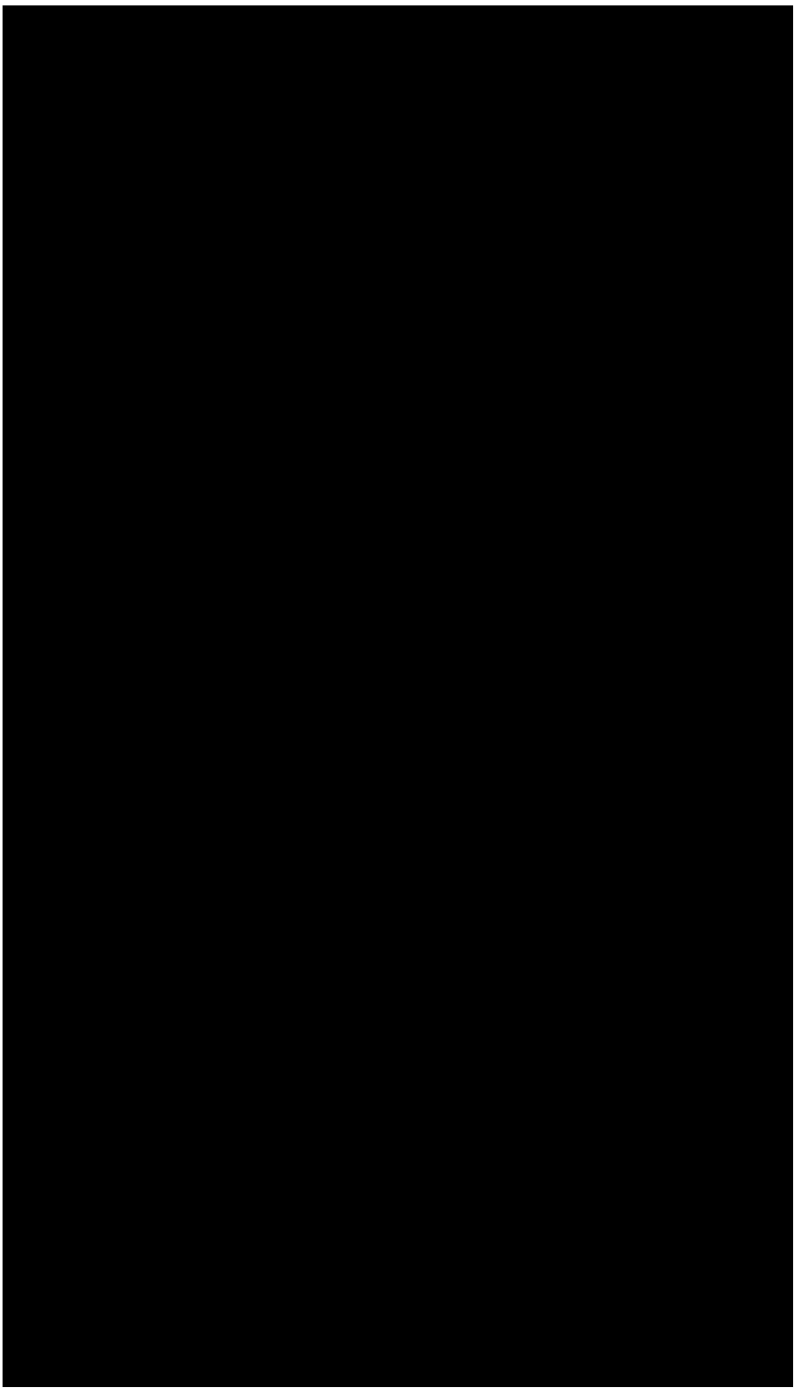

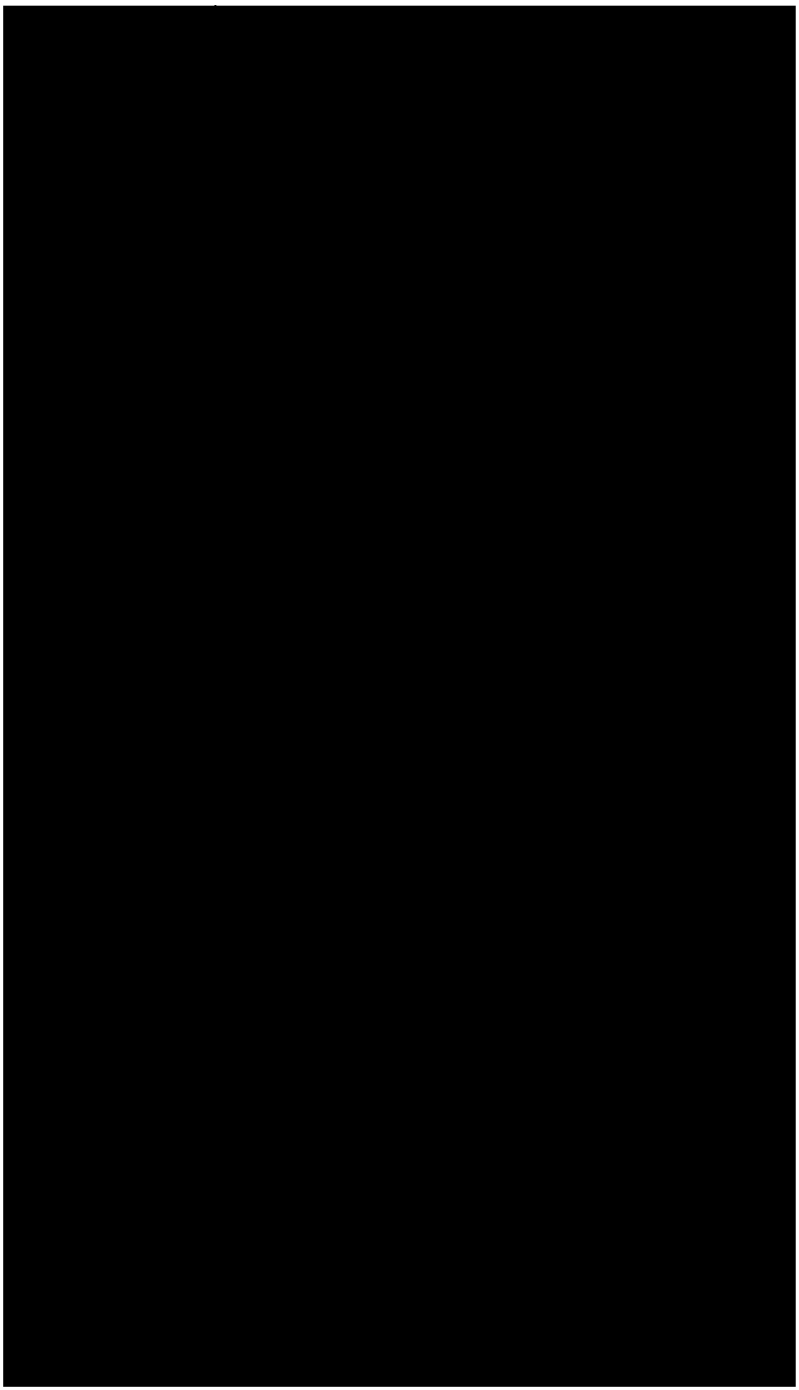

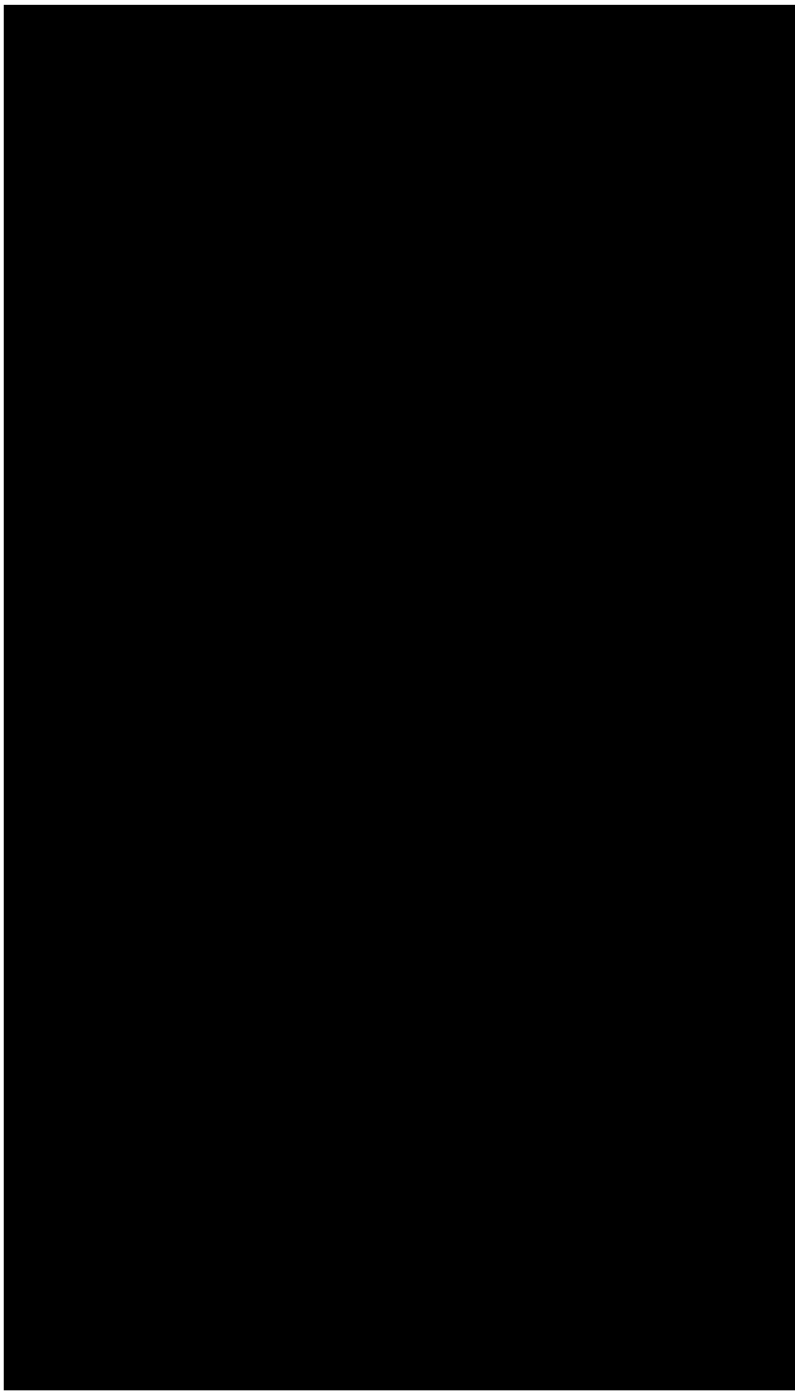

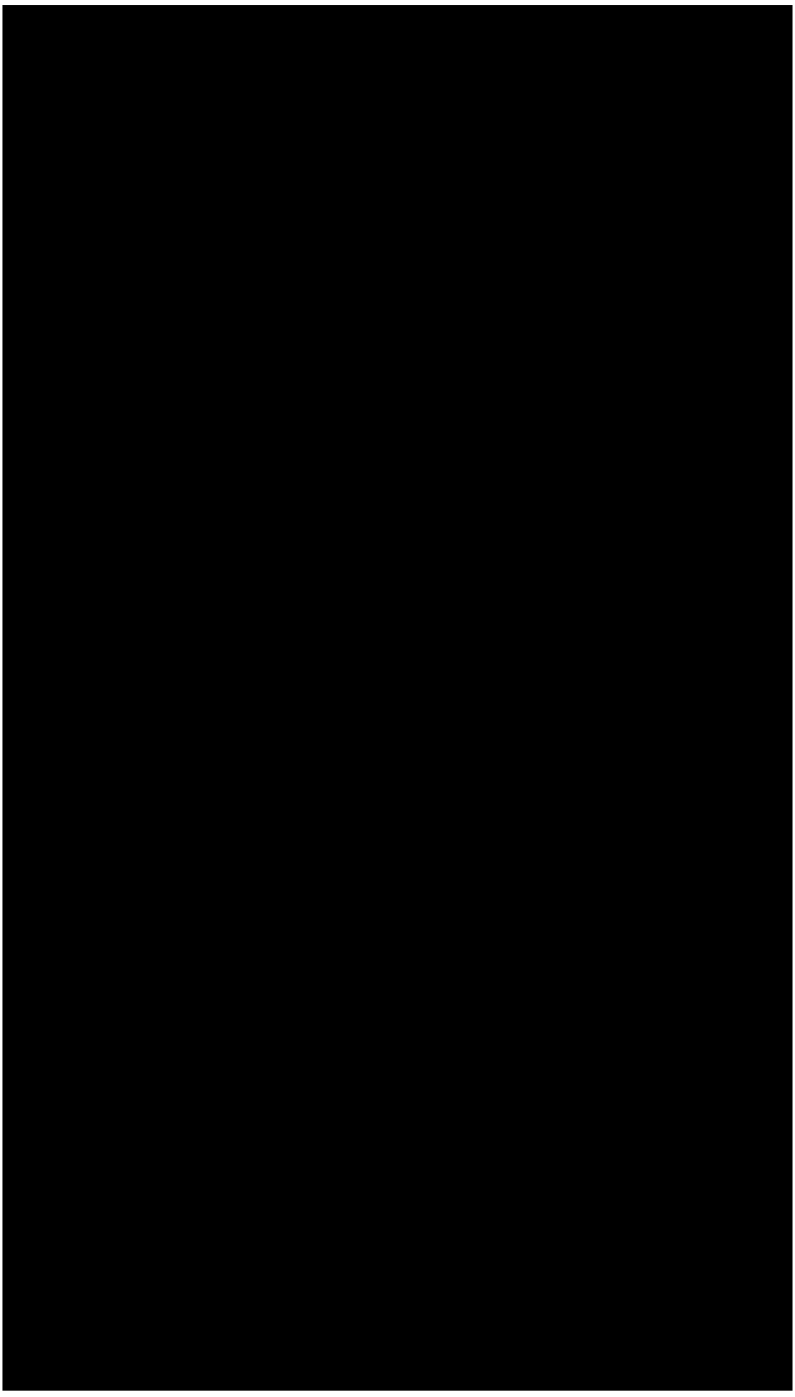

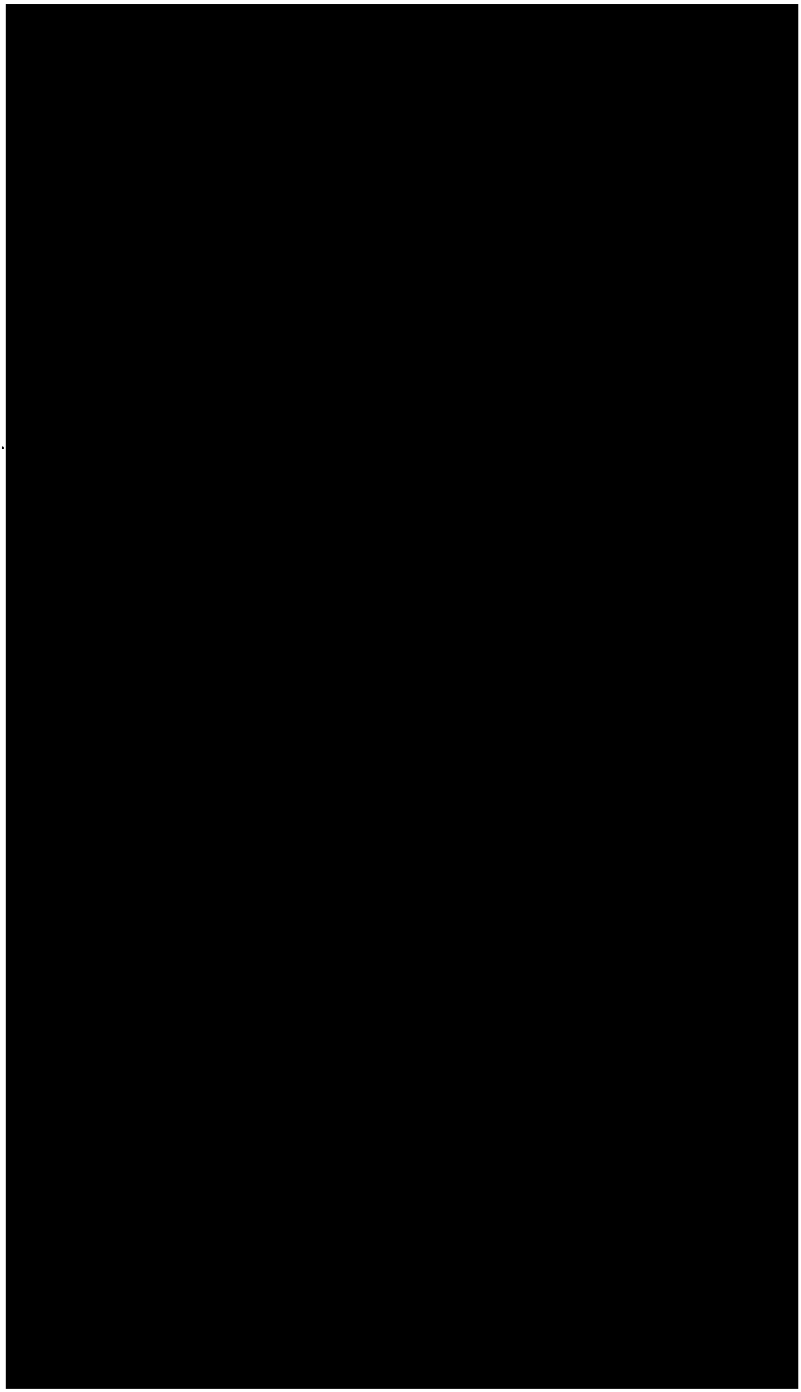

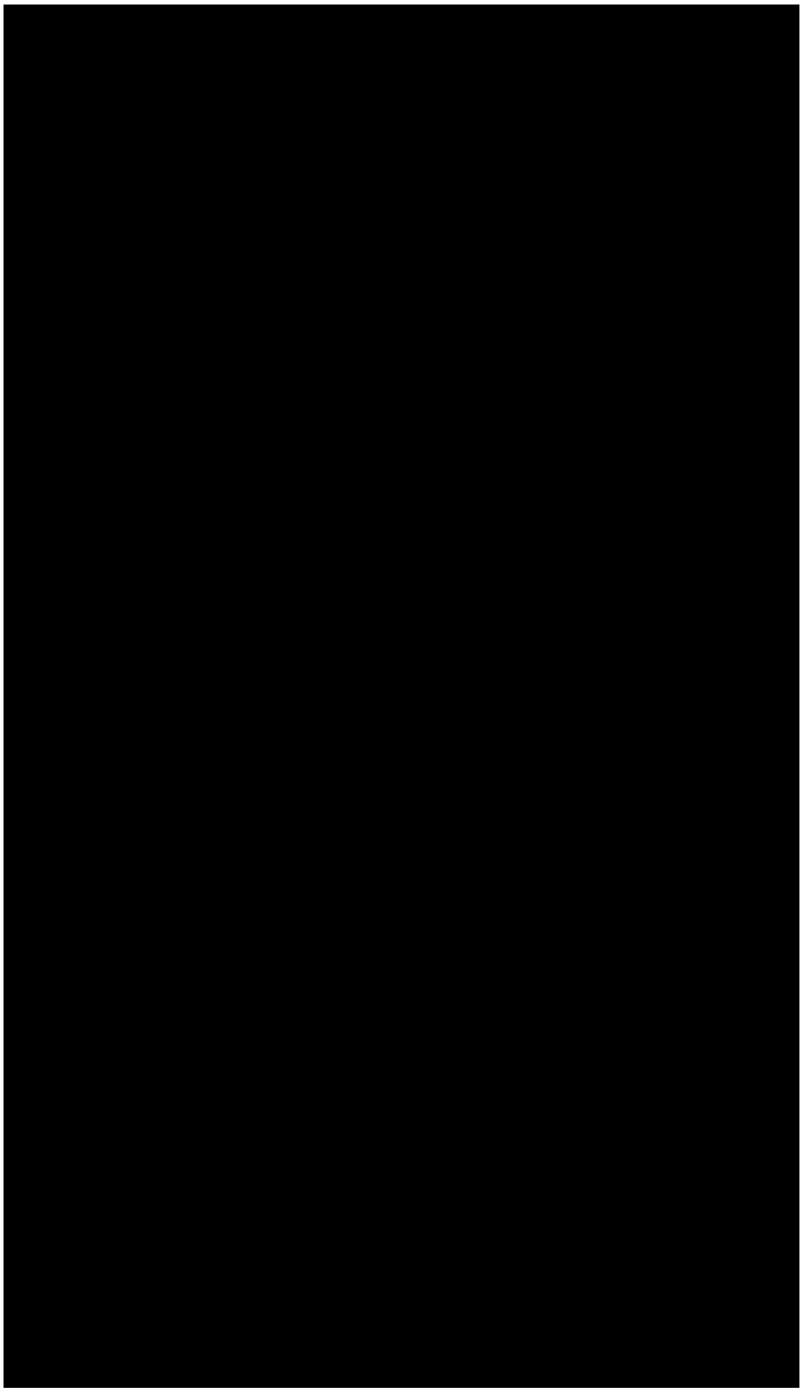

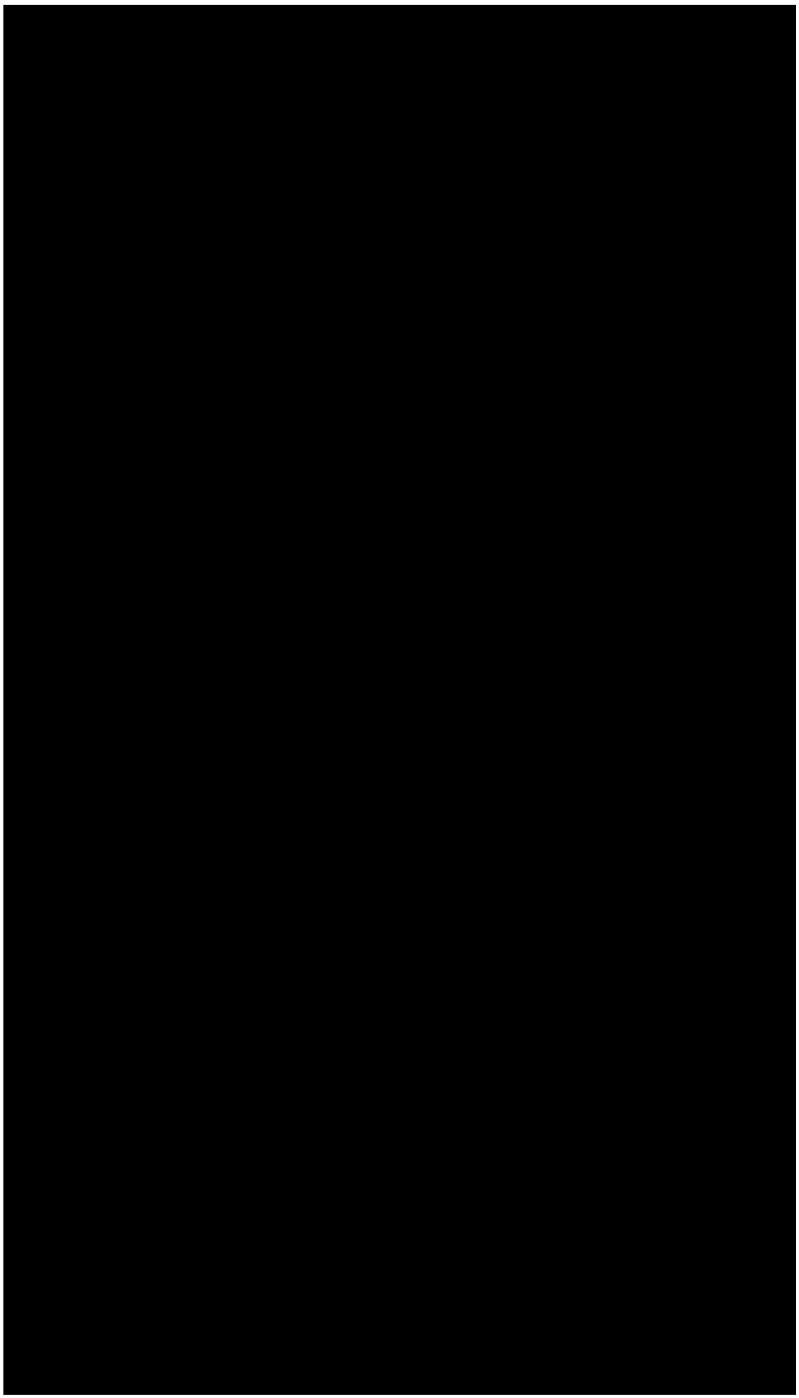

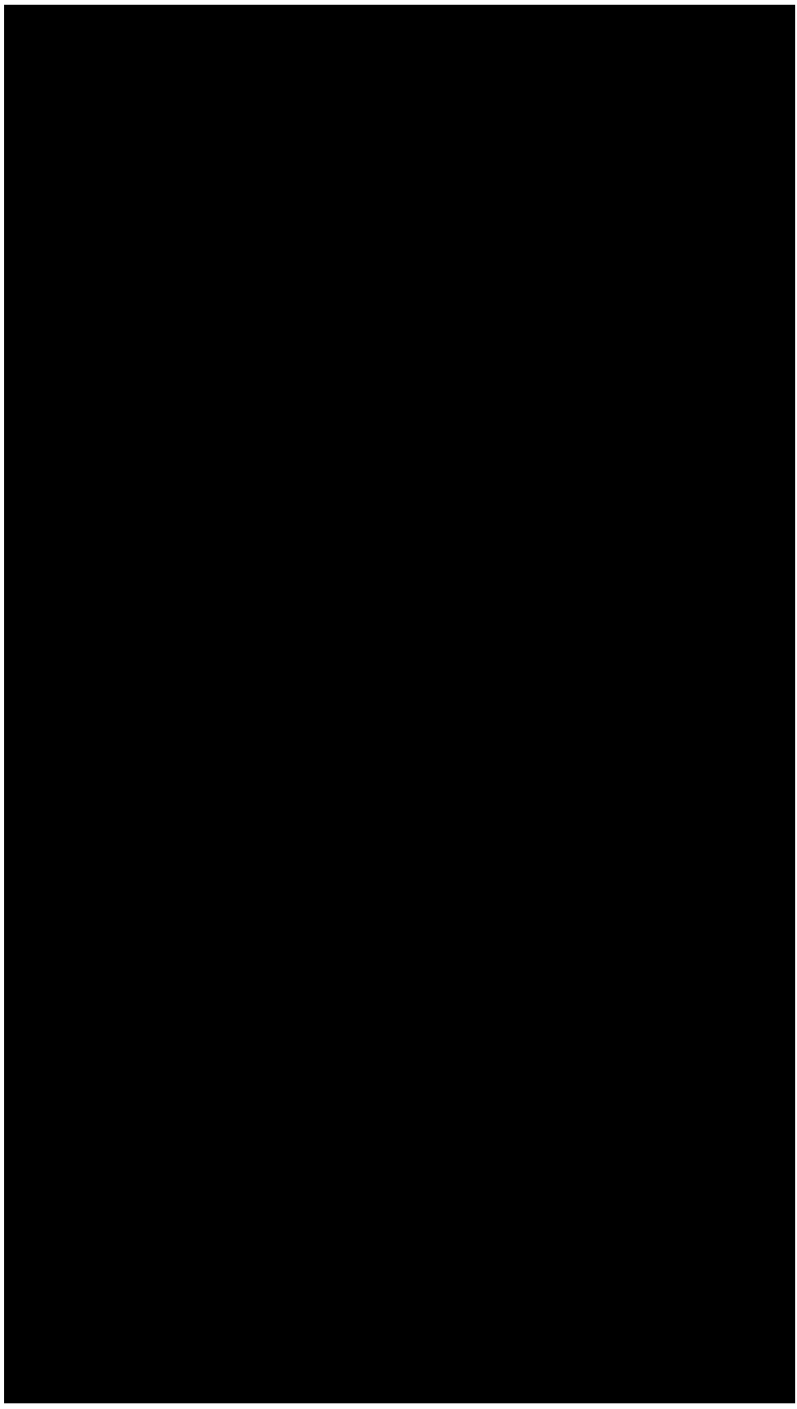

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Freddie SINKS *v.* STATE of Arkansas

CA CR 92-1314 864 S.W.2d 879

Court of Appeals of Arkansas
Division I
Opinion delivered November 3, 1993

[redacted]

[redacted]

Bradley, Coleman & Davidson, by: *W. Scott Davidson*, for appellant.

Winston Bryant, Att'y Gen., by: *Cathy Derden*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted in a bench trial of possession of cocaine. He was placed on three years supervised probation, fined $500.00 and assessed court costs. For reversal, he argues that the evidence is insufficient to support the verdict.

[redacted] On appeal, we view the evidence in the light most favorable to the State and affirm if the verdict is supported by substantial evidence. *LaRue* v. *State*, 34 Ark. App. 131, 806 S.W.2d 35 (1991). Substantial evidence is evidence which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resort to speculation or conjecture. *Kendrick* v. *State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992).

The record reveals that on July 18, 1991, police officers entered a residence in Jonesboro, Arkansas, pursuant to a search warrant. The appellant, who was the only person present in the residence when the warrant was executed, was found lying on a bed in a robe and underwear. The officers testified that a plate

with .024 grams of cocaine on it was on the bed within arm's reach of the appellant. This was seized, as were numerous items of drug paraphernalia including hemostats, scales, rolling papers, marijuana seeds, razor blades, a vial, a syringe, and $219.00. One officer testified that the serial numbers on two $20.00 bills found matched those of the bills used in a controlled buy made earlier at this residence.

Nancy Davis testified that the house belonged to her and that the room in which the appellant was found was her bedroom. She stated that she lived in the house with her son and that, although the appellant spent the night at the house occasionally, he was not living there, did not keep clothes there, did not help pay the bills, and did not have a key to the house. She testified that she and the appellant had an argument on the night of the appellant's arrest, that she left the house around midnight, that the appellant was the only person in the house when she left, and that there was not a plate on the bed. Finally, she testified that she did not use drugs and that she had never seen the appellant with drugs.

The appellant argues that the State did not prove beyond a reasonable doubt that he exercised care, control and management over the contraband and that he knew the matter possessed was contraband. His argument focuses on the fact that this was not his residence and that he had no ownership or possessory interest in the house. However, the appellant's argument is misplaced.

[redacted] It is not necessary to prove actual or physical possession in order to prove a defendant is in possession of a controlled substance. *Ramey* v. *State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993). Instead, a showing of constructive possession, which is the control or right to control contraband, is sufficient. *Cerda* v. *State*, 303 Ark. 241, 795 S.W.2d 358 (1990). Constructive possession can be implied where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. *Cerda*, *supra*.

[redacted] In the case at bar, the evidence shows that the controlled substance was retrieved from an area which was immediately and exclusively accessible to the appellant at the time of his arrest. *See Crossley* v. *State*, 304 Ark. 378, 802 S.W.2d 459

(1991); *Sanchez* v. *State*, 288 Ark. 513, 707 S.W.2d 310 (1986). The contraband was in plain view, in the appellant's immediate proximity, and the appellant was the only person in the residence at the time of the search. We think these circumstances are enough to permit the trial court to find the appellant guilty of possession of a controlled substance.

The appellant also argues that there was no evidence presented to establish he possessed a usable amount of cocaine as defined in *Harbison* v. *State*, 302 Ark. 315, 790 S.W.2d 146 (1990), as an amount "sufficient to be useable in the manner in which such a substance is ordinarily used." 302 Ark. at 322. However, we think that the appellant's reliance on *Harbison* is misplaced. The *Harbison* case involved a cocaine possession charge based only on possession of a bottle containing a trace amount of cocaine dust or residue; there was evidence in *Harbison* to show that the quantity of cocaine was too small to weigh and insufficient to have any effect on the human system. The Supreme Court reversed, holding that possession of a controlled substance must be of a measurable or usable amount to constitute a violation of Ark. Code Ann. § 5-64-401 (1987); *Harbison, supra*; *Kellogg* v. *State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992).

However, whereas the cocaine in *Harbison* was in an amount too small to be either used or measured, there was clearly a measurable amount of cocaine present in the case at bar.

Unlike in *Harbison*, the testimony in the case at bar indicated that the cocaine was capable of quantitative analysis, could be seen with the naked eye, was tangible and could be picked up. We find this evidence sufficient for the fact finder to determine that the substance was of a measurable amount.

The appellant also argues that there were discrepancies regarding the search and the search warrant. The appellant did not make this specific objection below, and we do not consider arguments made for the first time on appeal. *Magar* v. *State*, 39 Ark. App. 49, 836 S.W.2d 385 (1992). Accordingly, we find no error and affirm.

Affirmed.

PITTMAN AND ROBBINS, JJ., agree.

Jiles R. WRIGHT, III *v.* ABC AIR, INC.
d/b/a Mustang Agri-Air

CA 93-8 864 S.W.2d 871

Court of Appeals of Arkansas
En Banc
Opinion delivered November 3, 1993

[redacted]

[redacted]

Lohnes T. Tiner, for appellant.

Lindsey J. Fairley, for appellee.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case was injured while crop dusting in the course of his employment with the appellee. The Commission denied the appellant's claim after finding that the evidence failed to establish that the appellee had the requisite number of employees necessary for coverage under the Act. From that decision, comes this appeal.

On appeal, the appellant contends that the Commission erred in so finding. We find no error, and we affirm.

[redacted] The appellant's sole point for reversal consists of a challenge to the Commission's finding that he failed to establish that the appellee had the number of employees necessary for coverage under the Arkansas Workers' Compensation Law. When reviewing the sufficiency of the evidence to support a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if the Commission's decision is supported by substantial evidence. *Cagle Fabricating and Steel, Inc.* v. *Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *CDI Contractors* v. *McHale*, 41 Ark. App. 57, 848 S.W.2d 941 (1993). Where the Commission's denial of relief is based on the claimant's failure to prove entitlement to benefits by a preponderance of the evidence, the substantial evidence standard of review requires affirmance if the Commission's opinion displays a substantial basis for the denial of

relief. *Moser* v. *Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992).

[redacted] In order to be subject to the Arkansas Workers' Compensation Act, an employer must carry on an employment in which three or more employees are regularly employed in the course of business. *See* Ark. Code Ann. § 11-9-102(3)(A) (1987); *Stone* v. *Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (1988). In the case at bar, the record shows that only three individuals were involved with the corporation or its operations in any capacity: the appellant, whom the parties stipulated to be an employee; Randy Atkinson, who was in charge of the flying service; and Howard L. Cissell, who furnished the financing and was president of the corporation. Although corporate officers may be counted as employees if they take an active part in the business, *see Aerial Crop Care, Inc.,* v. *Landry*, 235 Ark. 406, 360 S.W.2d 185 (1962) and *Mountain Valley Superette* v. *Bottorff*, 4 Ark. App. 251, 629 S.W.2d 320 (1982), the question of whether a corporate officer is sufficiently active in the corporation to be considered an employee is to be determined by the circumstances of each case. *Fraternal Order of Eagles* v. *Kirby*, 6 Ark. App. 198, 639 S.W.2d 529 (1980). In the *Aerial Crop Care* case, *supra*, the Supreme Court found that the three corporate officers were employees based on evidence that each of them flew a plane, which happened to be the principal work of the corporation, and that each officer's pay depended to some extent on the amount of flying done. *Aerial Crop Care, Inc.*, 235 Ark. at 409. Likewise, the corporate officers in the *Mountain Valley* case were found to be employees on the strength of evidence that they worked in the daily operation of the corporation, and that the dividends they received from the corporation bore a direct relationship to the work performed by each of them in the daily operation of the business.

In the case at bar, the Commission found that Mr. Cissell was not sufficiently active in the business to be counted as an employee. In support of this finding, the Commission noted that there was no evidence that he was actively involved in the daily operations or routine decisions of the business, or relating to any other duties that he may have performed as president of the corporation. The Commission stated that, although there was evidence that Mr. Cissell visited the office on four or five occa-

sions, and that he was occasionally consulted on decisions of an extraordinary nature, his involvement in the business was essentially passive and he should therefore not be counted as an employee in considering whether the appellee is subject to the Act.

The Commission further found that the appellee did not come within the coverage of the Act under the provisions of Ark. Code Ann. § 11-9-102(3)(C), which provides that "[e]very employment in which one (1) or more employees are employed by a contractor who subcontracts any part of his contract" is covered by the Act. The Commission rejected this argument because it found that the evidence failed to establish that the appellee subcontracted any part of its business. In so holding, the Commission noted that, although Mr. Atkinson and Mr. Cissell characterized their relationship as one of a contractor/subcontractor, the question of whether one is a subcontractor is a question of fact for the Commission to decide. *Bailey* v. *Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982).

In holding that Ark. Code Ann. § 11-9-102(3)(C) was not applicable to this claim, the Commission noted that a subcontractor is defined as one who enters into a contract for the performance of work which another has already contracted to perform, *id.*, and found that Mr. Atkinson was responsible for setting up the operations and generally arranged all contracts for the corporation's services himself. Under the circumstances of this case, we think that the Commission's opinion provides a substantial basis for the denial of relief, and we hold that its decision is supported by substantial evidence.

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the majority opinion in this case. With all due respect, I think the majority has failed to apply the statutory law to the undisputed evidence.

The appellant was injured while flying an airplane which was spraying chemicals on a field owned by one of the appellee's customers. The threshold question is whether the appellant was

injured in an employment covered by the Arkansas Workers' Compensation Law.

The Commission found that the appellee was a corporation engaged "in the business of providing services consisting of the aerial application of pesticides and fertilizers." The Commission also found that the appellant and Randy Atkinson were employees of the corporation, but Howard Cissell, who was president of the corporation, was not actively involved in the operation of the business and should not be counted as an employee in considering whether the corporation was engaged in an employment subject to the compensation act. Therefore, the Commission found that the corporation was not subject to the act because it did not have three employees as required by Ark. Code Ann. § 11-9-102(3)(A) (1987).

On the other hand, the appellant contends that Randy Atkinson was not an employee of the corporation but was a subcontractor of the corporation and, therefore, the corporation was subject to the act under Ark. Code Ann. § 11-9-102(3)(C) (1987), which provides coverage for:

> (C) Every employment in which one (1) or more employees are employed by a contractor who subcontracts any part of his work.

It is well settled that we do not reverse the Commission unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. In this case, in my opinion, fair-minded persons applying the above quoted provision of the act, could not have found that the Commission reached the correct conclusion; therefore, we should reverse the Commission's decision. *See Price* v. *Little Rock Packaging Co.*, 42 Ark. App. 238, 856 S.W.2d 317 (1993).

The Commission reversed the decision of the administrative law judge who found that the appellee "by its own admission, subcontracted out a portion of [its] obligations to Mr. Atkinson." The Commission, in a two to one decision, stated that although both the appellee and Atkinson "have characterized the relationship as one of a subcontractor, the evidence fails to support that characterization." The Commission's opinion supports

its conclusion by quoting from *Bailey* v. *Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982), the statement that "subcontracting is merely 'farming out' to others all or part of work contracted to be performed by the original contractor" and then stating that "the evidence establishes that Atkinson was solely in charge of the routine operations of the business."

I do not think the Commission's reasoning actually reaches the point involved. The president of the appellee corporation testified that Randy Atkinson was in charge of "my flying service" and then looked at a document, admitted it said that Atkinson was a "self-employed sub-contractor," and admitted that this was "correct." The document was introduced into evidence. It is signed by Mr. Atkinson and states:

> I hereby acknowledge that I am an independent contractor and not an employee of Mustang Agri-Air, and I hereby agree to be responsible for commissions earned. I hereby request that Mustang Agri-Air do not withhold any taxes from the above earnings.
>
> As a self-employed sub-contractor I agree that I am responsible for insurance and personal liability while working for named business above. I hold named business above harmless in all injury or damages to other parties also.

In addition to the above evidence, the appellant points to the record where one of the appellee's attorneys stated at the hearing before the law judge that Mr. Atkinson was "an independent contractor." Moreover, the appellant testified that Mr. Atkinson had his own airplane; that the plane appellant was flying on the day he was injured was owned by the appellee; and that "sometimes" the appellant and Atkinson would "fly the same field." The appellant also testified that the owner of the field that appellant was spraying at the time of the crash came to the appellee's office and arranged for the job to be done. No one testified contrary to the appellant's testimony.

Most of the cases dealing with subcontractors have been concerned with what is now Ark. Code Ann. § 11-9-402 (1987) (formerly Ark. Stat. Ann. § 81-1306). That statute provides that where a subcontractor fails to secure compensation required by the Workers' Compensation Law the prime contractor shall be

liable for compensation to the employees of the subcontractor. *Bailey* v. *Simmons*, *supra*, pointed out that the statute applies only where the "prime contractor" is contractually bound to perform the work in which the subcontractor's employee was engaged at the time of the injury. *See also D&M Construction Co.* v. *Archer*, 14 Ark. App. 198, 686 S.W.2d 799 (1985). The terms "independent contractor" and "subcontractor" should not confuse the matter because one can be "an independent subcontractor." *Hale* v. *Mansfield Lbr. Co.*, 237 Ark. 854, 855, 376 S.W.2d 670, 671 (1964). In fact, a subcontractor is ordinarily an independent contractor. *Thomas* v. *Southside Contractors, Inc.*, 260 Ark. 694, 697, 543 S.W.2d 917, 919 (1976).

Although it is conceded that the appellee does not have workers' compensation insurance, Ark. Code Ann. § 11-9-402 does not apply in this case because the injured employee was an employee of the prime contractor — the appellee — and not an employee of the subcontractor. However, Ark. Code Ann. § 11-9-102(3)(C) does apply in this case because it provides that every employment is subject to the Workers' Compensation Law where "one or more employees are employed by a contractor who subcontracts any part of his work." In *Liggett Construction Co.* v. *Griffin*, 4 Ark. App. 247, 629 S.W.2d 316 (1982), this court held that Ark. Stat. Ann. § 81-1306 (now Ark. Code Ann. § 11-9-402) makes a prime contractor liable for compensation to employees of a subcontractor who has failed to secure workers' compensation coverage. In our en banc decision, we stated:

> The primary purpose of this provision is to protect the employees of subcontractors who are not financially responsible, and to prevent employers from relieving themselves from liability by doing through independent contractors what they would otherwise do through direct employees. *Hobbs-Western Co.* v. *Craig*, 209 Ark. 630, 192 S.W.2d 116 (1946).

4 Ark. App. at 251, 629 S.W.2d at 318. I think it is obvious that Ark. Code Ann. § 11-9-102(3)(C) is intended to accomplish this same general purpose.

In the present case the appellee is engaged, as found by the Commission, "in the business of providing services consisting of the aerial application of pesticides and fertilizers." It has one

employee — the appellant — who flies an airplane, owned by the appellee, and makes aerial application of the pesticides and fertilizers. The appellee also has an arrangement with Randy Atkinson — evidenced by a written document — whereby Atkinson, who is an independent contractor and not an employee, also flies an airplane (sometimes his own plane) and makes aerial application of the pesticides and fertilizers. Under this method of doing business the appellee — in the absence of the provisions in Ark. Code Ann. § 11-9-102(3)(C) — would not have to carry insurance, or be responsible, for workers' compensation coverage on the appellant. But Ark. Code Ann. § 11-9-102(3)(C) provides that the appellee is liable for coverage because it is engaged in an "employment in which one (1) or more employees are employed by a contractor who subcontracts [a] part of his work."

The president of the appellee corporation, who the Commission found "furnished the financing for the corporation," testified that Atkinson was in charge of "my flying service" and that the written document signed by Atkinson correctly set out Atkinson's status as a "self-employed sub-contractor." Appellee's attorney admitted the same thing in the hearing before the law judge. The written document also specifically requests that the appellee not withhold any taxes from the "commissions" earned by Atkinson.

Under the law and the evidence, I have to find that the appellee is liable for the workers' compensation benefits to which the appellant is entitled as a result of his injury. I would reverse and remand for the determination of those benefits.

Edward James SNISKY *v.* Sharon Kay WHISENHUNT

CA 93-163 864 S.W.2d 875

Court of Appeals of Arkansas
Division II
Opinion delivered November 3, 1993

[redacted]

[redacted]

[redacted]

David Goldman, P.A., for appellant.

Larry Honeycutt, for appellee.

JUDITH ROGERS, Judge. The appellant, Edward James Snisky, appeals from an order of the Garland County Chancery Court in which he was found in contempt and which provided a period of visitation for the parties' minor child with appellee, Sharon Kay Whisenhunt. On appeal, appellant raises two issues in which he contends that the chancery court lacked jurisdiction and thus committed error by both holding him in contempt and in granting appellee visitation with the child. We disagree with appellant's argument on the first point and affirm the finding of contempt; however, we agree with his second argument and reverse the order of visitation.

The record discloses that the parties in this case cohabitated for a time in the Bahamas and later in the State of Florida. On May 30, 1989, a male child was born of this unsolemnized union. Appellee thereafter left Florida with the child and returned to her home in Hot Springs, Arkansas. There, in the Garland County Chancery Court, she initiated a paternity action against appellant. On February 4, 1991, a consent order was entered whereby appellant was recognized as the natural father of the child. As per their agreement, appellee was granted custody of the child, while appellant was given certain rights of visitation and was also required to pay child support. The agreed order further pro-

vided that "[t]he parties have consented to the Court having both in person [sic] and in rem jurisdiction of this matter, as well as retaining such jurisdiction for any further Orders of Courts."

It appears that the parties resolved their earlier differences with the result that appellee and the child moved back to Florida to live with appellant. The case file from the Garland County Chancery Court contains a letter written by appellant's counsel, dated June 13, 1991, informing the Court of the parties' reconciliation and their agreement to abate the payment of child support. The letter also states that "[b]oth parties are aware that if the situation in Florida does not work to the benefit of all parties, that an action can be brought in Garland County for adjudication of any new issues which may arise."

After residing in Florida for roughly seven months, appellee again returned to Arkansas with the child. On April 9, 1992, shortly after appellee's departure, appellant obtained an *ex parte* restraining order from the Circuit Court of Broward County, Florida, which prohibited appellee from removing the child from the county and granted temporary custody to appellant. It appears from the record that appellant obtained this emergency order based on his representations that appellee's whereabouts were unknown and that the child was in danger due to appellee's drug dependency. On April 15, 1992, appellee filed a petition in the Garland County Chancery Court seeking, among other things, the reinstatement of child support. Appellee further asked the chancery court to confirm custody of the child with her, to confirm the court's jurisdiction, and not to give the restraining order entered by the Florida court full faith and credit. On May 20, 1992, appellee also filed a motion asking that appellant be held in contempt, alleging that appellant's institution of a custody action in Florida was a violation of their agreement contained in the court's order of February 4, 1991, that custody matters be litigated in Arkansas.

After having the issue briefed, the chancellor declined to exercise jurisdiction over the matter of custody based on the finding that Florida had become the home state of the child under both the PKPA and UCCJA. An order to that effect was entered on May 27, 1992, and it appears that custody of the child was transferred to appellant in accordance with the Florida court order.

The case thereafter proceeded to a hearing on appellee's motion for contempt. By order of August 23, 1992, the chancellor ruled that appellant was in contempt of the consent order for having brought a custody action in the Florida court. As a result, appellant was required to pay $4,526 into the registry of the court, plus $775 for costs. In addition, the chancellor ordered appellant to bring the child to Arkansas for visitation with appellee from July 4 to August 4, 1992. In the order, the chancellor also made a specific finding that appellant had misled the Florida court in securing the *ex parte* order. This appeal followed.

In this appeal, no questions are presented involving the interpretation of the provision in the consent order preserving jurisdiction in the Arkansas Court. In other words, we are not asked to decide such issues as whether the jurisdictional provision of the agreed order was sufficiently definite and certain in its terms to support a finding of contempt,[1] or whether the provision constituted a valid forum selection clause as opposed to a simple retention of jurisdiction provision.[2] Indeed, in his response to appellee's motion for contempt, appellant acknowledged that the order accurately reflected the parties' agreement that Arkansas would remain the setting for future custody litigation. Instead, as his first point, it is appellant's sole contention that the chancellor did not have jurisdiction over the contempt proceeding once jurisdiction of the custody matter was relinquished to the Florida Court. We do not agree.

The chancellor here deferred to the Florida court's exercise of jurisdiction over the issue of custody for the reason that Florida was the child's home state under both the PKPA and UCCJA. This decision was based on evidence that the child had

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[1]The general rule is that 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. *Arkansas Department of Human Services* v. *Gruber*, 39 Ark. App. 112, 839 S.W.2d 543 (1992).

[2]Choice of forum clauses in contracts have generally been held binding, unless it can be shown that the enforcement of the forum selection clause would be unreasonable and unfair. *Nelms* v. *Morgan Portable Building Corp.*, 305 Ark. 284, 808 S.W.2d 314 (1991). For cases discussing such clauses in the context of custody litigation, see *Crites* v. *Alston* , 837 P.2d 1061 (Wyo. 1992); *In re Marriage of Beuche* , 550 N.E.2d 48 (Ill. App. Ct. 1990); *In re Marriage of Hilliard* , 533 N.E.2d 543 (Ill. App. Ct. 1989).

lived in Florida for the preceding seven months, as well as most of his young life. Despite the provision in the consent order, the chancellor acted well within his discretion in declining jurisdiction over the issue of custody. *See Slusher v. Slusher*, 31 Ark. App. 28, 786 S.W.2d 843 (1990); Ark. Code Ann. § 9-13-207 (1987). However, under the peculiar circumstances of this case, we do not view the chancellor's decision to relinquish jurisdiction over the custody matter as having deprived the court of jurisdiction over the contempt proceeding.

The PKPA and UCCJA only specify circumstances under which a court has jurisdiction to make a "child custody determination." Looking to the PKPA, "child custody determination" is defined as a "judgment, decree, or other order of a court providing for the *custody or visitation* of a child, and includes permanent and temporary orders, and initial orders and modifications." 28 U.S.C. § 1738A(b)(3) (1982) (emphasis supplied). The chancellor in this case simply declined to entertain jurisdiction of the pending custody determination, which involved the potential modification of the prior custody order. There is a distinction, however, between the *modification* of a custody decision and the *enforcement* of a previous court order. When modification of a previous custody order is at issue, the focus is on whether there has been a material change in circumstances and whether modification is in the best interest of the child. *Bennett v. Hollowell*, 31 Ark. App. 209, 792 S.W.2d 338 (1990). On the other hand, the subject of a contempt proceeding is whether the alleged contemnor willfully disobeyed a previous court order. *See e.g. Dees* v. *Dees*, 28 Ark. App. 108, 771 S.W.2d 299 (1989). In this instance, that portion of the order which the chancellor was asked to enforce through contempt did not involve any questions relative to a custody determination, as that term has been defined. At issue was solely whether appellant's actions were in violation of the agreed order. Since the question of appellant's contempt did not touch upon the subject of child custody, jurisdiction of the contempt proceeding was not governed by the PKPA. Therefore, the chancellor's refusal of jurisdiction over the custody matter pursuant to the PKPA did not affect the chancery court's inherent authority to enforce its order with regard to an issue unconnected with the custody determination. In sum, under these facts, we hold that the chancery court retained juris-

diction over the issue of whether appellant was in contempt of the agreed order.

As part of this first issue, appellant also contends that he cannot be held in contempt for taking advantage of the federal statute by filing an action for modification in the child's home state. While appellant's pursuit of custody in Florida was in keeping with the PKPA, his actions were, nevertheless, in disregard of his agreement, which was incorporated as an order of the court, that Arkansas remain the forum for custody litigation. As the argument is presented, we can find no error in the chancellor's determination that appellant not be allowed to disobey a court order with impunity.

As his second issue, appellant argues that the chancellor lacked jurisdiction to grant appellee visitation rights with the child. We agree that the chancellor's order of visitation was inconsistent with his decision favoring jurisdiction in the Florida court. As noted above, the definition of "custody determination" in the PKPA does include orders providing for visitation with the child. Once the chancellor declined jurisdiction over the custody determination, it follows that the chancery court no longer had jurisdiction to order a period of visitation. It is apparent that the chancellor's action was prompted by appellant's failure to bring the child to Arkansas for the hearing as appellant had assured the court he would do at a previous hearing. While the chancellor's dismay is understandable, we cannot uphold the order of visitation. We must therefore reverse on this point.

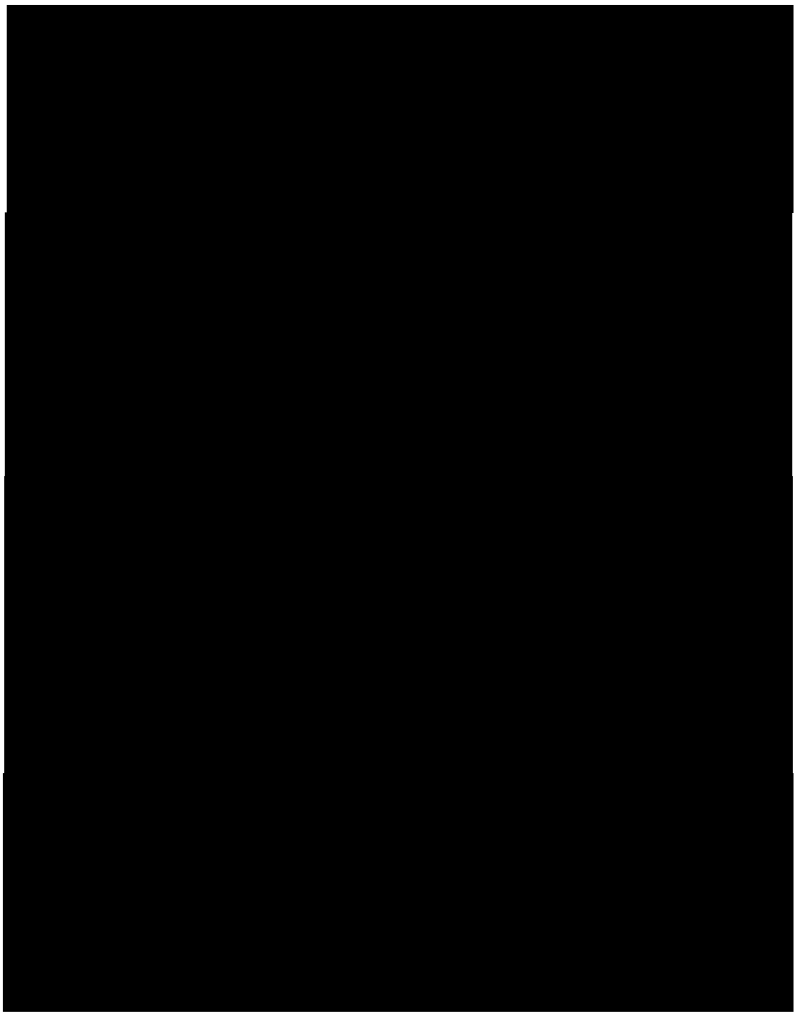
Affirmed in part; reversed in part.

JENNINGS, C.J., AND PITTMAN, J., agree.

RAZORBACK VACUUM *v.* DIRECTOR, Arkansas Employment Security Department and Sharon L. Clark

E 92-179 865 S.W.2d 649

Court of Appeals of Arkansas
Division I
Opinion delivered November 17, 1993



[redacted]

[redacted]

Morse U. Gist, Jr., for appellant.

Allen Pruitt, for appellees.

JAMES R. COOPER, Judge. The appellee in this unemployment compensation case filed a claim for unemployment benefits which was denied by the Agency on the grounds that she voluntarily left her last work without good cause connected with the work. This decision was affirmed by the Appeal Tribunal. The appellee then appealed the Appeal Tribunal's decision to the Board of Review. Prior to a telephone hearing before the Board, the appellant filed a Chapter 11 bankruptcy petition. After a hearing in which the appellant did not participate, the Board issued a decision reversing the Appeal Tribunal, finding that the appellee left her last work with good cause connected with the work, and granting the appellee benefits. From that decision, comes this appeal.

For reversal, the appellant contends that the hearing conducted by the Board of Review should have been stayed pursuant to the automatic stay provision of the Federal Bankruptcy Code, 11 U.S.C. § 362(a)(1).

The automatic stay provision of the Bankruptcy Act is extremely broad; by its terms, it is "applicable to all entities" to stay the commencement or continuation of a wide range of proceedings, including administrative proceedings. U.S.C. §362(a)(1) (1988). However, various exceptions are contained in subsection (b) of § 362, including the provision in § 362(b)(4) that the filing of a bankruptcy petition will not operate as a stay under sub-

section (a)(1) "of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." The narrow question presented by this appeal is whether an administrative hearing by the Arkansas Board of Review to determine if a claimant is qualified to draw unemployment benefits is exempt from the automatic stay provisions of the Bankruptcy Code as an exercise of the State's police power pursuant to 11 U.S.C. § 362(b)(4). We hold that such a hearing is exempt from the automatic stay, and we affirm.

The legislative history of § 362(b)(4) states that:

> This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

The appellant relies upon the case of *Herr* v. *State*, 28 B.R. 465 (1983), which analyzed the application of the automatic stay to the attempts of Maine's Employment Security Bureau to recover overpayments to the claimant on the basis of the pecuniary purpose and public policy underlying the State action. Although the *Herr* Court found that the Bureau was exempt from the automatic stay, the appellant argues that we should employ the same analysis in deciding the case at bar. We decline to do so, however, because we think that the circumstances of the present case are more akin to those presented to the Sixth Circuit Court of Appeals in *In re Mansfield Tire and Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981).

In *Mansfield*, a case of first impression, the Sixth Circuit held that the administration of workers' compensation claims by a state agency created for that purpose is a valid exercise of the police or regulatory power of a governmental unit so as to fall within the exception of § 362(b)(4). In so holding, the Sixth Circuit noted that actions under the Fair Labor Standards Act and enforcement proceedings by the National Labor Relations Board had been held to fall within the exception enunciated in § 362(b)(4). Furthermore, the Court noted that the Industrial Commission is

liable to the injured employee for his benefits. *Mansfield, supra*, 660 F.2d at 1115.

The Arkansas Employment Security Law was enacted under the police power of the State of Arkansas for the public good and general welfare of the citizens of this State. Ark. Code Ann. §11-10-102(3) (1987). Furthermore, as was the case in *Mansfield, supra*, benefits are not paid directly by the employer; instead, Ark. Code Ann. § 11-10-501 (1987) provides that all benefits under the Act are payable from the Unemployment Compensation Trust Fund through Employment Security Division offices. The effect on the employer in the case at bar would be limited to the calculation of the rate of contribution to be paid in the future. *See* Ark. Code Ann. § 11-10-701 et. seq.

The appellant asserts that *Mansfield* should be distinguished because the workers' compensation proceedings at issue in that case involved considerations of public safety which are absent from the unemployment compensation proceeding that gave rise to the case at bar. We find no meaningful distinction on that basis. "Police power" has been defined as "the power vested in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances . . . as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." *Black's Law Dictionary*, 1317 (4th ed. 1968). The furtherance of a State's goals in the regulation of public welfare has been cited as a factor in determining whether a government unit has exercised police power so as to be exempt from the automatic stay provision of § 362(b)(4). *See In re Piperi*, 133 B.R. 846 (Bankr. S.D. Tex. 1990). The Employment Security Law of the State of Arkansas was enacted by the Legislature for the specific purpose of alleviating the "serious menace to the health, morals, and welfare" of the people of Arkansas posed by economic insecurity due to unemployment. Ark. Code Ann. § 11-10-102(1) (1987). We hold that, under the circumstances of the case at bar, the Board of Review did not err in concluding that the administrative hearing was exempted from the automatic stay provisions under subsection (b)(4), and we affirm.

Affirmed.

PITTMAN and ROGERS, JJ., agree.

Thomas Craig KELLER and Craig Keller Flying Service, Inc.
v. SAFECO INSURANCE COMPANY OF AMERICA and
General Insurance Company of America

CA 93-528 866 S.W.2d 419

Court of Appeals of Arkansas
En Banc
Opinion delivered November 17, 1993

[redacted]

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

Snellgrove, Laser, Langley & Lovett, by: *Todd Williams*, for appellee.

JOHN B. ROBBINS, Judge. Thomas Craig Keller and Craig Keller Flying Service, Inc., appeal from a summary judgment for appellees, Safeco Insurance Company of America and General Insurance Company of America, on a claim for reimbursement of $8,650.00 for damages to an airplane owned by appellants. We affirm.

On March 18, 1991, appellees issued an insurance policy to appellants for $140,000.00 in coverage for a 1975 AgCat airplane. This policy had a $1,000.00 deductible if a loss occurred while the plane was "not in motion" and a deductible of ten percent of the total amount of insurance if the airplane was "in motion" when the loss occurred. In the definitions section, "in motion" was defined as: "The *aircraft* shall be deemed *'in motion'* when moving under its own power, or momentum therefrom. The *aircraft* shall be deemed *'not in motion'* under all other circumstances." "Aircraft" was defined as follows:

> *"Aircraft"* means the airplane or rotorcraft described herein and shall include the engines, propellers, rotor blades, tools and repair equipment therein which are standard for the make and type of the *aircraft,* and operating and navigation instruments and radio equipment usually attached to the *aircraft,* including parts temporarily detached and not replaced by other similar parts.

In another provision of the policy, the application of both deductibles was explained as follows:

> In the event the *aircraft*, while *not in flight*, is damaged by wind, hurricane, tornado, ice, snow or fire which occurs while the *aircraft* is unhangared and *not in flight*, the insurance afforded by Coverages H & I is subject to a single amount deductible, "Not in Motion" or "In Motion," of ten percent (10%) of the amount of insurance for the *aircraft*.[1]

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[1]The dissent suggests that this deductible provision may have not been in effect at the time of the accident. However, the page of the subject policy which sets forth this provision was among those pages of the policy which appellants attached as an exhibit to their complaint. Appellants alleged in their complaint that this "policy was in effect" at the time of the accident.

The plane suffered $9,650.00 of damages on May 13, 1991, during a windstorm. Appellants made a claim on the policy, and appellees denied it on the ground that the ten percent deductible applied and, therefore, the loss was less than the applicable deductible of $14,000.00. On April 7, 1992, appellants filed suit against appellees, taking the position that the $1,000.00 deductible applied to the claim.

In September 1992, the depositions of Jack Keller, Todd Wilkins, Larry McIntosh, and appellant Craig Keller, all of whom witnessed the accident, were taken. Craig Keller testified that he had flown the airplane all day; when he stopped flying in order to eat, he noticed a storm approaching. He then started the engine and taxied down the runway in order to secure the airplane. He felt the wind picking up and the airplane's wheels sink in the gravel. He tried to move the plane closer to the tie-down area but was unsuccessful. He stated that the wind got much worse, so he turned the engine off. The propeller continued to turn, however, and the wind lifted the tail of the airplane up, causing the propeller to hit the gravel. All of the blades were damaged.

Jack Keller testified that the engine was not running but the propeller was still turning from the momentum of the engine when the tail was lifted up. Todd Wilkins testified that, although he did not know if the engine was running, the propeller was turning when the propeller hit the gravel. Larry McIntosh also stated that the propeller was still turning when the tail came up and the propeller hit the gravel.

Appellees filed a motion for summary judgment and argued that, because the propeller was included within the definition of "aircraft" in the policy and was still moving when the loss occurred, the aircraft should be deemed to have been "in motion" when the loss occurred. Therefore, appellees argued, the unambiguous terms of the contract provided for the application of the ten percent deductible. The circuit judge agreed and held that, at the time of the loss, the aircraft was "in motion" under the terms of the policy and, therefore, the "in motion" deductible applied. He held that, because the damage to the aircraft was less than the "in motion" deductible, appellants could not recover from appellees.

For their first point, appellants argue that, although the facts are undisputed, it was error to enter summary judgment for appellees because the definitions in the policy were ambiguous. Appellants argue that the policy was fairly susceptible to two or more interpretations. They argue that it was not clear whether, under the definition of "in motion," the aircraft should have been deemed to be "in motion," if *any* part of the aircraft was moving. Appellants argue that, under the policy, for the aircraft to have been "in motion," *all* of its parts must have been moving. Appellees again argue that the policy was not ambiguous and that its construction and legal effect should be determined by the court as a question of law. We agree with appellees.

Summary judgment is an extreme remedy and should be granted only when it is clear that there is no issue of fact to be decided. *Johnson* v. *Stuckey & Speer, Inc.*, 11 Ark. App. 33, 35, 665 S.W.2d 904, 906 (1984). Summary judgment should be granted only when a review of the pleadings, depositions, and other filings reveals that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Magness* v. *Commerce Bank*, 42 Ark. App. 72, 77, 853 S.W.2d 890, 893 (1993); *Watts* v. *Life Ins. Co. of Ark.*, 30 Ark. App. 39, 41, 782 S.W.2d 47, 48 (1990). Once the moving party makes a prima facie showing of entitlement to summary judgment, the party opposing summary judgment must meet proof with proof by showing a genuine issue as to a material fact. *Magness* v. *Commerce Bank*, 42 Ark. App. at 78, 853 S.W.2d at 893.

On motion for summary judgment, the court is authorized to ascertain the plain and ordinary meaning of a written instrument after any doubts are resolved in favor of the party moved against, and if there is any doubt about the meaning, there is an issue of fact to be litigated. *Moore* v. *Columbia Mut. Casualty Ins. Co.*, 36 Ark. App. 226, 228, 821 S.W.2d 59, 60 (1991). The initial determination of whether a contract is ambiguous rests with the court. *Id.* When the intent of the parties as to the meaning of a contract is in issue, summary judgment is particularly inappropriate. *Camp* v. *Elmore*, 271 Ark. 407, 408-09, 609 S.W.2d 86, 87 (Ark. App. 1980). When the terms of a written contract are ambiguous, the meaning of the contract becomes a question of fact. *Stacy* v. *Williams*, 38 Ark. App. 192, 196, 834 S.W.2d 156, 158 (1992).

When a contract is unambiguous, however, its construction is a question of law for the court. *Moore* v. *Columbia Mut. Casualty Ins. Co.*, 36 Ark. App. at 228, 821 S.W.2d at 60. If the terms of an insurance contract are not ambiguous, it is unnecessary to resort to the rules of construction, and the policy will not be interpreted to bind the insurer to a risk which it plainly excluded and for which it was not paid. *Baskette* v. *Union Life Ins. Co.*, 9 Ark. App. 34, 36-37, 652 S.W.2d 635, 637 (1983).

[redacted] We agree with the circuit judge and appellees that the policy was not ambiguous. Its definition of the term "aircraft," which clearly included the propeller, must be viewed in light of the entire policy; it is especially appropriate to consider the deductible provision quoted above in reaching a decision. Different clauses of a contract must be read together and the contract construed so that all of its parts harmonize if that is at all possible. *Pate* v. *U.S. Fidelity & Guar. Co.*, 14 Ark. App. 133, 135, 685 S.W.2d 530, 532 (1985). The intention of the parties is to be gathered not from particular words and phrases but from the whole context of the agreement. *Id.* Therefore, the definitions provision relied upon by the appellees is simply a part of the entire policy, in light of which it must be viewed. *See Floyd* v. *Otter Creek Homeowners Ass'n*, 23 Ark. App. 31, 36, 742 S.W.2d 120, 123 (1988). No one disputes that the propeller was still moving when the loss occurred. Accordingly, we agree with the circuit judge that the "in motion" deductible applied.

[redacted] Furthermore, even if we held that the trial court erred in concluding that there was no genuine issue of material fact that the aircraft was "in motion" when the propeller blades struck the ground, the pleadings and affidavits clearly show that there is no genuine issue that the aircraft was damaged by wind, while unhangared and not in flight. Consequently, pursuant to the deductible provision of the policy quoted above, the deductible is $14,000.00, an amount greater than appellants' loss. We may affirm a trial court for a reason different than the one given by the trial court. *Hubbard* v. *The Shores Group, Inc.*, 313 Ark. 498, 502, 855 S.W.2d 924, 927 (1993); *Guthrie* v. *Tyson Foods, Inc.*, 285 Ark. 95, 97, 685 S.W.2d 164, 165 (1985); *Monaghan* v. *Davis*, 16 Ark. App. 258, 262, 700 S.W.2d 375, 377 (1985). Summary judgment was properly entered for appellees.

Affirmed.

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

JAMES R. COOPER, Judge. The proper deductible to apply in this case depends on whether the aircraft was "in motion" when the accident occurred. This question cannot be answered unambiguously by reference to the definitions section of the insurance policy. Although, as the majority notes, the definition of "aircraft" included the propeller, I do not agree that this inclusion clarifies the question of whether the aircraft is "in motion" under the policy so long as the propeller is turning. In this context, I think it should be noted that the definition of "aircraft" also includes tools in the aircraft, as well as radio and navigation instruments. Surely no one would argue that the aircraft is "in motion" under this policy so long as a wrench is being used, a radio dial is being turned, or a clock is ticking, but such a result must logically follow from the reasoning employed by the majority.

Furthermore, it is obvious to me that the purpose of the "in motion" provision is to limit the exposure of the insurer in cases where the aircraft is moving, and where an accident would therefore be more likely to involve extensive damage, if not total loss. This purpose would not be compromised by applying the $1,000 deductible in the case at bar where the aircraft was immobile when the accident took place.[1] I submit that the definitions section of the policy is ambiguous in this regard, and that the policy should therefore have been construed in favor of the insured. *See Moore* v. *Columbia Mut. Cas. Ins. Co.*, 36 Ark. App. 226, 821 S.W.2d 59 (1991). We should therefore remand this case for trial.

Furthermore, I submit that the majority should not have considered the deductible provision in arriving at its decision. Although I agree that this provision may be applicable, it is extremely important to note that this provision was not abstract-

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[1]Although it would seem from the facts recited by the majority that the airplane had just landed when the accident occurred, the record shows that the pilot had landed, left the airplane to eat lunch, and returned to the airplane afterwards to move it, whereupon the airplane became stuck in the mud, rendering it immobile. The accident occurred after the airplane became stuck.

ed by the parties, and none of the parties argued either to the trial court or to this court that it is applicable to the issue before us. The silence of the parties in this regard gives us an important indication of how they interpret their own agreement, *See Missouri State Life Ins. Co.* v. *Ross*, 185 Ark. 556, 48 S.W.2d 230 (1932); *Missouri State Life Ins. Co.* v. *Hill*, 109 Ark. 17, 159 S.W. 31 (1913) and I believe that we have failed to give the parties' construction of the agreement the great weight to which it is entitled. Perhaps the parties do not cite the deductible provision because it was not in effect at the time of the accident. I suggest that it is unwise of us to presume that we have a greater familiarity with the terms of the parties' agreement than the parties themselves.

Finally, I wish to emphasize that the deductible provision quoted by the majority in support of its decision was not argued as a basis for summary judgment in the appellee's motion. By seizing on this unargued point in order to affirm, we are going far beyond the parameters of Rule 56. Our Supreme Court has said that, in considering a motion for summary judgment, it would be error for a court to consider any allegations brought out for the first time in the parties' briefs. *Eldridge* v. *Board of Correction*, 298 Ark. 467, 768 S.W.2d 534 (1989). In the case at bar we are, in effect, sanctioning a summary judgment on grounds that were never brought out by the parties at all. Even if we have thereby arrived at an answer which is academically sound, that answer is not legally correct if we must depart from our standard of review to reach it.

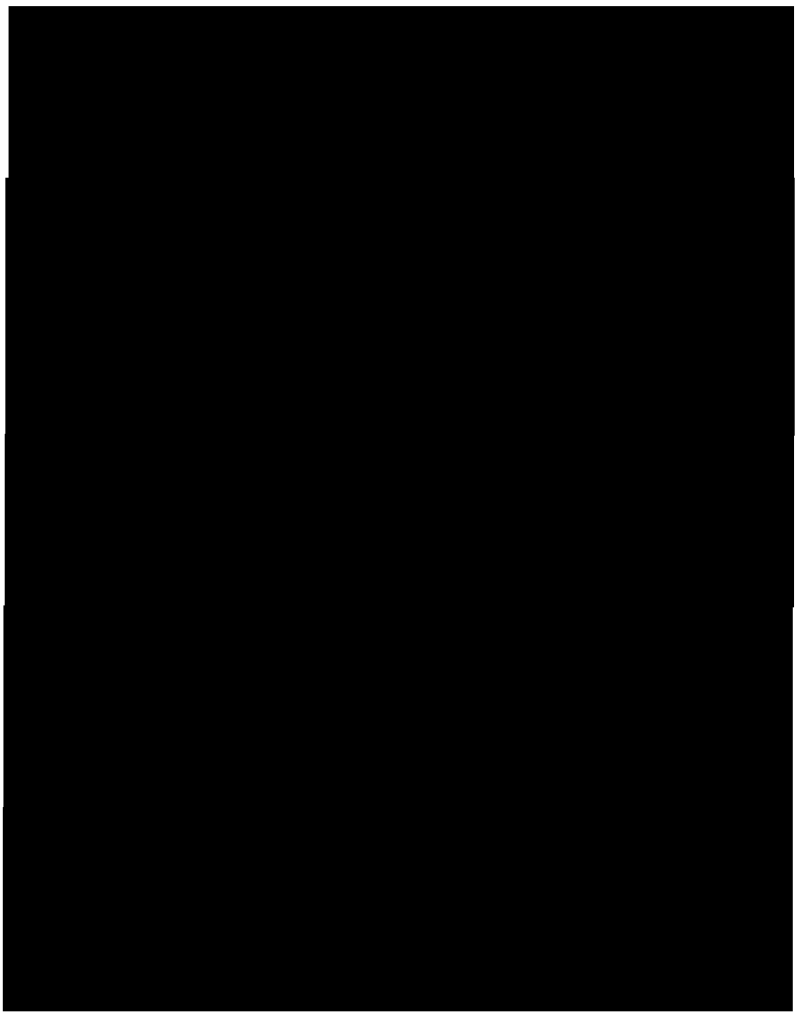
I dissent.

MAYFIELD, J., joins in this dissent.

AT&T COMMUNICATIONS of the Southwest, Inc.
v. CITY OF LITTLE ROCK

CA 93-86 866 S.W.2d 414

Court of Appeals of Arkansas
En Banc
Opinion delivered November 17, 1993



[redacted]

Wright, Lindsey & Jennings, by: *N.M. Norton, Jr.* and *Ray F. Cox, Jr.*, for appellant.

Thomas M. Carpenter, David A. Stewart, William C. Mann, III and *Anthony W. Black*, for appellee City of Little Rock.

Gilbert L. Glover and *Paul J. Ward*, for appellee Public Service Commission.

JUDITH ROGERS, Judge. The question presented in this appeal is whether the Arkansas Public Service Commission correctly found that an ordinance of the City of Little Rock (the City) that required AT&T Communications of the Southwest, Inc. (AT&T) to pay a certain fee for the privilege of using the public streets was valid. For reversal, AT&T relies on three points: (1)(a) the City lacked the authority to enact the ordinance, specifically that Ark. Code Ann. § 14-200-101 (1987) does not provide such authority and that Ark. Code Ann. § 23-17-101 (1987) bars such action by the City, and (b) the levy of the ordinance is an unauthorized tax; (2) the ordinance is arbitrary, capricious, and discriminatory; and (3) the ordinance is unreasonable and therefore an unconstitutional burden on interstate commerce.

On July 5, 1989, the City adopted an ordinance that granted each provider of interstate and intrastate toll (long distance) telephone services in the City a franchise to use the City's public ways. The ordinance was enacted and the complaint was heard pursuant to Ark. Code Ann. § 14-200-101, which authorizes any city to enact by ordinance "terms and conditions upon which the public utility may be permitted to occupy the streets, highways, or other public places within the municipality. . . ." The ordinance also levied a $.004 per minute charge on all long distance tele-

phone calls that are billed to a City service address. On July 25, 1989, AT&T challenged the ordinance by filing a complaint with the Arkansas Public Service Commission. The Commission designated an administrative law judge (A.L.J.) to hear the complaint. After a hearing on January 28 and 29, 1992, the A.L.J. issued Order No. 17 on October 5, 1992, finding the ordinance valid and dismissing AT&T's complaint. Subsequently, the order was adopted as an order of the Commission, and AT&T appeals from this order. Briefs in support of the Commission's dismissal of the complaint have been filed by the City and the Commission.

For its first point, AT&T contends that the City lacked the authority to enact the ordinance because telephone and telegraph companies have been granted the right to maintain their lines on public streets by the Arkansas General Assembly and that the levy imposed on AT&T by the ordinance is an unauthorized tax. AT&T relies on Ark. Code Ann. § 23-17-101(a), first enacted in 1885, which provides in part that:

> Any person or corporation organized by virtue of the laws of this state or of any other state of the United States or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence which is the equivalent of telephone or telegraph and which may be invented or discovered, may construct, operate, and maintain the telegraph, telephone, or other lines necessary for the speedy transmission of intelligence along and over the public highways and streets of the cities and towns of this state; across and under the waters and over any lands or public works belonging to this state[.]

In response, the City and the Commission contend the City has the authority to impose the levy in issue for AT&T's use of the public streets and its levy is not an unauthorized tax. For purposes of this appeal, however, we need not decide whether the City has the authority to exact compensation for the use of its streets because we agree with AT&T's contention that the fees assessed under the City's ordinance amount to a general revenue-raising scheme and therefore are taxes that have not been approved by the vote of the people as required by Ark. Code Ann. § 26-73-103 (1987).

At the hearing, Earl Paul, Deputy City Manager, testified about the development of the ordinance. He stated that the City recognized at the beginning of the 1988 budget cycle a need for additional sources of revenues for the City and began to search for sources of revenue that could be "tapped" by the City. He testified that because providers of local telephone service and other utilities were paying a franchise fee, the City considered the possibility of a franchise fee for long distance providers who use public rights-of-way in the provision of service. Mr. Paul stated that he met with long distance providers during 1988 in an effort to understand the technology involved in the service and to discuss the type of fee that "would not pose an onerous burden administratively on the company or the city." He further stated that the City knew its need for revenues and tried to design the ordinance to attain that amount of money. He testified that the City knew how much revenue it would try to generate by the levy and that city officials prepared estimates of the amount of revenue that would be generated by varying approaches to the structure of the levy. He also stated that the City worked with the providers to structure a fee that could be collected by the providers but passed on to its customers and finally arrived at a formula based on minutes of use. Mr. Paul testified that although the long distance providers wanted the fee based on percent of revenue, City officials believed it would be more equitable to base the fee on minutes of use. The City expected the revenue produced by the ordinance to be approximately $1,000,000.00 annually. Mr. Paul testified that the revenue would be spent for all municipal purposes without restriction; that the revenue would not be dedicated to any particular purpose, including any purpose associated with telephone service; and that the revenue would not be isolated or segregated from other general funds.

AT&T witnesses discussed AT&T's operations and its use of the City rights-of-way. Ed Moore explained that the 1983 divestiture, the separation of Southwestern Bell Telephone (SWB) and the other Bell operating companies from AT&T, required each company to conduct its business separately and independently from AT&T. Mr. Moore stated that divestiture caused no change in the occupation of city streets or public rights-of-way, although technological changes have caused each company to introduce new apparatus within its network. The record shows

that AT&T maintains facilities in the public rights-of-way, consisting of fiber optic cables that in the aggregate have a total length of twenty-three miles. In addition, AT&T obtains access to originating and terminating caller locations in the City over the facilities of SWB, a substantial portion of which occupy public rights-of-way in the City.

Charles Venus, an economist and expert witness for AT&T, testified that the charge levied by the City is in essence a tax. He stated:

> It makes a difference that the funds derived from the tax are used by the City for all sundry and general purposes [for which] the City spends public funds [.] That is what we call general revenue and it's normally produced by a tax and not a fee. Normally something allocated to general revenues is a tax and something allocated to special revenues or to special services is a fee. The occupation of streets and alleys and other rights-of-way is subject to direct assignment or direct allocation since it's a divisible service. This would suggest that a fee would be the appropriate charge as opposed to a tax.

The A.L.J. in his order limited his review of the levy's classification to an assessment of the minutes of use formula employed by the City and found that the formula was nondiscriminatory and reasonable. The A.L.J. in his order and the Commission at oral argument have, perhaps understandably, displayed some reluctance to make a judicial interpretation of the levy's status as a tax or a fee.

The supreme court has discussed the difference between a fee and a tax in several cases. In *City of Marion* v. *Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993), the court addressed certain sewer and water "tap and access fees" that the city charged developers of residential land in and around the city. The chancellor found that the ordinances were invalid because the fees assessed amounted to a general revenue raising scheme and were therefore "taxes" that had not been approved by a vote of the people as required by Arkansas Code Annotated § 26-73-103, which provides that a municipality's ordinance levying a tax is not valid until the tax is adopted by the voters of the city at a spe-

cial or general election. The supreme court discussed fees and taxes as follows:

> The distinction between a tax and a fee is that government imposes a tax for general revenue purposes, but a fee is imposed in the government's exercise of its police powers. *City of North Little Rock* v. *Graham*, 278 Ark. 547, 647 S.W.2d 452 (1983). An example of a fee charged in the exercise of a city's police power is found in *Holman* v. *City of Dierks*, 217 Ark. 677, 233 S.W.2d 392 (1950). There, the court held that an "annual sanitation charge" of $4.00 per business and residence which was to pay for fogging the city with insecticide three times a year was a fee, not a tax, for services to be rendered. On the other hand, the *Graham* court considered the validity of a North Little Rock ordinance which imposed a $3.00 per month "public safety fee" on the water bill of each household, business and apartment resident for the purpose of increasing the salaries of the city policemen and firemen and held such a fee was in actuality a tax because the so-called fee was for the cost of maintaining a traditional governmental function and services already in effect and not for a special service as was the case in the *Holman* case. 278 Ark. at 549, 647 S.W.2d at 453. As is illustrated by the *Graham* decision, this court in determining whether a governmental charge, assessment or fee is a tax is not bound by how the enactment or levy labels it. *See also City of Hot Springs* v. *Vapors*, 298 Ark. 444, 769 S.W.2d 1 (1989); cf. *Rainwater* v. *Haynes*, 244 Ark. 1191, 428 S.W.2d 254 (1968).

City of Marion v. *Baioni*, 312 Ark. at 425, 850 S.W.2d at 2. In finding the charge a fee, the court in *Baioni* went on to state:

> Of major importance, we point out that the city ordinances require the tapping and access fees to be segregated and placed into accounts to be used solely and exclusively to expand the capacity of the city's water and sewer systems. In other words, these funds will be used directly to benefit the new users and for no other purposes.

312 Ark. at 427-28, 850 S.W.2d at 3. The court also distinguished *Baioni* from "situations where municipalities have imposed fees to underwrite the costs of a special service to a new development but instead the monies benefitted the general public." *Id.*

In *City of North Little Rock* v. *Graham*, 278 Ark. 547, 647 S.W.2d 452 (1983), the court addressed whether a public safety fee was a fee or a tax. The court noted that if it were a tax, it was void because it was never voted on by the voters. The court stated:

> Taxes are enforced burdens exacted pursuant to statutory authority. *Miles* v. *Gordon*, 234 Ark. 525, 353 S.W.2d 157 (1962). Municipal taxes are those imposed on persons or property within the corporate limits, to support the local government and pay its debts and liabilities, and they are usually its principal source of revenue. 16 E. McQuillin, *Municipal Corporations* § 44.02 (3rd ed. 1979).
>
> There is a distinction between a tax imposed for general revenue purposes and a fee charged in the exercise of police power. *Parking Authority of Trenton* v. *Trenton*, 40 N.J. 251, 191 A.2d 289 (1963). An example of a fee charged in the exercise of police power is found in *Holman* v. *City of Dierks*, 217 Ark. 677, 233 S.W.2d 392 (1950). In *Holman* we held that an "annual sanitation charge" of $4.00 per business and residence which was to pay for fogging the city with an insecticide three times a year was a fee "for services to be rendered" and not a tax.

City of North Little Rock v. *Graham*, 278 Ark. at 548-49, 647 S.W.2d 453. Because the charge was to pay for a salary increase for policemen and firemen, the court found that the money was a contribution toward the cost of maintaining the traditional governmental functions of police and fire protection and concluded that it was a tax. *Id.*

In the case at bar, the City responds that the charge is not a tax but is imposed as an exercise of its police powers. The

City also maintains that the fee is the charge imposed for a special service, that of utilization of public streets and rights-of-way in excess of normal traffic purposes, and not the cost of maintaining a traditional governmental function or services already in effect. In support of its position, the City refers this court to *Mackay Telegraph & Cable Co.* v. *City of Texarkana*, 199 F. 347 (W.D. Ark. 1912). That case involved an ordinance requiring the utility to place certain wires underground. In its discussion, the court stated: "The city may impose, under its police power, reasonable requirements on the company as to the manner of construction and maintenance of its line." 199 F. at 349.

The City also cites *Alpert* v. *Boise Water Corporation*, 118 Idaho 136, 795 P.2d 298 (1990), in which a city's authority to grant gas and water utility franchises and impose franchise fees was challenged. The court found that the three percent charge on gross revenue was a valid consideration for the cities granting the franchises and agreeing not to compete with the utilities. In discussing the difference between a tax and a franchise fee, the court approved the following language: "In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs." 795 P.2d at 307.

In another Idaho case, *City of Hayden* v. *Washington Water Power Co.*, 108 Idaho 467, 700 P.2d 89 (Ct. App. 1985), the city attempted to impose a franchise fee of five percent of gross revenue on a utility already possessing a franchise from the city. The court noted that a city has an inherent right to enact valid police power regulations, even if contracts are thereby affected, but the court found that the police power is limited to governmental acts promoting the health, comfort, safety, and general welfare of society, and that it does not embrace revenue measures. 700 P.2d at 91. The court stated: "We are not persuaded that the franchise fees at issue here represent exercises of the police power. Neither does the record contain a showing that the fees are incidental to a scheme of supervision, inspection or control in the discharge of the police power." 700 P.2d at 91.

In the case at bar, the City held no election, presumably in reliance on Ark. Code Ann. § 14-200-101[1], which provides in pertinent part:

> (a) Acting by ordinance or resolution of its council or commission, every city and town shall have jurisdiction to:
>
> (1) Determine the quality and character of each kind of product or service to be furnished or rendered by any public utility within the city or town and all other terms and conditions upon which the public utility may be permitted to occupy the streets, highways, or other public places within the municipality, and the ordinance or resolution shall be deemed prima facie reasonable[.]

This section was enacted in 1935 as a part of the act forming the Department of Public Utilities, No. 324, Acts of 1935, and this act is regulatory in nature. *See Southwestern Bell Tel. Co.* v. *Matlock*, 195 Ark. 159, 168, 111 S.W.2d 500, 505 (1938). Clearly, § 14-200-101 gives the City the right to impose valid police power regulations; however, it remains for this court to determine whether the levy imposed by the City is a lawful exercise of that police power.

The City has also referred this court to language from two supreme court cases that it argues is authority for the imposition of the levy. We have reviewed those cases and find they are not on point and do not support the City's contention that the imposition of the levy in the case at bar was a lawful exercise of its police power. In *Southwestern Bell Telephone Co.* v. *City of Fayetteville*, 271 Ark. 630, 609 S.W.2d 914 (1980), the supreme court addressed whether a governmental authority had to reimburse the utility for the cost of relocation of their telephone poles and gas meters because of a street improvement project. In *City of Fort Smith* v. *Arkansas Public Service Commission*, 278 Ark. 521, 648 S.W.2d 40 (1983), the court affirmed a Commission order that directed public utilities to eliminate municipal utility or fran-

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[1]This code section was amended in 1993 to add "Except as provided in § 23-4-201" at the beginning and to insert "and rates for," after "each kind of." The section is now codified at § 14-200-101 (Supp. 1993).

chise taxes from their base rates. It is clear that in neither case was the validity of a franchise tax challenged.

[redacted] Here, the record clearly shows that the fee is a revenue-raising measure and the funds will be used as general revenue. The City admits that the fee was designed to collect a specific amount of money needed by the City for its operations. Pursuant to a Commission docket, the money will be collected by the long distance providers from those members of the public making or paying for interLATA or interstate calls and will be remitted to the City. We are not persuaded that the levy represents an exercise of the City's police power. Because a municipality's ordinance levying a tax is not valid until the tax is adopted by the voters of the city at a special or general election pursuant to § 26-73-103, we reverse. Our finding renders appellant's other arguments for reversal moot, and we need not address them.

Reversed.

MAYFIELD, J., concurs.

COOPER, J., not participating.

[redacted]

Roy CATE and Judie Cate *v.* Charles S. IRVIN and Ivy Irvin, Husband and Wife

CA 93-426 866 S.W.2d 423

Court of Appeals of Arkansas
Division I
Opinion delivered November 17, 1993

[redacted]

[redacted]

Michael Yarbrough, for appellant.

Cypert, Crouch, Clark & Harwell, by: *William M. Clark, Jr.*, and *R. Jefrey Regnerson*, for appellee.

JUDITH ROGERS, Judge. Appellants, Roy Cate and Judie Cate, appeal from a summary judgment entered against them by the Washington County Circuit Court for a debt due appellees, Charles Irvin and Ivy Irvin. We find no error and affirm.

In 1987, appellants sold the Sunshine Frozen Yogurt Shop in Springdale to appellees. In 1988, appellees sold the shop to Phyl Brinkley, Deborah Brinkley, Phil Dewey and Gail Dewey; the Brinkleys later acquired the Deweys' interest in the shop. The Brinkleys defaulted in their payments to appellees, and in a written contract dated December 31, 1990, appellants agreed to purchase the shop and to assume the Brinkleys' indebtedness to appellees. The 1990 contract contained a merger clause and provided that it could only be modified in writing. Appellants contend that, before they entered into the contract with the Brinkleys, appellees orally agreed to accept $4,000.00 from appellants as full payment of the debt due them. Appellees deny that such an agreement was made.

After appellants defaulted, appellees sued the Brinkleys, the Deweys, and appellants for $7,820.00, the full amount due on the contract, and attached copies of the 1988 and 1990 contracts to their complaint.

In their answer, appellants stated:

> [B]efore entering into the contract . . . with the Brinkleys, [Appellant] Roy B. Cate talked to Charles S. Irvin and it was agreed between them that if the Cates would assume the Brinkley contract, which was then in default,

> Irving [sic] would accept Four Thousand Dollars ($4,000.00) in full payment of their interest in the Brinkley contract, payable by the Cates executing a promissory note with payments to begin in June of 1991. Relying on that agreement, the Cates entered into the contract with the Brinkleys to protect both themselves and the Irvins.

In their answers to appellees' requests for admissions of fact, appellants admitted that they had assumed the Brinkleys' debt to appellants but stated that, "at that time, the [appellees] had agreed to accept a note from the Cates in the principal amount of $4,000.00 as payment of that indebtedness." Appellants filed an amended answer and counterclaim wherein they stated that appellees had agreed to accept $4,000.00 in full payment of the debt and, as a result of that representation, appellants had entered into operation of the yogurt shop.

Appellees moved for summary judgment against the Brinkleys, the Deweys, and appellants, arguing that the purported oral agreement to limit the debt to $4,000.00 was inadmissible under the parol evidence rule. In their affidavit supporting their motion, appellees denied agreeing, either orally or in writing, to accept any reduced amount for the debt.

In their brief in response to appellees' motion for summary judgment, appellants set forth a lengthy recitation of facts which they claimed demonstrated that they had a separate oral contract with appellees:

> Cate . . . contacted Irvin and explained that if Brinkley and Dewey defaulted, both Cate and Irvin would sustain financial losses. Cate inquired of Irvin how much he would settle for to cancel the debt that Brinkley and Dewey owed him. At this time, the amount of the debt was approximately $7,800. Irvin called Cate on the telephone and told Cate and he would accept $4,000 to settle the Brinkley/Dewey debt, and allow Cate to operate the business.
>
> Pursuant to this agreement, Cate bought the yogurt store on December 31, 1990. On January 7, 1991, Cate executed a promissory note in which he agreed to pay Irvin $4,000.

In their affidavit supporting their response to the motion for summary judgment, appellants stated that the facts recited in the brief were correct and incorporated them within their affidavit.

In a letter opinion, the circuit judge initially held that evidence of the purported oral agreement to limit the debt to $4,000.00 did not violate the parol evidence rule because there was no written contract between appellees and appellants. Appellees then moved for reconsideration of this holding, arguing that they could properly invoke the parol evidence rule as to the purported oral agreement because they were third-party beneficiaries of the contract wherein appellants agreed to assume the debt due appellees.

The circuit court was persuaded by appellees' argument and entered summary judgment for appellees against the Brinkleys, the Deweys, and appellants in the amount of $11,714.00, which included interest, attorneys' fees, and costs. The circuit court concluded that appellees were third-party creditor beneficiaries of the 1990 contract of sale between the Brinkleys and appellants and that the parol evidence rule would not permit oral modification of that contract. The Deweys and the Brinkleys have not appealed.

On appeal, appellants argue that the trial court erred in granting appellees' motion for summary judgment because they had an original and independent agreement with appellees. They argue that the parol evidence rule does not bar evidence of their separate oral agreement with appellees regarding the debt. Apparently, appellants seek to persuade this court that prior oral negotiations and agreements between a party to a written contract and the third-party beneficiary of that contract are not subject to the parol evidence rule. As explained below, we disagree. Appellants alternatively argue that, even if the parol evidence rule does apply, it does not bar such evidence in this case because a written contract may be modified or revoked by a *subsequent* oral agreement even if the written contract says otherwise. Therefore, appellants argue, whether an oral modification of the written agreement occurred is also a question of fact which should be tried. Again, we disagree.

The parol evidence rule prohibits the introduction of extrinsic evidence, parol or otherwise, which is offered to vary the terms of a written agreement; it is a substantive rule of law, rather than a rule of evidence, and its premise is that the written agreement itself is the best evidence of the intention of the parties. *First Nat'l Bank of Crossett* v. *Griffin*, 310 Ark. 164, 168, 832 S.W.2d 816, 819 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1280 (1993). It is a general proposition of the common law that in the absence of fraud, accident or mistake, a written contract merges, and thereby extinguishes, all prior and contemporaneous negotiations, understandings and verbal agreements on the same subjects. *Id.* It is well settled that a written contract may be modified by a later oral agreement. *O'Bier* v. *Safe-Buy Real Estate Agency, Inc.*, 256 Ark. 574, 576, 509 S.W.2d 292, 293 (1974); *Prudential Ins. Co. of America* v. *Stratton*, 14 Ark. App. 145, 149, 685 S.W.2d 818, 820 (1985). Such testimony is inadmissible if it tends to alter, vary, or contradict the written contract but is admissible if it tends to prove a part of the contract about which the written contract is silent. *Gallion* v. *Toombs*, 268 Ark. 955, 956-57, 597 S.W.2d 842, 843 (Ark. App. 1980).

We agree with the circuit court that the parol evidence rule applies to the purported oral agreement between appellants and appellees. Appellees clearly were the third-party beneficiaries of the 1990 contract wherein appellants agreed to purchase the business from the Brinkleys and to assume the indebtedness to appellees. It is established law that a contract made for the benefit of a third party is actionable by the third party. *Howell* v. *Worth James Constr. Co.*, 259 Ark. 627, 629, 535 S.W.2d 826, 828 (1976); *Monaghan* v. *Davis*, 16 Ark. App. 258, 260, 700 S.W.2d 375, 376 (1985).

Appellants have cited no case which holds that the parol evidence rule is not applicable to prior negotiations and agreements regarding a contract's terms between a party to the contract and the third-party beneficiary of that contract. Our research leads us to conclude that the parol evidence rule was properly applied by the circuit court. It has often been held that the parol evidence rule applies only where the controversy is between the parties to the instrument or their privies and that parol evidence can be used to vary a contract when the litigation is between a party to the contract and a stranger thereto. *See Sil-*

vicraft, Inc. v. *Southeast Timber Co.*, 34 Ark. App. 17, 21-22, 805 S.W.2d 84, 87 (1991); *Echo, Inc.* v. *Stafford*, 21 Ark. App. 201, 203, 730 S.W.2d 913, 914-15 (1987); *Sterling* v. *Landis*, 9 Ark. App. 290, 293, 658 S.W.2d 429, 431 (1983). In *Barfield Mercantile Co.* v. *Connery*, 150 Ark. 428, 431, 234 S.W. 481, 482 (1921), the supreme court noted that the parol evidence rule may be applied to the parties to the instrument *and to those claiming some right or interest under it.* This holding was discussed and applied in *Rainey* v. *Travis*, 312 Ark. 460, 464-65, 850 S.W.2d 839, 841 (1993). As third-party beneficiaries of the contract, appellees clearly claim rights under that contract and are directly interested therein. It can also be said with certainty that appellees are not strangers to that contract. Accordingly, the parol evidence rule could properly be invoked by appellees.

It is also apparent that the purported oral agreement by appellees to accept only $4,000.00 from appellants, even if true, occurred *prior* to appellants' execution of the 1990 contract to purchase the shop from the Brinkleys. Accordingly, under the parol evidence rule, evidence of this prior oral agreement is not admissible.

Summary judgment should be granted only when a review of the pleadings, depositions, and other filings reveals that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Magness* v. *Commerce Bank*, 42 Ark. App. 72, 77, 853 S.W.2d 890, 893 (1993); *Watts* v. *Life Ins. Co. of Ark.*, 30 Ark. App. 39, 41, 782 S.W.2d 47, 48 (1990). Once the moving party makes a prima facie showing of entitlement to summary judgment, the party opposing summary judgment must meet proof with proof by showing a genuine issue as to a material fact. *Magness* v. *Commerce Bank*, 42 Ark. App. at 78, 853 S.W.2d at 893.

On motion for summary judgment, the court is authorized to ascertain the plain and ordinary meaning of a written instrument after any doubts are resolved in favor of the party moved against, and if there is any doubt about the meaning, there is an issue of fact to be litigated. *Moore* v. *Columbia Mut. Casualty Ins. Co.*, 36 Ark. App. 226, 228, 821 S.W.2d 59, 60 (1991). When a contract is unambiguous, its construction is a question of law for the court. *Id.* The initial determination of whether a

contract is ambiguous rests with the court. *Id.* When the terms of a written contract are ambiguous, the meaning of the contract becomes a question of fact. *Stacy* v. *Williams*, 38 Ark. App. 192, 196, 834 S.W.2d 156, 158 (1992). We agree with the circuit court that appellants failed to demonstrate a genuine issue of material fact and hold that summary judgment was properly entered for appellees.

Affirmed.

PITTMAN and COOPER, JJ., agree.

COLEMAN'S SERVICE CENTER, INC. *v.* SOUTHERN INNS MANAGEMENT, INC.; and Federal Deposit Insurance Corporation, as Receiver for Audubon Federal Savings & Loan Association of New Orleans, Louisiana

CA 92-998 866 S.W.2d 427

Court of Appeals of Arkansas
En Banc
Opinion delivered November 24, 1993
[Rehearing denied December 22, 1993.*]

*Mayfield, J., would grant rehearing. Pittman, J., not participating.

[redacted]

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

Eichenbaum, Scott, Miller, Liles & Heister, P.A., by: *James H. Penick III*, for appellee.

JOHN E. JENNINGS, Chief Judge. In 1984 D'Jer, Inc., an Arkansas corporation, borrowed 4.2 million dollars from Audubon Federal Savings and Loan Association, a Louisiana institution, to build a truck stop at Brinkley, Arkansas. The note was secured by a deed of trust. D'Jer leased the "convenience store" part of the project to the appellant, Coleman's Service Center, Inc., also an Arkansas corporation. D'Jer defaulted on the note, the project was refinanced, and the real property was conveyed and reconveyed several times.

In 1986 Audubon Savings and Loan failed, and the Federal Deposit Insurance Corporation (as receiver for Audubon and successor to the FSLIC) sued in federal district court to foreclose the deed of trust for nonpayment on the note. Coleman's was made a party to that action.

The United States District Court for the Eastern District of Arkansas appointed the appellee, Southern Inns Management, Inc., as the receiver for the project property. In that capacity Southern Inns then dismissed its cause of action against Coleman's in federal court and filed an action for a writ of possession in Mon-

roe County Circuit Court, based on Coleman's alleged nonpayment of rent.

On February 13, 1991, the circuit court entered a "judgment" directing the clerk of the court to issue a writ of possession. The order recites "that plaintiffs have presented prima facie evidence that they are entitled to judgment against defendant in the amount of $143,240.90 with interest . . . ."

On March 22, 1991, Coleman's filed a counterclaim against Southern Inns and the FDIC, and a third-party complaint against Don Dedman, alleging that the counter-defendants and cross-defendant took possession of Coleman's property "without justification or adequate basis." The pleading alleged both breach of contract and slander.

On January 23, 1992, the circuit court dismissed Coleman's counterclaim and third-party complaint based upon lack of subject matter jurisdiction under Ark. R. Civ. Pro. 12(b)(1).[1]

On February 7, 1992, the court entered an order pursuant to Rule 54(b) of the Rules of Civil Procedure finding "that it would be highly prejudicial for the plaintiff [Southern Inns and the FDIC] to proceed to trial and obtain judgment against Coleman's Service Center, Inc. on its cause of action without first having a final adjudication of said Coleman's Service Center, Inc.'s right to assert its counterclaim and third-party complaint." Based on that finding, the court directed "that final judgment be entered as to the counterclaims and third-party complaint of Coleman's Service Center, Inc. as amended pursuant to the above mentioned express determinations by the court."

On February 14, 1992, Coleman's filed a notice of appeal reciting that "it appeals all orders and judgments entered herein." Coleman's subsequently retained its present counsel.

Coleman's now raises four "points to be relied upon" which follow verbatim: 1) This court has no jurisdiction of the subject matter of this case since the dismissal of the issues relating to the D'Jer-Coleman lease from the federal case does not permit

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[1] Neither the correctness of the circuit court's decision to dismiss nor of its stated basis are issues raised on this appeal.

refiling of these issues in the state court; 2) The trial court erred in refusing to set aside the judgment rendered in favor of the plaintiffs against the defendants at the September 12, 1991 hearing; 3) The "restructuring" of the original indebtedness to FDIC by Audubon was a novation, an entirely new obligation between different parties; 4) The order of the court finding that the supersedeas bond proffered by defendant Coleman's was not timely filed and did not otherwise comply with the statute is clearly erroneous.

We note at the outset the appellees' argument that the trial court erred in permitting the appellant to take an interlocutory appeal under Rule 54(b). The trial judge expressly relied on *Austin* v. *First National Bank*, 305 Ark. 456, 808 S.W.2d 773 (1991). The subsequent decision by the supreme court in *Fisher* v. *Citizens Bank*, 307 Ark. 258, 819 S.W.2d 8 (1991), seems to take a more restrictive approach. In *Fisher* the court said:

> [M]erely tracking language of Rule 54(b) will not suffice; the record must show facts to support the conclusion that there is likelihood of hardship or injustice which would be alleviated by an immediate appeal rather than at the conclusion of the case. Those essential findings, and the facts which undergird them, are wholly lacking in this order. The rule is not intended to create an avenue for two stages of review simply by citing Rule 54(b). It is intended to permit review before the entire case is concluded, but only in those *exceptional* situations where a compelling, discernible hardship will be alleviated by an appeal at an intermediate stage.

Even so, we cannot say in the case at bar that the trial court's findings are clearly wrong. We therefore conclude that we are not without jurisdiction to hear the appeal.

Whether the issues raised by the appellant are within the scope of the appeal is a different matter. The appellee contends that they are not, and we agree. Under Ark. Code Ann. § 18-60-307 (Supp. 1991), an action for unlawful detainer is a two-step process. The statute contemplates that the right to possession will be preliminarily determined and, if appropriate, a writ of possession issued, but that the question of damages will be

left for a subsequent hearing. The statute expressly provides that an order directing the issuance of a writ of possession shall not be a "final adjudication of the parties' rights in the action." Ark. Code Ann. § 18-60-307(d)(1). In the case at bar, the parties are in the middle of the primary lawsuit. While the circuit court has directed the issuance of a writ of possession, its orders clearly contemplate a further hearing on the question of damages. A money judgment has not yet been entered.

[redacted] The first sentence of Rule 54(b) states: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment." This, of course, is what the circuit court did in the case at bar — it directed the entry of final judgment as to the dismissal of appellant's counterclaim and third-party complaint, in order to permit Coleman's to appeal that dismissal. The issues Coleman's raises, however, are totally unrelated to the interlocutory order that it has been permitted to appeal. All of the issues raised relate to the primary cause of action, the suit for unlawful detainer, which is still pending in the circuit court. In the language of Rule 54(b) no "final judgment as to" this "claim" has been entered by the trial judge. Our view is that when the trial court permits an interlocutory appeal under Rule 54(b) the issues raised must be reasonably related to the order or orders appealed from. A Rule 54(b) order may not be used as a vehicle to bring up for review matters which are still pending before the trial court.

Because there is no contention that the trial court erred in dismissing the appellant's counterclaim and third-party complaint, the decision of the trial court is affirmed.

Affirmed.

MAYFIELD, J., dissents.

PITTMAN, J., not participating.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the majority opinion in this case because it does not decide the issues presented by the appellant. Without reciting all the history of the litigation, the background pertinent to the issues presented by this appeal can be briefly stated.

In February of 1990, the Federal Deposit Insurance Corporation (FDIC), as receiver of a failed savings and loan company, filed suit in United States District Court seeking foreclosure of a mortgage on certain property in Monroe County, Arkansas. The appellant, Coleman's Service Center, Inc., was operating a truck stop on the property under a lease with the mortgagor, and appellant was made a party to the foreclosure suit. Subsequently, appellee FDIC and appellee Southern Inns Management, Inc., who had been appointed receiver of the property by the federal court, dismissed their federal court suit against Coleman's and filed the present case in Monroe County Circuit Court. This suit was based on breach of contract and sought damages and possession of the property.

The case in state court was set for hearing on February 12, 1991, but Coleman's and its attorney failed to appear at 9:00 a.m. The court proceeded in their absence and entered an order finding appellees entitled to possession of the property and money damages. Coleman's filed a motion to set aside this order, but the motion was denied.

In March of 1991, Coleman's filed a counterclaim against FDIC and Southern based upon breach of contract and slander. This claim was dismissed in January of 1992 on the finding of the state court that it did not have subject matter jurisdiction to hear it. (A third party complaint was also dismissed.)

On February 7, 1992, the state court entered an order pursuant to Ark. R. Civ. P. 54(b). The order makes the following pertinent findings:

> The court notes that there is related litigation pending between these parties in the United States District Court and the court further notes that Coleman's Service Center, Inc. has indicated that it will appeal the United States District Court's decision to the Eighth Circuit Court of Appeals.

> The court further observes that the plaintiffs' claim against the defendant is reset for pretrial on April 3, 1992 by order filed January 23, 1992.
>
> The court finds that it would be highly prejudicial for the plaintiff to proceed to trial and obtain judgment against Coleman's Service Center, Inc. on its cause of action without first having a final adjudication of said Coleman's Service Center, Inc.'s right to assert its counterclaim and third party complaint.
>
> The court therefore determines that there is no just reason for the delay and the court further expressly directs entry of final judgment at this time pursuant to Rule 54(b).

On February 7, 1992, Coleman's filed a notice of appeal specifically stating that it "appeals all orders and judgments entered herein." In its brief to this court, appellant makes four arguments.

The first argument contends that the state court did not have jurisdiction to grant possession of the property to the appellees or to award appellees damages based upon a breach of contract involving the possession of said property. Coleman's argument on this point is based on the contention that the appellees dismissed part of the issues in federal court pertaining to Coleman's lease and filed those claims again in state court. Coleman's argument is that this "is a clear violation of a long established rule in Arkansas that prohibits the splitting of causes of action." Citing *Lisenby* v. *Farm Bureau Mutual Ins. Co.*, 245 Ark. 145, 431 S.W.2d 484 (1968), and *Eiermann* v. *Beck*, 221 Ark. 138, 252 S.W.2d 388 (1952), as well as other authorities, the appellant says that the appellees' suit in federal court originally included allegations sufficient to involve all security for the mortgage, but appellees dismissed Coleman's interest in the collateral from that suit and brought suit in state court for possession of that portion of the collateral. This, it is argued, violated the rule against splitting causes of action and, under the authorities cited, the state court did not have jurisdiction over this "split" cause of action.

I do not discuss the merits of the above point but only call attention to the fact that the majority does not decide this point. The majority simply says that the trial court did not err in "dis-

missing the appellant's counterclaim." The majority takes the position that subject matter jurisdiction, as argued under Coleman's first point, is not before this court on appeal. The majority concedes that the trial court's findings were sufficient to permit it to "direct the entry of a final judgment as to one or more but fewer than all the claims," as authorized by Ark. R. Civ. P. 54(b). But the majority says that the trial court "directed the entry of final judgment as to the dismissal of appellant's counterclaim and third party complaint, in order to permit Coleman's to appeal that dismissal" and that the issues Coleman's raises on appeal "are totally unrelated to the interlocutory order that it has been permitted to appeal."

In all due respect, I find this statement hard to understand. Coleman's counterclaim, and amendments thereto, filed against the appellees alleged that appellees wrongfully breached the lease agreement under which Coleman's operated the truck stop. The trial court dismissed the counterclaim and directed its entry as a final order, which could be appealed under Ark. R. Civ. P. 54(b), because "it would be highly prejudicial for the plaintiff [appellees] to proceed to trial and obtain judgment against [Coleman's] . . . without first having a final adjudication of said [Coleman's] right to assert its counterclaim and third party complaint."

Thus, it seems clear to me that Coleman's first point, which argues that the appellees could not split their cause of action and sue for possession in state court, is a proper point to argue in this case in which a final order has been entered pursuant to Rule 54(b). This issue would clearly have some effect on Coleman's counterclaim.

Coleman's second point on appeal is likewise properly before this court. This point argues that the trial court erred in refusing to set aside the order finding appellees entitled to possession and damages because Coleman's was not in court in person or by counsel at 9:00 a.m. on February 12, 1991. Appellant filed a motion, with an affidavit, to set that order aside. Again, without discussing the merits of the argument, I dissent because the majority does not decide whether the motion should have been granted.

The third and four points argued by the appellant are set out in the majority opinion. Without extending this discussion, I would

only call attention to the fact that neither of these two points is decided by the majority.

Without citation of authority, the majority opinion is based on the assumption that the judgment which a court makes "final" under the authority of Ark. R. Civ. P. 54(b) must be "reasonably related" to the order that is questioned on appeal. While it may be possible to think of a factual situation where there would be no reasonable relationship, I do not agree that this should be a rule or restriction announced by this court. But, in any event, the concept is not applicable in this case. Here, as the majority opinion points out, the trial court has directed the issuance of a writ of possession. No money judgment has yet been entered; further hearings are contemplated; and, as the trial court noted, a pretrial has been set. The order dismissed the appellant's counterclaim because of lack of subject matter jurisdiction. The trial court directed that this is a final judgment, and one of the reasons this is allowed by Rule 54(b) will be defeated if we simply affirm the dismissal of the counterclaim and do not decide the points argued by the appellant in this appeal.

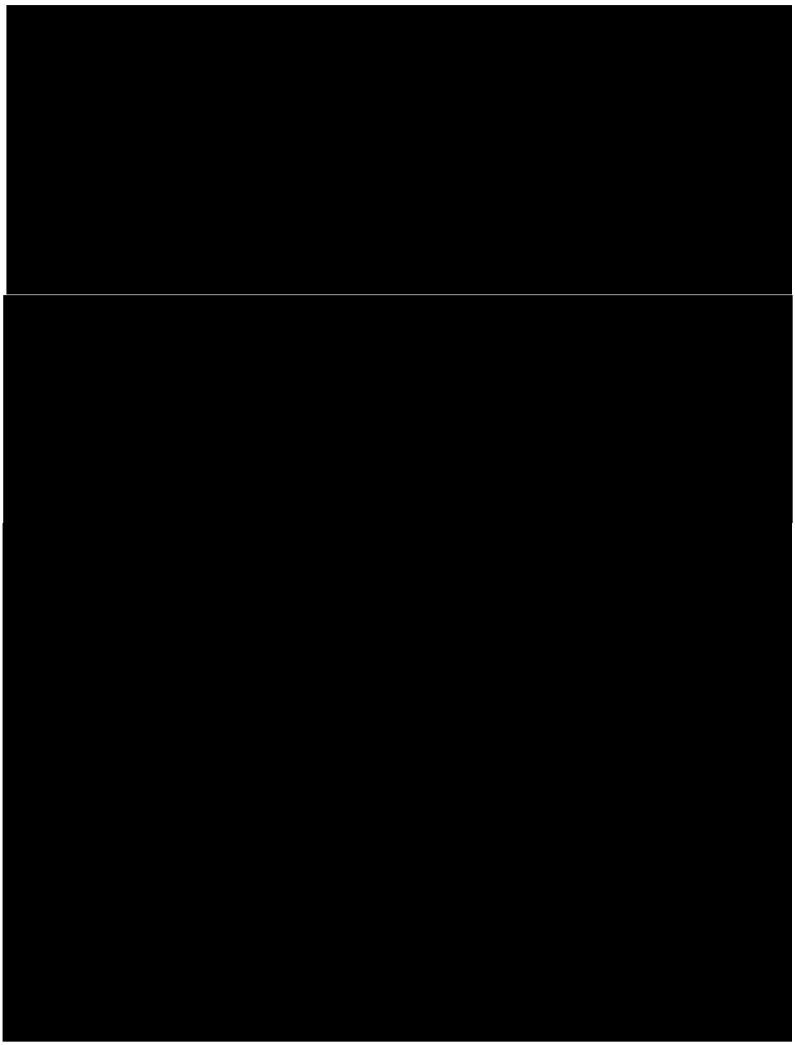
The problem in this case is not that the points argued on appeal are unrelated to the order that dismissed the appellant's counterclaim but that the appellant does not argue that the court erred in dismissing the counterclaim. Our Rule 54(b) is taken word-for-word from Rule 54(b) of the Federal Rules of Civil Procedure. In *Curtiss-Wright Corporation* v. *General Electric Company*, 446 U.S. 1 (1980), the Court discussed the application of Federal Civil Procedure Rule 54(b) and said that one of the considerations involved was "whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." 446 U.S. at 8. Here, the trial court properly directed that the order dismissing the appellant's counterclaim be entered as a final judgment. Regardless of whether the dismissal is argued as error in this appeal, the points that are argued by appellant are related to the dismissal of the counterclaim, and if they are decided in this appeal they will not have to be decided in another appeal.

I dissent because the majority opinion affirms the dismissal of the counterclaim, thus treating it as a final order, but refuses to decide the other issues presented in this appeal.

Larry Daniel HAMBLEN *v.* STATE of Arkansas

CA CR 92-1216 866 S.W.2d 119

Court of Appeals of Arkansas
Division II
Opinion delivered November 24, 1993



[redacted]

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

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

JOHN B. ROBBINS, Judge. On June 10, 1992, appellant Larry D. Hamblen, Jr. was convicted by a jury of battery in the first degree and permitting abuse of a child. Appellant was sentenced to twenty (20) years and fined $15,000.00 on the battery charge and sentenced to ten (10) years and fined $10,000.00 for permitting child abuse, with the sentences to run concurrently. Appellant contends on appeal that the trial court erred in admitting into evidence certain testimony which had been given at an earlier hearing in juvenile court. We find no error and affirm.

The testimony presented in this case revealed that on October 27, 1991, appellant, Larry D. Hamblen, took his five-week-old son, Kendall A. Hamblen, to the emergency room at Methodist Hospital in Jonesboro. Dr. L. K. Austin, a practicing pediatrician in Jonesboro, testified that he attended the five-week-old child on the afternoon of October 27, 1991. Dr. Austin stated that Kendall had multiple bruising on his arms, the palms of his hands were bruised, and that the child was in severe pain when moving his lower extremities. X-rays of Kendall's lower extremities revealed multiple fractures below his knees. Both bones above the ankle of Kendall's left leg and one bone of his right leg were fractured. Dr. Austin testified that a CT scan also revealed swelling of the brain which the doctor opined was due to a shaking syndrome; where you pick up a child and shake him, whiplashing the neck and causing the brain to bounce back and forth against the skull. Dr. Austin stated that it takes tremendous force to break bones in a five-week-old infant because the bones are so flexible, some bones not being completely formed and still

being partly cartilage. The doctor further stated that, on the basis of his twenty-seven years of experience practicing medicine, in his opinion the injuries sustained by Kendall were the result of child abuse. He stated that appellant's explanation that the child fell out of a crib was not consistent with his physical findings.

Dr. John Woloszyn, a practicing orthopedic surgeon in Jonesboro, testified that he also attended to the injuries of Kendall on October 27, 1991. In addition to the injuries listed above, Dr. Woloszyn found what he believed to be a typical cigarette burn, or the healed remnants thereof, on the left outside of the child's arm. He opined that the injuries to Kendall were less than one week old and that the trauma to the legs involved quick, sharply applied force. Dr. Woloszyn also stated that it was his opinion that these injuries were caused by child abuse, and that the appellant's explanation to him that Kendall must have banged his leg on something could not have caused these results.

Bill Brown, an employee attending Kendall in the emergency room on the day in question, testified that Kendall was apprehensive and very jumpy anytime someone would speak to him. He stated that appellant was initially very cooperative, but then before anyone mentioned child abuse the appellant stated, "[d]on't accuse me of beating my child. I didn't do it." Mr. Brown and Tammy Summers, an LPN on staff at the hospital, both verified the bruising on Kendall's arm, legs and back.

On October 28, 1991, an emergency custody order was entered by the juvenile division of the Craighead County Chancery Court finding that an emergency existed and placing the child in the temporary custody of the Division of Children and Family Services. On October 30, 1991, a probable cause hearing was held at which the two parents were present, appellant and Donna Reams, the mother of the child but who was not married to the appellant. The appellant and Miss Reams were both advised of their right to have an attorney present and their right not to testify if they so wished. The following exchange took place as the hearing began:

> THE COURT: Do you understand that you have a right to be represented by any attorney in these proceedings?
>
> . . .

THE COURT: This is not in the nature of a criminal proceeding, and at this point and time under the law I'm not authorized to appoint an attorney to represent you. Do you understand that? [Appellant's request for indigent status had previously been denied.]

MR. HAMBLEN: Yes sir.

THE COURT: Miss Reams has indicated to the court that she wants to go ahead and proceed without an attorney with the probable cause hearing today. Do you want to do that also?

MR. HAMBLEN: Yes.

THE COURT: The other thing I would caution you of, Mister Hamblen, and also you likewise Miss Reams, is the court has been advised that the two of you have apparently had some criminal charges filed against you, or will have some criminal charges filed against you as a result of this alleged incident. Is that correct?

THE COURT: I want to caution you that number one, you have the right to refuse to testify in this matter if you choose not to testify, and also advise you that if you do choose to testify and you're placed under oath in these proceedings that even though these proceedings are not in the nature of criminal proceedings but involve the custody of this child, that anything that you say in this court can and will be used against you in the criminal proceedings. Do both of you understand that?

MR. HAMBLEN: Yes sir.

THE COURT: Do you understand that also?

MS. REAMS: Yes sir.

Both appellant and Miss Reams went on to testify in the juvenile court hearing on October 30, 1991. Miss Reams testified that she had observed the appellant shake the child on several occasions, but that she did not believe "anything happened when this occurred." When appellant testified he denied ever having "shaken" the child and yet testified, "I never shook him hard."

On June 8, 1992, the appellant was before the circuit court on the criminal charges. The case against Miss Reams was severed from the appellant's. Miss Reams' attorney notified the court and the State that she would exercise her Fifth Amendment right and refuse to testify at appellant's trial. The State gave notice that it intended to use Miss Reams' sworn testimony from the juvenile court proceeding as evidence against appellant in his criminal trial. The appellant objected, contending that he was not represented by counsel at the earlier hearing and that a probable cause hearing was not the type of "prior hearing" contemplated by the Arkansas Rules of Evidence. The trial judge ruled in favor of the State and Miss Reams' testimony was introduced.

Appellant contends on appeal that it was error to admit the testimony of Miss Reams against him. The following is a portion of the testimony given by Miss Reams at the chancery court juvenile division hearing which indicates that appellant did shake the child:

DONNA REAMS

[H]aving been first duly sworn to speak the truth, the whole truth and nothing but the truth, then testified as follows:

DIRECT EXAMINATION

BY MR. McCAULEY:

Q You are Donna Reams?

A Yes sir.

Q And you heard the Judge explain to you that you do not have to testify at this hearing?

A Right.

Q Do you wish to testify?

A Yes.

Q You do?

A Uh-huh.

Q You heard the statement of Mr. Moxley about the statement that you gave to the — Officer Beals?

A Uh-huh.

Q Is that accurate?

A Right.

Q And did you observe Mr. Hamblen shake the child on several occasions?

A Uh-huh.

Q How may times?

A About two times, maybe three.

Q Did you think anything happened when this occurred?

A No.

Q Do you think that the shaking was of the nature that could've caused the broken legs of the child?

A No, I don't.

Q Do you have any explanation as to the cause of the broken legs?

A The only thing I can think of is the swing or changin' a diaper. That's the only thing we've come up with.

Q No other explanation?

A No.

Arkansas Rules of Evidence 804 provides in part:

Rule 804. Hearsay exceptions — Declarant unavailable. —
(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;

. . .

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The question of admissibility of an unavailable witness's testimony was addressed in *Scott and Johnson* v. *State*, 272 Ark. 88, 612 S.W.2d 110 (1981), where the Arkansas Supreme Court stated:

> There has traditionally been an exception to the right of confrontation where a witness who testified at a prior trial is unavailable at a later judicial proceeding. State evidentiary rules can fall within this exception if two tests are met. First, the witness must be "unavailable". . . . Next, the evidence must be reliable. . . . [A]dmission depends upon the circumstances surrounding the hearing. In the case of a preliminary hearing admission depends upon what kind of hearing is involved and whether it is a "full fledged" hearing or a limited one.

(Citations omitted.) 272 Ark. at 92-93, 612 S.W.2d at 112-113. In *Scott* the supreme court cited *California* v. *Green*, 399 U.S. 149 (1970), which held that testimony from a preliminary hearing was admissible because the circumstances of the hearing were not "significantly different" but closely approximated those that surrounded a typical trial. The reasons given were: the witness was under oath; the defendant was represented by counsel and had the opportunity to cross-examine the witness; and, the trial was before a tribunal equipped to provide a judicial record.

As the record from the probable cause hearing cited above reveals, appellant was informed of his right to be represented by an attorney but stated that he wanted to proceed without counsel. He and Miss Reams were both specifically told that crimi-

nal charges were to be filed against them for the same matters before the chancery court, and that they had the right to refuse to testify. They were further informed that "if you do choose to testify and you're placed under oath in these proceedings that even though these proceedings are not in the nature of criminal proceedings but involve the custody of this child, that *anything that you say in this court can and will be used against you in the criminal proceedings*." (Emphasis added). Both appellant and Miss Reams acknowledged that they understood the significance of testifying. Appellant was clearly given the opportunity to cross-examine Miss Reams on her testimony that he shook the child, however he declined to do so. His "motive to develop the testimony" in the chancery case was very similar to his motive in the criminal case; i.e., to avoid any implications of child abuse, so that the child could remain with him and he would not be convicted of child abuse.

[redacted] Miss Reams was an unavailable witness because she invoked her Fifth Amendment right not to testify. The requirements of Ark. R. Evid. 804(b)(1) were met to allow the introduction of Miss Reams' earlier testimony. The evidence was clearly reliable because Miss Reams' motive was also to keep the child in their home. The circumstances and protection of rights afforded the appellant at the probable cause hearing were not "significantly different" from an actual trial. *See California* v. *Green, supra.* We find no abuse of discretion by the trial court in admitting the testimony.

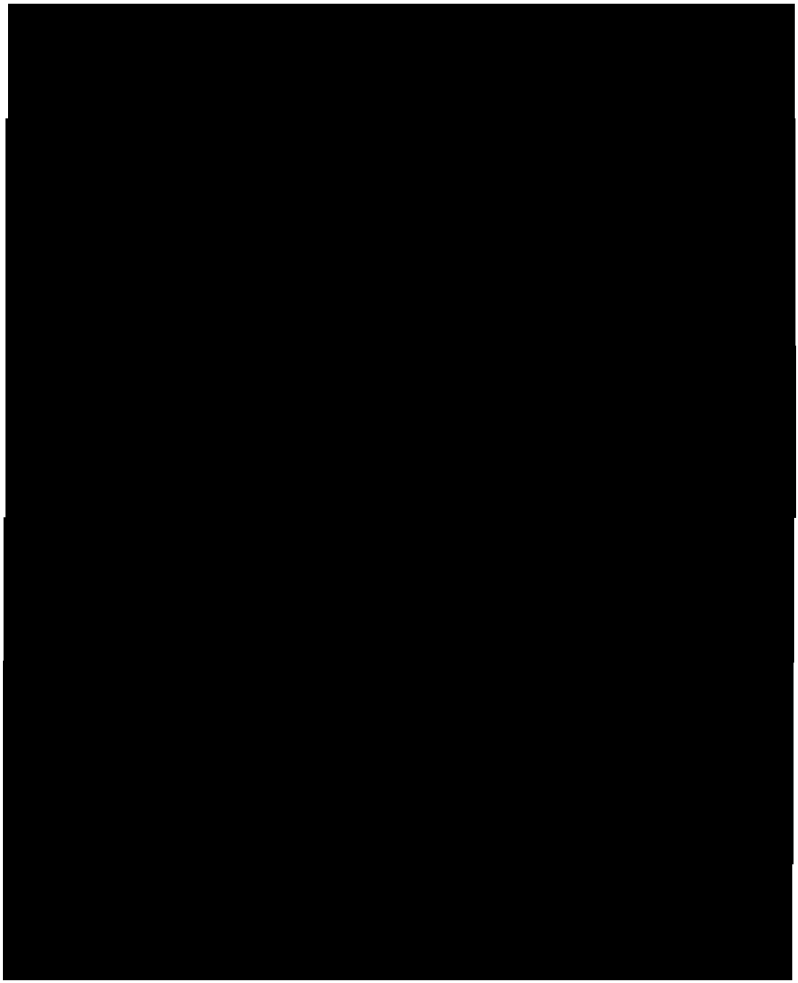
Affirmed.

JENNINGS, C.J., and MAYFIELD, J., agree.

Ruth I. JONES *v.* Gary BALENTINE, Individually and as Administrator of the Estate of Otto Everett Balentine, Deceased; Larry Balentine; and Inez Balentine

CA 93-30 866 S.W.2d 829

Court of Appeals of Arkansas
Division II
Opinion delivered November 24, 1993



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[redacted]

[redacted]

[redacted]

Skokos & Coleman, P.A., by: *Randy Coleman*, for appellant.

Henry Hodges, for appellees Gary Balentine, individually; Larry Balentine; and Inez Balentine.

Wright, Lindsey & Jennings, for appellee Gary Balentine as Administrator of the Estate of Otto Everett Balentine.

JOHN B. ROBBINS, Judge. Appellant, Ruth Jones, has appealed from the Pulaski County Probate and Chancery Courts' decision (in two consolidated actions) affirming the validity of a purported family settlement agreement into which appellant entered with her nephews, appellees Larry Balentine and Gary Balentine, and their mother, appellee Inez Balentine, the widow of appellant's predeceased brother, Roscoe Balentine, who died in 1990. The family settlement agreement at issue purported to settle the estate of appellant's brother, Otto Balentine, who died intestate on April 26, 1991. Appellant has also appealed from the denial of her petition to remove Gary as administrator of Otto's estate. Appellant is a resident of Baltimore, Maryland, and appellees live in North Little Rock. The parties met with an attorney, Richard Hatfield, in May 1991 and signed an agreement later that day which equally distributed Otto's estate among appellant and appellees. Without this agreement, Inez would not have been entitled to a share of Otto's estate.

The next day, the administration of Otto's estate was opened in the Pulaski County Probate Court, and waivers of inventory, accounting, and notice signed by appellant were filed. An order appointing Gary as administrator of the estate was entered, and letters of administration were issued to him. A week later, Gary made a partial distribution of $340,000.00 in cash without first obtaining the probate court's approval. In this partial distribution, each party received $85,000.00.

In June 1991, appellant revoked her waivers. She unsuccess-

fully sought to rescind the agreement and refused to sign some quitclaim deeds in connection with the agreement. In August 1991, appellant filed a petition to remove Gary as administrator, citing the unapproved partial distribution of $340,000.00. In response, Gary admitted that he had not petitioned the probate court for approval but stated that he had relied upon the family settlement agreement in making the partial distribution. Attached to his response was a copy of the family settlement agreement, which stated:

> Agreement made by and between Inez Balentine, Ruth Jones, Gary Balentine and Larry Balentine.
>
> 1. Otto Balentine died on April 26, 1991, leaving the following property which we, as the persons who are entitled to the property, agree to distribute as follows.

Property	*Recipient*
House located at 1410 Willow Street	Inez Balentine
All stock and ownership in Tac-A-Taco	Inez Balentine
1979 Lincoln	Inez Balentine
1973 Ford LTD	Inez Balentine
House and lot located at 1412 Willow Ave.	1/4 each
Cash including C.D.s and checking owning approximately $363,000, less payment of administration expenses and debts	1/4 each
Building and lot located at 1720 W. Long 17th Street, No. Little Rock	Split 1/4 each, after Veva Brant ceases to occupy it in accordance with the contract with her

4 lots in Pinecrest Cemetery	1/3 each to Ruth Jones, Gary Balentine and Larry Balentine
Personal Property	Distributed by agreement.

2. We shall equally divide all expenses and debts to be paid from the checking account.

In August 1991, appellant filed a complaint against Gary, individually and as administrator of the estate, Larry, and Inez, in the Pulaski County Chancery Court to rescind the agreement on the grounds of undue influence and appellees' breach of their confidential and fiduciary relationships with appellant. Later, Gary filed an inventory listing the value of the personal property at $369,616.00 and the real property at $59,500.00 as of the date of the decedent's death. Gary also filed a petition for authority to reimburse Inez for expenses of the estate which she had paid. These expenses included insurance, utilities, maintenance, and repair bills for the real property. The probate court granted reimbursement to Inez in the amount of $5,415.95 in August 1992.

The cases were consolidated for trial. In her proposed findings of fact, appellant asked the chancery court to grant her oral motion to amend the pleadings to conform to the evidence to include the issues of lack of consideration; failure to include an interested, non-consenting, and necessary person (appellant's spouse) in the agreement; and mutual mistake of fact. Appellant also requested that the court find the purported family settlement agreement to be an executory contract requiring consideration. The court upheld the family settlement agreement and found that, pursuant to this agreement, the proper people had received the money and, therefore, the distribution was not grounds for Gary's removal as administrator. The trial judge stated that, although Gary may not have done everything he should have done to keep the estate's assets properly maintained, he had relied upon his mother to maintain the estate's assets. In her conclusions of law, she held that Gary's actions as administrator did not rise to the level of malfeasance or mismanagement, as required by Ark. Code Ann. § 28-48-105 (1987), to justify his removal.

In her findings of fact and conclusions of law, the chancellor found that, as Otto's surviving sibling, under the Arkansas law of descent and distribution, appellant would have been legally entitled to an undivided one-half interest in his estate; Otto's nephews, Larry and Gary, would have been each entitled to an undivided one-fourth interest. As widow of the decedent's brother, Inez would have been entitled to no interest in the estate.

The chancellor also found that no confidential relationship existed between appellant and appellees. She noted that appellant had not seen appellees for several years before Otto's death. She also found that appellant had threatened to engage in litigation with her brothers in the past; she had no close relationship with her nephews; and she had only a slightly closer relationship with Inez. The chancellor further found that Gary had no fiduciary duty to appellant at the time the agreement was executed because he had not yet been appointed personal representative of the estate. Additionally, the chancellor found no evidence of undue influence on the part of appellees. She found that appellant was competent, could act for herself, and could protect her own interests in legal transactions. She found that appellant did not appear to be unduly upset and was not so incapacitated by her grief that she was unable to make a rational decision about the agreement. The chancellor found that, although appellees had a better understanding of Otto's assets, there was no evidence that they made any misrepresentations to appellant and that she was fully informed of the estate's assets. The chancellor found that Mr. Hatfield had informed appellant and appellees of their legal rights under Arkansas law and advised each of them that they were entitled to have separate counsel before entering into the agreement.

The chancellor also found appellees' and Mr. Hatfield's testimony to be truthful. With regard to appellant's veracity, however, she stated:

> 17. The Court is not convinced that Ms. Jones is a totally truthful witness and feels she is not an accurate witness. The most that the Court can give her is that Mr. Hatfield said and explained certain things to her which she didn't catch. Parts of her testimony lead the Court to believe she doesn't always tell the complete truth on the first ques-

> tion. While not characterizing or trying to brand the Plaintiff as a liar, the Court does not credit all of her testimony and believes she testifies in ways that put a more favorable light on circumstances than an objective viewer would give them. The Court does not see all the situations she described in precisely the same light as she does.

In her conclusions of law, the chancellor expressed the general principle that family settlement agreements are favored in the law and will not be set aside except for very strong and cogent reasons and that only nominal consideration is required to support such agreements.

In her first point on appeal, appellant argues that the agreement is void for lack of consideration; she argues that the rules of law applicable to family settlement agreements do not apply here because this is not a "family" settlement agreement. Appellant argues that, because Inez was not an heir and had no legal interest in Otto's estate under the Arkansas laws of descent and distribution, Inez was an "outsider" to the estate. Appellant cites 15A C.J.S. *Compromise and Settlement* § 9, at 201 (1967), which states: "The doctrine that the settlement of family disputes affords sufficient consideration for a compromise applies only between parties in interest, and will not sustain an agreement between a party in interest and an outsider not to create trouble in the family." Appellant argues that the Arkansas cases dealing with family settlements uniformly involve agreements among heirs-at-law, widows, devisees, parents, siblings, children, and pretermitted children; she argues that Inez, the widowed sister-in-law of Otto, is not an interested party in his estate and is, therefore, an "outsider." According to appellant, Inez's status as an "outsider" prevents this agreement from being characterized as a family settlement agreement and, therefore, the usual requirement of consideration is necessary.

[redacted] We note that appellant has cited no Arkansas case which holds that *all* parties to a family settlement agreement must be legally interested in the decedent's estate. It is true that most of the cases cited by appellant do involve heirs, spouses, and distributees. However, *Pfaff* v. *Clements*, 213 Ark. 852, 213 S.W.2d 356 (1948), and *Turner* v. *Davis*, 41 Ark. 270 (1883), lend support to appellees' position. In *Pfaff*, the Arkansas Supreme

Court quoted *Turner* v. *Davis* and reversed the Pulaski County Chancery Court's decision allowing some of the parties to a family settlement agreement to repudiate that agreement. In 1946, Samuel Ernest Pfaff died intestate survived by a son, Terrence Pfaff; a daughter, Justine Pfaff Petre; and two grandchildren, Carel Heizman Clements and Carl E. Heizman II, who were the only children of Ernestine Pfaff Heizman, a daughter of Samuel Ernest Pfaff who had predeceased her father. Terrence Pfaff was appointed administrator of his father's estate but died before the administration was complete. He was survived by his wife, Anna Mae Pfaff; his sister, Justine Petre; his niece, Carel Heizman Clements; and his nephew, Carl Heizman II. The estate of Terrence Pfaff apparently consisted, at least in part, of his share of the estate of Samuel Ernest Pfaff. Mrs. Petre, Mrs. Clements, and Carl Heizman signed and delivered to Anna Mae Pfaff an agreement giving the share of Samuel Ernest Pfaff's estate which Terrence would have received to Anna Mae Pfaff. Later, the sister, niece, and nephew of Terrence decided to repudiate the agreement. Although Anna Mae Pfaff claimed they had a valid family settlement agreement, the chancery court allowed the other parties to repudiate the agreement. On appeal, the supreme court reversed and discussed at length the many Arkansas cases dealing with family settlements. The court noted that these cases contain a "common refrain" that family settlements are favored and should be encouraged where no fraud or imposition was practiced. 213 Ark. at 855, 213 S.W.2d at 358. The court stated:

> A study of our cases, and also those from other jurisdictions, fails to disclose any definition, or any statement listing all of the essential ingredients of a family settlement. Notwithstanding such absence, there are, however, some matters that are clear; and these are sufficient for a decision in the case at bar:
>
> 1. It is not necessary that there be a previous dispute or controversy between the members of the family before a valid family settlement may be made. Thus, in *Martin* v. *Martin*, [98 Ark. 93, 135 S.W. 348 (1911),] there was no dispute at the time of the conveyance or will in question, yet the agreement was called a "family settlement"; and Mr. Justice FRAUENTHAL, speaking for the court, used this language:

"This was in effect a family settlement of the interests of these members of the family in these two remaining tracts of land which came from these two estates of the family. Courts of equity have uniformly upheld and sustained family arrangements in reference to property where no fraud or imposition was practiced. The motive in such cases is to preserve the peace and harmony of families. The consideration of the transaction and the strict legal rights of the parties are not closely scrutinized in such settlements, but equity is anxious to encourage and enforce them. As is said in the case of *Pate* v. *Johnson*, 15 Ark. 275: 'Amicable and family settlements are to be encouraged, and when fairly made . . . strong reasons must exist to warrant interference on the part of a court of equity.' *Turner* v. *Davis*, 41 Ark. 270; *Mooney* v. *Rowland*, 64 Ark. 19, 40 S.W. 259; *LaCotts* v. *Quertermous*, 84 Ark. 610, 107 S.W. 167; *Smith* v. *Smith*, 36 Ga. 184, 91 Am. Dec. 761; *Smith* v. *Tanner*, 32 S.C. 259, 10 S.E. 1058; *Good Fellows v. Campbell*, 17 R.I. 402, 22 Atl. 307, 13 L.R.A. 601."

The case last cited in the above quotation is that of *Good Fellows* v. *Campbell*, 17 R.I. 403, 13 L.R.A. 601, wherein there had been no previous dispute, yet a family settlement was upheld; and the opinion contains this pertinent language:

"But there is a class of cases of family arrangements, relating to the settlement of property, in which there is no question of doubtful or disputed rights, and in regard to which a peculiar equity has been administered, in that they have been supported upon grounds which would hardly have been regarded as sufficient if the transaction had occurred between strangers. In these cases the motive of the arrangements was to preserve the honor or peace of families or the family property. When such a motive has appeared, the courts have not closely scrutinized the consideration.

213 Ark. at 855-56, 213 S.W.2d at 358.

[redacted] With regard to the issue of consideration, the court stated:

> (2) Likewise, it is not essential that the strict mutuality of obligation or the strict legal sufficiency of consideration — as required in ordinary contracts — be present in family settlements. It is sufficient that the members of the family want to settle the estate: one person may receive more or less than the law allows; one person may surrender property and receive no *quid pro quo*. Thus, in *Turner* v. *Davis*, 41 Ark. 270, there was claimed that one — Watkins — had no interest in the property sufficient to support a family settlement; but in disposing of that contention, Mr. Justice EAKIN said: "We cannot go behind the agreement to ascertain the interest of Watkins. It is a matter of no consequence whether he had courtesy [sic] or had nothing. . . . The agreement stands on the ground of family settlements,. . . They are supposed to be the result of mutual good will, and imply a disposition to concession for the purpose, regardless of strict legal rights; always excepting cases of fraud, of which nothing, in this case, appears."
>
> . . . .
>
> It is true that in some of our cases (a recent such case is *Mills* v. *Alexander*, 206 Ark. 754, 177 S.W.2d 406), we have mentioned the "consideration" or benefit received by the person who later sought to question the family settlement; but in each such case the consideration was discussed to demonstrate that there had been no fraud, imposition or overreaching practiced against the complaining party. In the case at bar there is no claim that there has been any such fraud, imposition or overreaching, so the matter of consideration becomes of no consequence in the family settlement here involved.

213 Ark. at 857-58, 213 S.W.2d at 359. *See also Harris* v. *Harris*, 236 Ark. 676, 370 S.W.2d 121 (1963), where the appellee unsuccessfully challenged the appellants' interest in the property as insufficient to support a family settlement agreement.

Additionally, in *Jackson* v. *Smith*, 226 Ark. 10, 287 S.W.2d 571 (1956), the supreme court affirmed the Johnson County Chancery Court's refusal to set aside a family settlement under

which the appellant had executed and delivered a deed to the appellees. That lawsuit involved the estate of James Poteet, who died intestate. James Poteet had four sisters, appellants Mrs. Collins, Mrs. Jackson, and two other sisters who had predeceased him, leaving children (appellee Mr. Bernice Smith and appellee Mrs. Luther Norvell). Mrs. Collins and her nephew, Bernice Smith, agreed that Mrs. Collins and Mrs. Jackson would convey to Bernice Smith and Luther Norvell all of their interest in the estate of Mr. Poteet; in return, Mr. Smith and Mr. Norvell would pay all of the debts of the estate. Later, Mrs. Jackson and Mr. Norvell also agreed to this arrangement, and a deed was signed and acknowledged. It should be noted that Mr. Norvell was not a legal heir of the decedent; he was simply a spouse of a living heir. Later, Mrs. Collins and Mrs. Jackson learned the value of the tract of land and sued to set the deed aside. On appeal, they argued that the deed was not within the "family settlement rule." The court disagreed and stated: "That the deed from Mrs. Collins and Mrs. Jackson to Mr. Smith and Mr. Norvell is within the 'family settlement rule' is too clear to admit of doubt. *Pfaff* v. *Clements*, 213 Ark. 852, 213 S.W.2d 356, is complete authority for such conclusion." 226 Ark. at 13, 287 S.W.2d at 573.

[redacted] We conclude, therefore, that it is not necessary that all parties to a family settlement agreement must have an enforceable legal interest in an estate in order for the agreement to be enforceable as a family settlement agreement which requires little, if any, consideration. Here, Inez was the mother of the decedent's two nephews, each of whom was entitled to an undivided one-quarter interest in the estate. Additionally, three of the four parties to this agreement were heirs-at-law of the decedent. The chancellor did not err in concluding that this was a family settlement agreement.

[redacted] Citing 31 Am. Jur. 2d *Executors and Administrators* § 67 (1989), appellant also argues that, even if the agreement *is* a family settlement agreement, it is still invalid because it is an executory contract. Appellant argues that executory family settlement agreements must be supported by consideration. Appellant contends that the cases of *Grubbs* v. *Mattson*, 268 Ark. 1144, 599 S.W.2d 148 (Ark. App. 1980), and *Trantham* v. *Trantham*, 221 Ark. 177, 252 S.W.2d 401 (1952), support this argument. Both of these cases are distinguishable. There is no reference in

either case to the agreement involved therein as a "family settlement agreement." Additionally, the agreements at issue in those cases were made before the death of the family member whose estate was involved. In the case at bar, the chancellor held that, in Arkansas, even *executory* family settlement agreements are not subject to the general requirement of consideration. In addition to *Pfaff* v. *Clements*, executory family settlement agreements were upheld as valid in the following cases: *Isgrig* v. *Thomas*, 219 Ark. 167, 240 S.W.2d 870 (1951); *Barnett* v. *Barnett*, 199 Ark. 754, 135 S.W.2d 828 (1940); and *Davis* v. *Davis*, 171 Ark. 168, 283 S.W. 360 (1926).

Appellant also argues that the agreement is invalid because appellant's husband was not a party to it. She asserts that her husband had acquired a curtesy interest, as her spouse, in the real estate controlled by this agreement. Appellant cites 31 Am. Jur. 2d *Executors and Administrators* § 56 (1989) as authority for this argument:

> In the typical case all successors to an estate (including the surviving spouse, if any) are parties to a family settlement, and every successor whose rights may be affected adversely should be made a formal party to it.
>
> If a written settlement makes all successors parties to it, and it is contemplated that all shall sign it, but one does not, the contract is not binding even on those who have signed. But otherwise, whether a particular successor is a necessary party depends upon the circumstances. One is not a necessary party to a settlement which does not impair or affect his rights, and such a settlement is valid as to those who are parties.

At 31 Am. Jur. 2d *Executors and Administrators* § 60, spouses are addressed: "Where a party to a family settlement agrees to transfer title to real estate, it is necessary that his or her spouse sign the agreement or the subsequent deed, in order to waive dower." The chancellor did not agree that Mr. Jones' failure to join in the agreement rendered it invalid. She stated that Mr. Jones' curtesy was only an inchoate interest and that appellant was free to transfer by deed any interest in real property she owned without his participation. She added, however, that, if

appellant were to die within seven years of the transfer, Mr. Jones might have a claim based on his curtesy interest. In *Mickle* v. *Mickle*, 253 Ark. 663, 488 S.W.2d 45 (1972), the supreme court said that a widow's right of dower in real property remains only an inchoate right and is not an estate until her husband's death; the right of dower is only a contingent expectancy during the lifetime of her husband. *Id.* at 668, 488 S.W.2d at 48. The chancellor was correct in her determination of this issue.

In her second point on appeal, appellant argues that the chancellor erred in failing to find that the agreement was obtained by undue influence and that appellees had breached their confidential relationship with her. She also argues that Gary breached his fiduciary duty as administrator to her. The chancellor found that Gary and Inez had informed appellant that she would be entitled to one-half of Otto's estate and that Gary and Larry would receive one-fourth of that estate. She further found that Mr. Hatfield had advised appellant about each of the parties' rights under the laws of descent and distribution in Arkansas and told each of them that they were entitled to have separate counsel. In finding that no confidential relationship existed between appellant and appellees, the chancellor noted appellant's lack of a close relationship with them and with her brothers. The chancellor further found that Gary had no fiduciary duty to appellant at the time the agreement was executed because he had not yet been appointed administrator of the estate. She found appellant to be competent, able to protect her own interests, and not so incapacitated by grief over her brother's death that she was unable to make a rational decision about the agreement. The chancellor also found Mr. Hatfield's past association with Inez to be insubstantial. She went on to find that she believed appellees and Mr. Hatfield were telling the truth and that she was not convinced that appellant was a totally truthful witness. The evidence more than amply supports these findings.

[redacted]Ordinarily, the burden is upon one who attacks such a transaction to prove that the donor was unduly influenced. *See Burns* v. *Lucich*, 6 Ark. App. 37, 47, 638 S.W.2d 263, 269 (1982). A different burden of proof arises when it is shown that a confidential relationship existed between the donor and a dominant donee. *Id.* Where special trust or confidence has been shown, the transfer to the dominant party is presumed to be void. *Id.* Relation-

ships deemed to be confidential are not limited to those involving legal control; they also arise whenever there is a relation of dependence or confidence, especially confidence which springs from affection on one side and a trust in reciprocal affection on the other. *Id.* at 48, 638 S.W.2d at 270. In addition to proving the existence of a confidential relationship, a party challenging such a transaction must also show that the donee occupied such a superior position of dominance or advantage as would imply a dominating influence over the donor. *Id.* at 49, 638 S.W.2d at 270. Each case must be determined on its own facts. *Donaldson* v. *Johnson*, 235 Ark. 348, 350-51, 359 S.W.2d 810, 812-13 (1962). Whether undue influence occurred is a question for the trier of fact. *Carpenter* v. *Horace Mann Life Ins. Co.*, 21 Ark. App. 112, 121-22, 730 S.W.2d 502, 507 (1987).

[redacted] Although chancery cases are reviewed *de novo* on the record, this court does not reverse a decree unless the chancellor's findings are clearly against a preponderance of the evidence. *Burns* v. *Lucich*, 6 Ark. App. at 47, 638 S.W.2d at 269. Since this question turns heavily on the credibility of the witnesses, this court defers to the superior position of the chancellor in this regard. *Id.* The evidence in this case overwhelmingly supports the chancellor's finding that no confidential relationship existed between appellant and appellees. As in *Woods* v. *Woods*, 260 Ark. 789, 795, 543 S.W.2d 952, 955 (1976), appellees' relationship with appellant was such that "[i]t was highly unlikely that they could unduly influence her actions or that she suddenly had a confidence in them which had not previously existed." In view of the fact that the chancellor expressly discredited appellant's testimony, we hold that her findings that appellees had not exercised undue influence and had not breached a confidential relationship are not clearly erroneous. It is also clear that Gary had not yet been appointed administrator of Otto's estate when the agreement was signed and thus violated no fiduciary duty to appellant in signing it.

[redacted] In her third point on appeal, appellant argues that the probate judge erred in refusing to remove Gary as the administrator of the estate. Appellant asserts that such removal was required by Ark. Code Ann. § 28-48-105 (1987), which states:

> (a)(1) When the personal representative becomes mentally incompetent, disqualified, unsuitable, or incapable of discharging his trust, has mismanaged the estate, has failed to perform any duty imposed by law or by any lawful order of the court, or has ceased to be a resident of the state without filing the authorization of an agent to accept service as provided by § 28-48-101(b)(6), then the court may remove him.

See also Morris v. *Cullipher*, 306 Ark. 646, 816 S.W.2d 878 (1991); *Cude* v. *Cude*, 286 Ark. 383, 691 S.W.2d 866 (1985); *Price* v. *Price*, 258 Ark. 363, 527 S.W.2d 322 (1975); *Davis* v. *Adams*, 231 Ark. 197, 328 S.W.2d 851 (1959). The probate judge found that, although Gary may not have done everything he should have done to keep the estate's assets properly maintained, he had relied upon his mother's assistance in maintaining them. She also found that, since the family settlement agreement was upheld, the proper people had received the $85,000.00 disbursements and that this partial distribution should not be grounds for Gary's removal as administrator. Although probate cases are reviewed *de novo* on the record, this court will not reverse the findings of the probate judge unless clearly erroneous, giving due deference to the probate judge's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *O'Flarity* v. *O'Flarity*, 42 Ark. App. 5, 12, 852 S.W.2d 150, 154 (1993).

[redacted] In her findings, the chancellor acknowledged that this partial distribution was without court approval as required by statute. She noted, however, that all parties had testified that they were willing and able to restore this cash if the court so ordered and that the right people had received the money. This finding by the chancellor is in line with the frequently applied rule of law that error is no longer presumed to be prejudicial; unless the appellant demonstrates prejudice, this court does not reverse. *Jones* v. *Jones*, 43 Ark. App. 7, 13, 858 S.W.2d 130, 134 (1993). The evidence shows that Inez used her own money to maintain the real property of the estate and that, following the denial of the petition to remove him as administrator, Gary requested and received the probate court's permission to reimburse his mother for these expenses. Although appellant argues that an administrator is not permitted to delegate his responsibilities to

other individuals, there is nothing in the probate code which denies the administrator the authority to engage the assistance of others in meeting his responsibilities. Also, no creditors made claims against the money which was distributed.

The decision is affirmed in all respects.

JENNINGS, C.J., and MAYFIELD, J., agree.

WHITE CONSOLIDATED and Continental Loss Adjusting *v.* Alonzo ROONEY and Second Injury Fund

CA 92-1141 866 S.W.2d 838

Court of Appeals of Arkansas
En Banc
Opinion delivered November 24, 1993
[Rehearing denied December 22, 1993.]

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., by: *Brian Allen Brown*, for appellants.

The Whetstone Law Firm, by: *Robert H. Montgomery*, for appellees.

JOHN B. ROBBINS, Judge. This is an appeal by White Consolidated and its workers' compensation carrier, Continental Loss Adjusting (appellants), from a decision of the Workers' Compensation Commission which held that a prior work-related injury must involve a loss of wage earning capacity before Second Injury Fund (appellee) liability may be found.

The claimant, Alonzo Rooney, suffered a work-related back injury on September 30, 1980, while employed by Universal Nolin. As a result of this injury he underwent surgery on March 8, 1982, and there is evidence that this injury resulted in some degree of permanent physical impairment to the body as a whole.

There is also evidence that he did not, however, experience any reduction in wage earning capacity as a result of this injury.

On March 29, 1988, Rooney suffered a compensable lumbosacral strain while employed by White Consolidated. There is evidence that this injury resulted in a permanent physical impairment to the body as a whole; that this injury and the 1980 injury combined to produce a greater disability than would have resulted from the last injury alone, had the 1980 injury not occurred; and that Rooney is now permanently and totally disabled.

The Administrative Law Judge found that appellants' liability was limited to benefits for the 10% permanent physical impairment that he found had resulted from the March 29, 1988, compensable injury and that the Second Injury Fund was liable for benefits for a 55% permanent disability to the body as a whole. This 55% represents the sum of the 10% anatomical impairment that the law judge found had resulted from the 1988 injury and the 35% impairment attributable to the 1980 injury, subtracted from Rooney's total disability (100%) after his last injury.

The Second Injury Fund appealed to the full Commission, which affirmed the Administrative Law Judge in part, but reversed his finding that the Second Injury Fund had liability. The Commission held that the Fund had no liability because Rooney's 1980 injury was work-related and did not result in a loss of earning capacity.

On appeal to this court, the appellants do not contend that the Commission erred in finding that Rooney is permanently and totally disabled, but they contend that the Commission erred in finding that the Second Injury Fund has no liability for the payment of compensation benefits due him.

The Commission recognized that the Arkansas Supreme Court held in *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988), that "the liability of the Fund comes into question only after three hurdles have been overcome."

> First, the employee must have suffered a compensable injury at his present place of employment. Second, prior

> to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

295 Ark. at 5, 746 S.W.2d at 541 (emphasis in the original).The Commission said it was stipulated that the first requirement was satisfied, but with regard to the second requirement, the Commission stated:

> [D]efinitional constraints imposed by the Arkansas Workers' Compensation Law and by the Courts require a distinction between prior conditions that are work-related and prior conditions that are not work-related. *See Weaver* v. *Tyson Foods*, 31 Ark. App. 147, 790 S.W.2d 442 (1990). This distinction is based on the statutory definition of "disability" and on the Court's definition of "impairment," as those terms are used in Ark. Code Ann. § 11-9-525 (1987). . . .
>
> . . . As those terms have been defined by statute and by the Courts, a prior anatomical impairment with no loss of wage earning capacity can only be an "impairment." However, the definition of "impairment" limits application of the term to prior non-work-related conditions. As a result, prior work-related conditions are precluded from ever being considered "impairments.". . .
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> . . . .
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> In the present claim, the claimant's prior condition was work-related, so it must be established that the 1980 injury and subsequent surgery resulted in a disability before the Fund may be found liable. Therefore, it must be established that the prior injury resulted in a loss of wage earning capacity.

The Commission then found that the "preponderance of the evidence fails to establish that the claimant sustained any loss of earning capacity as a result of the 1980 injury." Thus, the Commission found that the Fund had no liability to Rooney.

The thrust of appellants' argument to this court is that the statutory law as set out in Ark. Code Ann. § 11-9-525 (1987) uses the words "disability or impairment" in the "disjunctive"

and that the General Assembly intended "to protect all 'handicapped workers' and not just those with non-work-related handicaps." The appellants' brief in this court shows that this issue was argued to the full Commission upon the Second Injury Fund's appeal from the decision of the Administrative Law Judge. Appellants told the Commission, in their brief filed on February 4, 1992, that since the Arkansas Supreme Court's decision in *Mid-State Construction, supra,* neither that court nor this court had issued a published opinion on this issue. Appellants argued that the language in *Mid-State* indicated that to allow second-injury-fund liability to depend upon whether the worker's disability or impairment was work-related would impermissibly distinguish between two types of handicapped workers. Appellants' brief in this court also contains an objection to the jurisdiction of this court on the basis that the appeal should be heard by the Arkansas Supreme Court. Of course, that objection is overruled. *See Houston Contracting Co.* v. *Young*, 271 Ark. 455, 609 S.W.2d 895 (1980), and Rules of the Supreme Court and Court of Appeals 1-2(a)(3), 2-4(c).

[redacted] *Mid-State Construction, supra*, set out the process by which this court, in ultimate reliance upon *Chicago Mill & Lbr. Co.* v. *Greer*, 270 Ark. 672, 606 S.W.2d 72 (1980), reached our decision in *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985), where we held that the word "impairment," which was added by Act 290 of 1981 to what was then Ark. Stat. Ann. § 81-1313(i) (Supp. 1979) (which had previously been amended by Section 4 of Act 253 of 1979), meant "loss of earning capacity due to a non-work-related condition" and that the impairment must be "independently" causing disability prior to the second injury and continue to do so after that injury. But in *Mid-State* our supreme court said we were wrong in holding "that the impairment must have involved loss of earning capacity." The court said that "a claimant's non-work-related condition suffered prior to the recent compensable injury need not have involved a loss of earning capacity." 295 Ark. at 6, 746 S.W.2d at 542. However, *Mid-State* also quoted the "operative language" from its *Greer, supra*, decision and said:

> In other words, the claimant's prior impairment must have been of a physical quality sufficient in and of itself to support an award of compensation had the elements of

> compensability existed as to the cause for the impairment. It is the substantial nature of the impairment which is emphasized, and the elements of compensability, none of which may have existed as to the particular claimant, merely assist the fact finder in his determination as to whether the former condition was sufficient in degree to constitute an impairment qualifying the claimant as one of the "handicapped" for whose benefit the statute was enacted. . . .

Id.

While the opinion in *Mid-State* did not specifically state that *Osage* was wrong in holding that "impairment" is a condition that is not work-related, one thing is clear. The court said that our definition of impairment in *Osage* requires a result that:

> [I]mpermissibly distinguishes between two types of handicapped persons, contravenes the statutory scheme which makes employers liable only for the "degree or percentage of disability or impairment which would have resulted from the [recent compensable] injury had there been no preexisting disability or impairment," and defeats the purpose of the Fund to encourage the hiring of the handicapped.

295 Ark. at 8, 746 S.W.2d at 543 (brackets in the original).

[redacted] Thus it is clear that there is a point at which it is impermissible to distinguish between types of handicapped persons. Therefore, it appears that we must retreat from that portion of our definition of "impairment" that said it is a non-work-related condition. Not only is this strongly implied by the *Mid-State* opinion, but there seems to be no real justification for limiting "impairment" to a non-work-related condition. Moreover, neither party has cited us to a decision where this precise issue has been presented to us. In fact, a division of this court has said that the legislature added the words, "or impairment" to the act to make it clear that "non-work-related" conditions were included. *See Masonite Corporation* v. *Mitchell*, 16 Ark. App. 209, 212, 699 S.W.2d 409, 411 (1985). By implication, at least, this suggests that "work-related" conditions were already included in the term "disability."

[redacted]

This means, that we must remand this case for two reasons. One, the Commission did not find that the claimant, Mr. Rooney, sustained a 35% anatomical impairment as a result of his first (1980) injury. The law judge made such a finding, but the Commission must make the finding that we review. *Ark. Coal Co.* v. *Steele*, 237 Ark. 727, 375 S.W.2d 673 (1964); *Jane Traylor, Inc.* v. *Cooksey*, 31 Ark. App. 245, 792 S.W.2d 351 (1990). Two, the Commission must make a determination with regard to the second and third "hurdles" that *Mid-State* said must be "overcome" before the Fund has any liability. We therefore point out that our decision today only removes from our former definition of "impairment" the requirement that it must be a non-work-related condition. The Arkansas Supreme Court in *Mid-State* removed from our definition of impairment the requirement that there must be "loss of earning capacity." The consequence of that holding is spelled out in *Mid-State*, but we point out that *Mid-State* was remanded for the Commission to determine:

> (1) whether Davis' former neck injury and loss of the right eye constituted an "impairment" in that they were of a physical quality which, were the other elements of compensability present, would have been capable of supporting an award; and (2) whether, even if the first requirement is satisfied, Davis' former condition combined with his 1981 compensable injury to produce a disability greater than that which "would have resulted from the last injury, considered alone and of itself." Section 11-9-525(b)(3).

295 Ark. at 9, 746 S.W.2d at 543.

We affirm the Commission's finding that Rooney is permanently and totally disabled. We reverse its finding as to the liability of the Second Injury Fund and remand that issue for a new determination in keeping with this opinion and the opinion in *Mid-State*.

JENNINGS, C.J., concurs.

JOHN E. JENNINGS, Chief Judge. I concur in the decision of the court for the reasons expressed in the opinion of the administrative law judge, the pertinent part of which follows:

Turning to the Second Injury Fund liability question, I note that as it normally does, the Fund seeks to defend by claiming that if claimant cannot demonstrate that his first injury (i.e., 1980 injury) left him with some degree of permanent partial disability (and it is clear that he sustained no such disability) the Fund has no liability, its position being that the term "impairment" in Ark. Code Ann. §11-9-525 (1987), the Second Injury Fund statute, means a *non-work-related* condition. Therefore, the argument runs, a claimant having a substantial permanent physical impairment flowing from a previous *work-related* injury is ineligible for an award from the Fund based on the combination of this impairment and a subsequent compensable impairment. The argument is that, unless the first impairment is non-work related, a claimant must prove disability — i.e., diminished wage earning capacity (Ark. Code Ann. §11-9-102(5) (1987)) — flowing from the previous injury. . . .

The Fund's position is that §11-9-525, as interpreted by the Arkansas Supreme Court in *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988), restricts Fund liability to two types of cases: First, cases in which claimant can show that the effects of the last injury have combined with those of a former work-related injury that itself produced wage loss disability; or, second, cases in which claimant can show that the sequelae of his last injury combined with the effects of a previous non-work-related permanent physical impairment.

In the case at bar, claimant did not sustain a permanent wage-loss disability after his first injury, only a substantial permanent physical impairment. If the Fund's argument that "impairment" means only a "*non-work related* impairment" is well taken, then claimant cannot get to the Second Injury Trust Fund. . . .

I am well aware that the Court of Appeals has unambiguously taken the position in *dicta* that impairment means a non-work related condition, but I note at the outset that it does not appear to have squarely ruled on the issue, for example by relieving the Fund of liability solely on the

ground that a claimant's pre-existing impairment was attributable to a job related condition, although the court came close to doing this in *State of Arkansas Second Injury Fund* v. *Girtman*, 16 Ark. App. 155, 698 S.W.2d 514 (1985). See, also, *Second Injury Fund* v. *Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985); *Del Monte Frozen Foods, Inc.* v. *Harmon*, 19 Ark. App. 51, 716 S.W.2d 784 (1986). So recondite has the law become that the Court of Appeals itself appears to become confused at times. For instance, in *Masonite Corp.* v. *Mitchell*, 16 Ark. App. 209, 699 S.W.2d 409 (1985), the court implied that impairment means both compensable and non-work related conditions:

> [Appellant] asserts that by adding 'or impairment' after the word 'disability' in §4 of Act 290 of 1981 the legislature intended to make the fund liable whether or not the prior impairment was causing loss of earning capacity prior to the injury. That argument was rejected in *Osage Oil Company* v. *Rogers, supra*, where we held that the inclusion of the word 'impairment' was intended only to make it clear that the first impairment *did not have to be* one which would be compensable under the act but rather, the definition *included* non-work-related ones.

Id. at 212, 699 S.W.2d at [411] (emphasis added).

The Fund's argument on the definition of "impairment" runs as follows. In 1980, the Arkansas Supreme Court decided *Chicago Mill & Lumber Co.* v. *Greer*, 270 Ark. 672, 606 S.W.2d 72 (1980), construing Ark. Stat. Ann. §81-1313(f)(2)(iii) (Repl. 1976). In rejecting the Fund's contention that previous injuries and disabilities had to be *work related*, the Court in *Greer* quoted with approval the following language from Professor Larson's treatise: "[A] prior impairment, although not actually a compensable disability, must have been of a physical quality capable of supporting an award if the other elements of compensability were present." *Id.* at 677, 606 S.W.2d at [74]. For some reason the Fund appears to have read this language not as a recognition, which it obviously was, that impairment should be expansively defined to include not only

compensable conditions but also non-compensable ones capable of supporting an award if "elements of compensability were present," but instead as supportive of a restrictive definition encompassing only non-work related conditions. In response to *Greer*, the Fund argument continues, Act 290 of 1981 was enacted, amending the statute by adding the phrase "or impairment" or other language using the term "impairment" at several places in the statute. By these additions, the Fund maintains, the General Assembly intended to make clear that Fund liability could be grounded on a previous non-work related condition (impairment) or a previous compensable disability.

A number of difficulties inhere in the Fund's argument about the meaning of impairment. First, the language of the Act forecloses the reading advocated by the Fund. The Second Injury Fund statute, as amended by Act 290 of 1981 and recodified in language identical in all material respects to the Act 290 language, reads in pertinent part as follows:

> (a)(1) The Second Injury Trust Fund established in this chapter is a special fund designed to insure that an employer employing a handicapped worker will not, in the event the worker suffers an injury on the job, be held liable for a greater disability or *impairment than actually occurred while the worker was in his employment.*
>
> . . .
>
> [b] (3) If an employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a *subsequent compensable injury resulting in additional permanent partial disability or impairment* so that the degree or percentage of disability *or impairment* caused by the combined disabilities or *impairments* is greater than that which would have *resulted from the last injury*, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, then

the employer at the time of the last injury shall be liable only for the degree or percentage of disability or *impairment which would have resulted from the last injury* had there been no pre-existing disability or impairment.

(4) After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than *the actual anatomical impairment resulting from the last injury*, has been determined by an administrative law judge or the commission, [the combined disability shall be determined.]

(5) *If the previous disability or impairment, whether from compensable injury or otherwise*, and the last injury together result in permanent total disability, the employer at the time of the last injury shall be liable only for the *actual anatomical impairment resulting from the last injury considered alone and of itself.*

Subsections 11-9-525(a)(1), (b)(3)—(5) (1987).

In the space of four paragraphs the word impairment is used in seven different contexts in a fashion utterly incompatible with its having a meaning restricted to non-work related injury. How can impairment mean a non-work related condition in a statute that speaks of a "compensable injury resulting in additional permanent partial disability *or impairment*" ((b)(3)) and furthermore says, "[T]he employer at the time of the last injury shall be liable only for the actual anatomical *impairment resulting from the last injury* . . ." ((b)(5))?

The rationale for restricting the meaning of impairment is fallacious. The Fund appears to argue that the term impairment must mean something other than a compensable condition because if it did not, if it meant the impairment arising from a compensable injury, the mathematical computations required by what is now §11-9-525(b)(4) would be impossible, as one would be forced to choose between different percentage amounts in adding past disability ratings to present ones. . . .

The Fund argues that the statute cannot sensibly be read unless impairment means "loss of earning capacity due to a non-work related condition." But *the statute says* that an impairment may flow from a "compensable injury" ((b)(3)). The Fund argues that the statute can be interpreted only by ignoring its plain language.

Even if this argument were correct, it would not resolve the dilemma mentioned in the Fund's argument above, because many Fund cases involve multiple previous injuries — claimants frequently have previous non-work-related impairments as well as work-related conditions —with the result that claimants arrive at the Commission with combinations of work-related disabilities and work-related and non-work-related impairments. (*Mid-State* itself was such a case.) Accepting the Fund's contentions about computation problems for purposes of argument, what happens when, prior to the last injury, the claimant has a 10% impairment from a non-work related condition and a 15% disability from a previous compensable injury? In such a case the "disability" and the "impairment" do not "constitute the same mathematical quantity or extent of injury. . ." (brief at 13), and computation becomes impossible, according to the Fund. This is obviously incorrect. The problem is illusory. In such cases, one would simply add the percentage of disability to the percentage of impairment. There is no other way to proceed. There is certainly no implied or explicit rule against adding or subtracting disabilities and impairments. . . Once one accepts that there are cases where disabilities and impairments must be added or subtracted if the statute is not to be rendered a nullity, it becomes clear that distinguishing between work-related and non-work-related impairments was unnecessary in the first place.

Third, it has never been convincingly explained why, if the legislature wanted to inject into the statute a reference to non-work-related conditions, it did not say this in so many words rather than select from all the terms available the one (impairment) universally used by practitioners, the Commission, and the courts alike to refer to a compensable, functional compromise of bodily capacity. The

Fund's argument requires that the word "impairment" mean one thing in a part of the act not pertaining to Fund liability — for instance, §11-9-522(b) — but something entirely different in §11-9-525. According to the Fund's argument, the term "anatomical impairment" in §11-9-525 means something different from "impairment" in the same section, but means the same thing as "impairment" in §11-9-522(b). To accept this argument one must of necessity impute to the Legislature an intent to maximize confusion. With this I cannot agree. In this connection, it should be borne in mind that the General Assembly did not stop using the word "impairment" in 1981. Act 10 of 1986 (Second Extraordinary Session) amended the Workers' Compensation Law by adding the following language to what is now Ark. Code Ann. §11-9-522(b) (1987):

> In considering claims for permanent partial disability benefits in excess of the employee's percentage of *permanent physical impairment*, the commission may take into account, in addition to the percentage of *permanent physical impairment*, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of *permanent physical impairment* established by a preponderance of the medical testimony and evidence.

(Emphasis added.)

The Legislature did not use the term "anatomical impairment," as it would have if argument of the Fund presented above were correct. The Legislature used "impairment." If "impairment" means a "non-work related condition," the Legislature is here recognizing employer liability flowing from injuries that are *ex hypothesi* non-compens-

able. The burden should be on the Fund to explain why this should be so. Of course, the reality is that by using the word impairment the Legislature was using the term most commonly employed in legal parlance to refer to residual incapacities of compensable injuries.

Perhaps the best argument against the Fund's contrived interpretation of impairment is the irrationality of the result it entails, which is to release the Fund from liability in a case (such as this one) where a claimant sustains a 35% back impairment at work for employer A and subsequently becomes totally disabled while working for employer B after another compensable injury to the same area of the back. Imposing liability on the Fund in these circumstances permits the employee to get the job with employer B, a job that otherwise may well be refused if *Osage* dicta continues to be followed. For why should employer B hire a previously injured employee, if all liability for a subsequent injury will fall on B's carrier? Not only is the distinction drawn by the Fund logically insupportable, it works a discernible harm on injured employees, who are less likely, by definition, to be able to compensate for employment discrimination (based on "previously-injured" status) by making themselves more attractive to employers through working longer and harder. The question is not just which of three types of respondents — carriers, self-insured respondents, or the Fund — should pay. The ability of an injured worker to return to gainful employment is also at issue.

The Fund relies on *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988) to support its restrictive reading of the term impairment. There is language in *Mid-State*, the primary source of authority from the Arkansas Supreme Court, that, if not considered in the context of the case's history, might be read as approval of the definition advocated by the Fund. Properly placed in context, however, the *Mid-State* language relied upon by the Fund finds the Arkansas Supreme Court merely adopting the Court of Appeals' position on an aspect of the definition of impairment not at issue in *Mid-State.*

[redacted]

It must be remembered that the primary issue faced by the Supreme Court in *Mid-State* was whether the term impairment connoted, as the Court of Appeals had previously held, wage loss disability. In focusing on the question of whether impairment necessarily meant loss of wage earning capacity, as the Arkansas Court of Appeals had previously held in a number of cases, the Supreme Court in *Mid-State* appears to have assumed that the Court of Appeals had correctly restricted impairment to non-work-related conditions. The result was that the Supreme Court merely adopted an impairment standard probably suggested by the Fund and seemingly required by previous Court of Appeals cases such as *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985) *because whether "impairment" meant only non-work-related conditions was not a question presented by the appeal in Mid-State* A better reason for statutory interpretation rules counseling wariness about reliance on *dicta* can scarcely be imagined.

A salient point about the *Mid-State* decision avoided by the Fund in its arguments is that in that case the claimant's previous 10% permanent impairment *resulted from a compensable neck injury. . .*

Stating what remained to be decided after its decision, the Court in *Mid-State* had the following to say:

> We have discarded the definitional prerequisite that an impairment involve a loss of earning capacity. As such, it remains to determine: (1) whether *Davis' former neck injury* and loss of the right eye constituted an 'impairment' in that they were of a physical quality which, were the other elements of compensability present, would have been capable of supporting an award;...

Mid-State at 8, 746 S.W.2d at [543] (emphasis added.) Why would the Supreme Court decide on the one hand that impairment meant only non-work related conditions and in the next breath instruct the lower court to decide whether claimant's previous compensable work-related neck injury left him with an impairment? Did the Supreme Court in

Mid-State intend to agree with Court of Appeals' cases saying *Greer* held that the term impairment should be restrictively read to encompass only non-work related injuries? The answer to this question appears in *Mid-State* when the Court stated, "In considering the question of Second Injury Fund liability, we first note that the claimant's former condition *need not* have met all elements of compensability under workers' compensation law. [Citing *Greer*.]" *Mid-State* at 5, 746 S.W.2d at [541]. Later in the same opinion, the Court had the following to say:

> To hold, as did the court of appeals, that there must in fact be evidence that the impairment involved a loss of earning capacity, mandates a prerequisite which (with the narrow exception that the impairment *can* be non-work-related) directly conflicts with the language from Larson and our decision in *Greer* that the impairment need *not* have been a 'compensable disability.'

Mid-State at 7, 746 S.W.2d at [542] (emphasis added.)

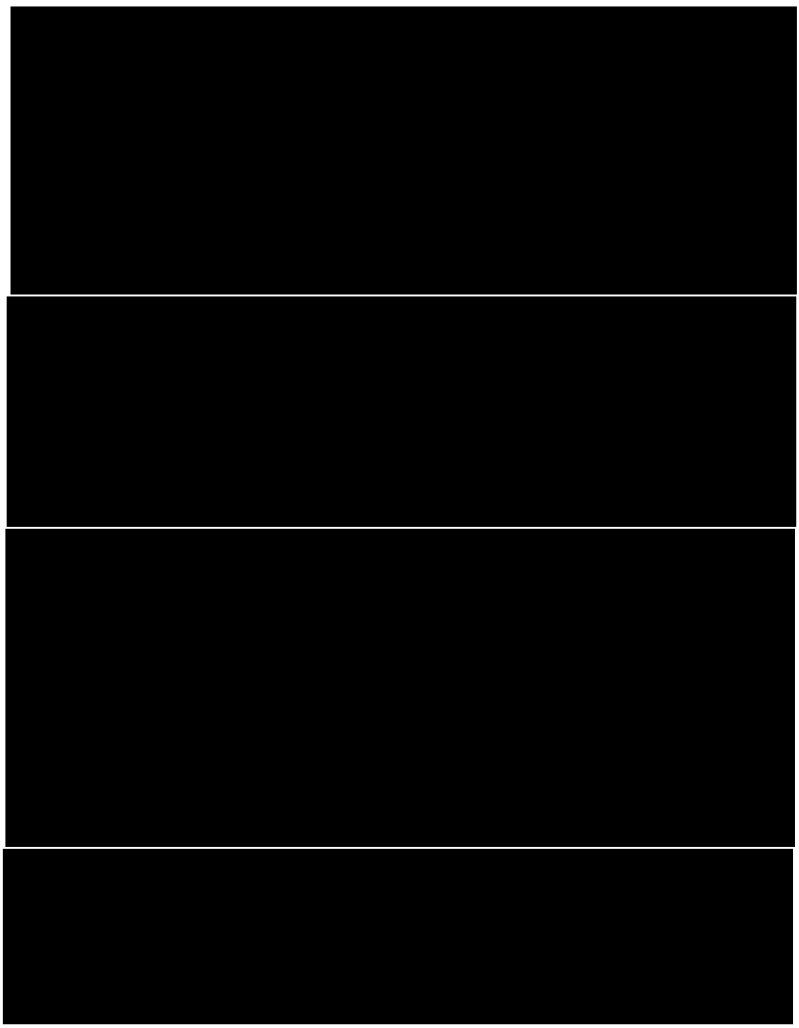
To say that a claimant's former condition need not have met requirements of compensability does not, under any regime of logic, mean that it must be shown that, in fact, the former condition did not meet compensability standards. Properly read, the Court's opinion in *Mid-State* contains nothing that immunizes the Fund from claims asserted by claimants with serious pre-existing impairments stemming from compensable injuries.

The Arkansas Supreme Court has never adopted the Fund's reasoning on the impairment question and in fact, as pointed out above, has by implication declined to follow it.

Ricky WOFFORD *v.* STATE of Arkansas

CA CR 93-36 867 S.W.2d 181

Court of Appeals of Arkansas
Division I
Opinion delivered December 1, 1993



[redacted]

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

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

JOHN MAUZY PITTMAN, Judge. The appellant, Ricky Wofford, was convicted by a jury of rape and kidnapping. He was sentenced to ten years imprisonment on the rape charge and five years on the kidnapping charge, the sentences to be served concurrently. His sole argument on appeal is that the evidence was insufficient to support the conviction for kidnapping and that the trial court, therefore, erred in denying his motions for a directed verdict of acquittal on that charge. We find no error and affirm.

A motion for directed verdict constitutes a challenge to the sufficiency of the evidence. *Thomas* v. *State*, 311 Ark. 609, 846 S.W.2d 168 (1993). In reviewing the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State and will affirm the judgment if there is any substantial evidence to support the jury's verdict. *Harris* v. *State*, 299 Ark. 433, 774 S.W.2d 121 (1989). 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. *Thomas* v. *State, 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 finding of guilt. *Tarentino* v. *State*, 302 Ark. 55, 786 S.W.2d 584 (1990).

[redacted] As is pertinent in this case, a person commits the offense of kidnapping if, without consent, he restrains another person so as to interfere substantially with her liberty with the purpose of engaging in sexual intercourse with her. Ark. Code Ann. § 5-11-102(a)(4) (1987). An offense such as rape necessarily contemplates restrictions on the victim's liberty while the crime is being committed. Therefore, it has been held that only when the restraint imposed exceeds that normally incidental to the underlying crime should the rapist also be subject to prosecution for kidnapping. *See Shaw* v. *State*, 304 Ark. 381, 802 S.W.2d 468 (1991); *Summerlin* v. *State*, 296 Ark. 347, 756 S.W.2d 908 (1988); *see also* Commentary to Ark. Code Ann. § 5-11-102.

Here, the record shows that on February 3, 1992, the fourteen-year-old victim and a friend were walking through an alley on their way to visit other friends. After walking a short distance past four young men, one of the men, Lewis Parham, called to the victim and asked her to come back to him. When she walked back to Parham's location, he pulled a gun and told her that she had to go with him. Parham then forced the victim at gunpoint to walk to a nearby apartment complex and enter a vacant apartment. The other three men, one of whom was appellant, followed along behind Parham. Each of the men then had sexual intercourse with the victim against her will, with appellant being the last of the four. At trial, the victim testified that she could not remember whether appellant ever held the gun on her. However, she also testified that she had suffered a serious head injury between the incident and the trial, and that since that injury she had been confused. Detective Janice Jenson, of the North Little Rock Police Department, testified that she interviewed the victim on the day after the crimes occurred. She further testified, without objection, that the victim told her that while the third man raped her, appellant was in the room and holding the gun.

Appellant contends that the State failed to prove that he employed any restraint on the victim in excess of that normally incidental to the crime of rape. He argues that the undisputed proof shows that it was Parham who forced the victim at gun-

point to go to the apartment. He also argues that the only time he restrained the victim occurred during and for the purpose of his commission of rape, which was after she had already been removed to the apartment and restrained there by someone else. The State does not contend that appellant personally committed the elements of the crime of kidnapping. Instead, citing cases turning on accomplice liability, the State contends that appellant's conviction should be affirmed because the victim was, in fact, kidnapped and "[t]he proof at trial was sufficient to illustrate the joint nature of this appellant's actions in conjunction with those of Parham, the person identified as having the pistol."

[redacted] It is true that a person is criminally liable for the conduct of another when he is an accomplice of the other person in the commission of an offense. Ark. Code Ann. § 5-2-402 (1987). A person is an accomplice of another person if, with the purpose of promoting or facilitating the commission of an offense, he solicits, advises, or encourages the other person to commit it, or aids, agrees to aid, or attempts to aid the other person in planning or committing it. Ark. Code Ann. § 5-2-403(a) (1987). However, in this case, the State did not request, and the court did not give, a jury instruction on accomplice liability. Rather, the case was submitted to the jury only on the theory that appellant, personally, committed all of the elements of both offenses with which he was charged.[1] The jury was not asked or given the opportunity to pass on the question of whether appellant encouraged or assisted anyone else in the commission of kidnapping, and it is outside the province of this court to determine such questions of fact on appeal. Under these circumstances, we do not consider whether the proof would have been sufficient to support a finding that appellant acted as an accomplice to kidnapping.

[redacted] Nevertheless, we cannot agree with appellant that the evidence is insufficient to support the jury's finding of his guilt

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[1] The jury in this case was instructed that the judge determines the law; that it was the jury's duty to follow the instructions as given; that the jury was not to consider any rule of law unless it was included in the instructions; and that, in order to prove appellant guilty of kidnapping, the State had to prove beyond a reasonable doubt that *appellant* restrained the victim in the manner and for the purpose prohibited by the statute.

as a principal. Our kidnapping statute speaks in terms of restraint rather than removal. Consequently, it reaches a greater variety of conduct, since restraint can be accomplished without any removal whatever. Commentary to § 5-11-102; *see Summerlin* v. *State, supra.* Moreover, it is the quality and nature of the restraint, rather than the duration, that determines whether a kidnapping charge can be sustained. Where the action of the accused substantially confines his victim in such a way that escape is made difficult or impossible, the fact that the restraint is of relatively brief duration does not necessarily remove it from the scope of our statute. *Cook* v. *State*, 284 Ark. 333, 681 S.W.2d 378 (1984); *Handy* v. *State*, 24 Ark. App. 122, 749 S.W.2d 683 (1988). While the restraint must exceed that which is "normally incidental" to the commission of rape, the kind of restraint that is considered incident to a rape is that which is necessary to consummate the act; any additional restraint will support a conviction for kidnapping. *Harris* v. *State*, 299 Ark. 433, 774 S.W.2d 121 (1989).

Appellant's argument that he insufficiently restrained the victim overlooks Detective Jenson's testimony, admitted without any objection whatever, concerning her interview of the victim soon after the incident. Among other things, the victim told Detective Jenson that while one of the other men was raping her, and before appellant raped her, appellant stood in the room and held the gun. Viewed in the light most favorable to the State, we conclude that this implied threat of deadly force constituted evidence from which the jury could find restraint by appellant in excess of that incidental to appellant's rape of the victim. We also conclude that the jury could reasonably infer that at least one of appellant's purposes in so restraining the victim was to insure that she did not escape before appellant raped her, too. Rape is not a continuing offense; rather, each act of rape is a separate offense. *Harris* v. *State, supra.* Therefore, we conclude that there is substantial evidence to support the finding that appellant kidnapped the victim before his act of rape. *See id.*

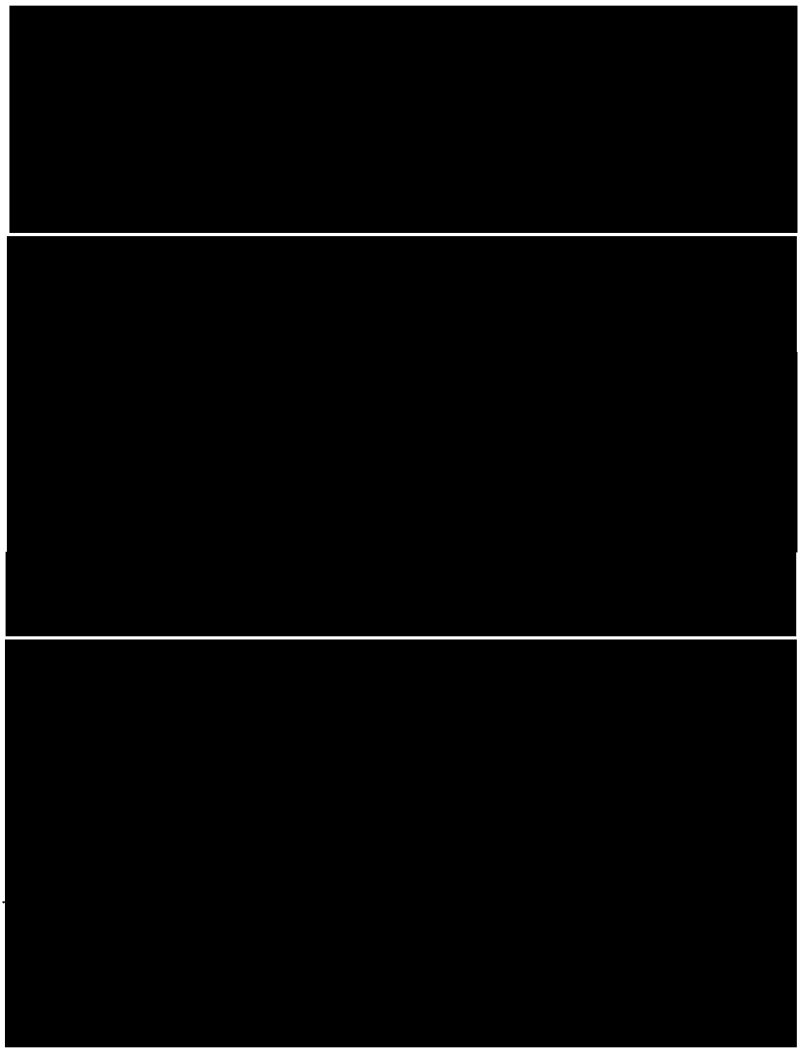
Affirmed.

COOPER and ROGERS, JJ., agree.

Clarence McCULLOUGH *v.* STATE of Arkansas

CA CR 93-157 866 S.W.2d 845

Court of Appeals of Arkansas
Division II
Opinion delivered December 1, 1993



[redacted]

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

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

MELVIN MAYFIELD, Judge. Clarence McCullough was convicted in a bench trial of possession of a controlled substance with intent to deliver and sentenced as a habitual offender to twenty years in the Arkansas Department of Correction. On appeal he argues that the evidence was insufficient to support the verdict and that the judge erred in sentencing him as a habitual offender.

[redacted] In *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), the Arkansas Supreme Court held that when there is a challenge to the sufficiency of the evidence, we must review that point prior to considering any alleged trial errors and, in doing so, we must consider all the evidence, including any which may have been inadmissible, in the light most favorable to the appellee. We affirm the conviction if there is substantial evidence to support the decision of the trier of fact. *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty and precision, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Williams* v. *State*, 298 Ark. 484, 768 S.W.2d 539 (1989); *Ryan, supra.*

When considered in the light most favorable to the appellee

there was evidence that on January 30, 1992, Detectives Kevin Tindle and Steuart Sullivan of the Little Rock Police Narcotics Unit entered the Highland Court area at approximately 6:30 p.m. They observed a group of people standing near an apartment, and when they pulled up and started to get out of the patrol car two men turned as if to leave. Detective Tindle testified he ordered the men to stop and identified himself as a police officer, but they broke and ran. As appellant was running between two apartment buildings, Tindle saw appellant drop a white container from his hand. Tindle chased, caught, and arrested the second man while appellant was chased and apprehended on 12th Street by two other detectives. Tindle then took appellant into custody and went back to the area, where he had seen appellant drop something, and retrieved a white pill bottle and what proved to be narcotics, which were scattered over a five to ten foot area. Detective Tindle said he took the evidence and both men to the narcotics annex where the evidence tested positive for cocaine. He also related that appellant first gave officers a false name.

Detective Steuart Sullivan testified that when the men started running he circled a building in order to cut them off. When he saw Detective Tindle capture the other man, he chased appellant and eventually caught him on 12th Street. According to Detective Sullivan, he was present when another officer searched appellant, but no evidence was found on him.

Nick Dawson, a chemist with the Arkansas State Crime Laboratory, testified that he had performed three screening tests on each of the eleven pieces of evidence submitted to him by Detective Tindle and analyzed them by thin layer chromatography and infrared spectrometry. The substance tested to be 1.645 grams of 92 percent pure cocaine base.

Appellant first argues that the evidence was not sufficient to support the verdict. He points to testimony that in the area where the men ran between the two apartment buildings, it was very dark; Detective Tindle was unsure which hand appellant held the bottle in; several men ran from the scene; no other officer could confirm that the bottle was dropped by appellant; and since the cocaine was scattered over the ground, rather than being contained in the pill bottle, there was no evidence to show the cocaine was contained in the pill bottle.

[redacted] The testimony of Detective Tindle that he saw appellant drop a white pill bottle as he was running down a path; that he later retrieved the bottle and what appeared to be its contents, which were scattered about five to ten feet down the path; and that the recovered material tested positive for cocaine is adequate to support the verdict.

[redacted] The uncorroborated testimony of one State's witness is sufficient to sustain a conviction. *Tisdale* v. *State*, 311 Ark. 220, 843 S.W.2d 803 (1992); *Carmichael* v. *State*, 296 Ark. 479, 757 S.W.2d 944 (1988); *Maulding* v. *State*, 296 Ark. 328, 757 S.W.2d 916 (1988); Davis v. State, 284 Ark. 557, 683 S.W.2d 926 (1985). Although the evidence that the cocaine was in the pill bottle was circumstantial, circumstantial evidence may constitute substantial evidence. *Sheridan* v. *State*, 313 Ark. 23, 852 S.W.2d 772 (1993); *Hill* v. *State*, 299 Ark. 327, 773 S.W.2d 424 (1989). To be sufficient to sustain a conviction, the circumstantial evidence must exclude every other reasonable hypothesis consistent with innocence, but this is a question for the fact finder to determine. *Sheridan, supra*; *Bennett* v. *State*, 308 Ark. 393, 825 S.W.2d 560 (1992). We think, since Detective Tindle saw appellant throw down a white bottle and eleven pieces of cocaine were found within a few feet of the bottle, the trier of fact could find that the only reasonable hypothesis was that the cocaine was in the bottle when it hit the ground. In addition, the fact that appellant fled from the officers, and when he was caught, gave them a fictitious name may also be indicative of guilt. Flight to avoid arrest and the use of a false name can be considered as corroboration of evidence tending to establish guilt. *Riddle* v. *State*, 303 Ark. 42, 791 S.W.2d 708 (1990); *Austin* v. *State*, 26 Ark. App. 70, 760 S.W.2d 76 (1988).

Appellant also argues that the trial court erred in sentencing him as a habitual offender. The record shows that on August 20, 1991, appellant entered a negotiated plea of guilty to possession of a controlled substance (1 count) and possession of drug paraphernalia (1 count), and was sentenced to three years probation conditioned upon compliance with written rules of conduct. Appellant argues that these two convictions should be considered only one conviction because of the circumstances surrounding the charges in that case. Counsel for the defendant argued to the trial court that because appellant was charged with

possessing drugs and the paraphernalia with which to use the drugs, the two felony convictions should be regarded as only one conviction for enhancement purposes. The issue was reserved until sentencing.

At the time of sentencing the trial judge relied upon the case of *Pitts* v. *State*, 256 Ark. 693, 509 S.W.2d 809 (1974), in which Pitts had been convicted of possession with intent to deliver morphine, cocaine, and secobarbital and sentenced to forty-five years each for the morphine and cocaine and four and one-half years for the secobarbital, to run consecutively. Our supreme court reversed and remanded because the judge had commented on the evidence during instructions. The court also said:

> As we construe the Controlled Substance Act, Ark. Stat. Ann. § 82-2617 (Supp. 1973), [now Ark. Code Ann. § 5-64-401 (1987)] the simultaneous possession for delivery of drugs classified as a narcotic drug under subsection (a)(1)(i) constitutes but one offense. Likewise the simultaneous possession of drugs classified under subsection (a)(1)(ii) would constitute only one offense. However, the simultaneous possession of drugs classified under subsection (a)(1)(i) and of drugs classified under subsection (a)(1)(ii) would constitute separate offenses.

256 Ark. at 695, 509 S.W.2d at 811. The judge in this case held that *Pitts* did not apply because possession of a controlled substance and possession of drug paraphernalia fall under two separate statutes and both offenses are felonies. Appellant was sentenced as a habitual offender to twenty years in the Arkansas Department of Correction.

But appellant argues that since Ark. Code Ann. § 5-4-501(c) (Supp. 1993) provides that burglary and the underlying felony are considered a single felony conviction and since simultaneous possession of drugs classified in the same statute subsection constitute only one offense, it should logically follow that possession of crack cocaine and possession of the pipe with which to smoke it should be considered only one offense.

In *Robinson* v. *State*, 303 Ark. 351, 797 S.W.2d 425 (1990), the appellant argued that previous offenses of robbery and theft of property over $2,500 should be considered as a single con-

viction for sentence enhancement purposes because the theft occurred during the course of the robbery. Again the Arkansas Supreme Court rejected this argument. After quoting Ark. Code Ann. § 5-4-501(c) the court stated:

> No such formula exists with respect to *robbery*, and, in the absence of such specific language, we decline to write into the legislation a provision that the legislative branch has failed to enact, presumably by design, in relation to the statutory definition of robbery.
>
> Nor are the appellant's 1978 convictions of robbery and theft of property conceptually connected. Just as the burglary and battery convictions in *Shockley* v. *State*, 291 Ark. 251, 724 S.W.2d 156 (1987), arising from the shooting of a policeman responding to a burglary report, were held to be "entirely separate and not subject to being counted as one offense under the habitual offender statute," so here separate acts resulting in separate convictions are involved.

303 Ark. at 353, 797 S.W.2d at 426 (emphasis in the original).

This principle may be applied to the instant case. Appellant had previously entered a plea of guilty to possession of a controlled substance, a violation of Ark. Code Ann. § 5-64-401 (Supp. 1993), a felony, and possession of drug paraphernalia, a violation of Ark. Code Ann. § 5-64-403 (1987), also a felony. Therefore, the trial judge was correct in finding that appellant had been convicted of two previous felonies and sentencing him accordingly.

Affirmed.

COOPER and PITTMAN, JJ., agree.

Staci COCHRAN, Lon Cochran, and A.N.C. *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES, Division of Children and Family Services, Allison Hickey, and SCAN, Inc.

CA 92-1404 865 S.W.2d 651

Court of Appeals of Arkansas
En Banc
Opinion delivered December 1, 1993

[redacted]

Leroy Autrey, for appellant.

No response.

PER CURIAM: The appellee Department of Human Services brought an action to remove the minor child, A.N.C., from the custody of Lon Cochran, her father, and declare the child to be dependent/neglected. The trial court, pursuant to Mr. Cochran's motion, entered an order declaring him to be an indigent person and appointing present counsel to represent him. Counsel continued to represent Mr. Cochran throughout an appeal to this Court, in which he prevailed. *See Cochran* v. *Arkansas Department of Human Services*, 43 Ark. App. 116, 860 S.W.2d 748 (1993). The appellant's attorney has now petitioned this Court for attorney's fees and expenses.

[redacted] Mr. Cochran's right to counsel in this proceeding is established by Ark. Code Ann. § 9-27-316(f) (Supp. 1989), which states that a parent or guardian has the right to be represented by

appointed counsel, if indigent, during all stages of any proceeding to terminate parental rights or remove custody of a juvenile. That statute also provides that payment of attorney's fees and costs pursuant to such an appointment is to be awarded from the Juvenile Court Representation Fund. In considering a similar motion, the Arkansas Supreme Court remanded for the trial court to determine the petitioner's entitlement to attorney's fees from the Juvenile Court Representation Fund as prescribed by Ark. Code Ann. § 9-27-316. In the absence of any precedent for an allowance of fees under § 9-27-316 to be made directly by this Court, we likewise remand for the trial court to determine the petitioner's entitlement to attorney's fees from the Juvenile Court Representation Fund pursuant to § 9-27-316.

Brad TAYLOR *v.* STATE of Arkansas

CA CR 93-7 866 S.W.2d 849

Court of Appeals of Arkansas
Division I
Opinion delivered December 8, 1993

Witt Law Firm, P.C., for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant, Brad Taylor, was convicted in municipal court of the misdemeanor of driving while intoxicated, first offense. He then appealed to circuit court. On the day set for his trial *de novo* in circuit court, appellant failed to appear. The circuit court declined to hold the trial in appellant's absence, dismissed the appeal, and ordered that the municipal court's sentence be put into execution. Appellant appeals from the circuit court's order, contending only that the court erred in denying his attorney's request that appellant be tried *in absentia*. We affirm.

Appellant argues that, because the defendant in a misdemeanor case need not be present in order for his trial to be held, the trial court abused its discretion in not holding his trial despite his absence. Appellant cites only Ark. Code Ann. § 16-89-103(b) (1987) in support of his argument. That code section provides, "If the indictment is for a misdemeanor, the trial *may* be had in the absence of the defendant." (Emphasis added.)

We agree that the statute makes it permissible for a court to hold the trial for an accused misdemeanant *in absentia*. However, we cannot agree that it is mandatory. More than a century ago, this same statute was construed by the supreme court as making it discretionary with the trial court whether to hold such a trial, assuming that the accused consents to waive the right to be present. *See Owen* v. *State*, 38 Ark. 512 (1882). In *Owen*, the appellant was tried and convicted by a justice of the peace of malicious mischief, a misdemeanor. He appealed the conviction to circuit court. As in the present case, the appellant failed to appear for his trial in circuit court. Although his attorney did appear and offer to proceed in the appellant's absence, the circuit court dismissed the appeal for want of prosecution. The supreme court affirmed, holding that, while the circuit court under those circumstances could have allowed the case to proceed to trial in the appellant's absence, it was not legally obliged to do so. The court further stated that holding one's trial in his absence is a practice not to be commended, especially where imprisonment is a possible punishment in the event of a conviction. The supreme court concluded:

> On the failure of appellant to appear for trial in the prosecution of his appeal, as he was bound to do, the court might have ordered him brought in on bench warrant or capias. But the court thought proper, on such failure, to dismiss his appeal, which it had the discretion to do, and which left the judgment of the justice standing and to be enforced.

Owen v. *State*, 38 Ark. at 513-14. *See also Martin* v. *State*, 40 Ark. 364 (1883); *Bridges* v. *State*, 38 Ark. 510 (1882).

Similarly, although appellant's attorney appeared in this case and requested that the trial be held, appellant was absent. Also, as in *Owen*, imprisonment is a possible punishment for the offense with which appellant had been charged. *See* Ark. Code Ann. § 5-65-111(a) (1987). No argument is made that § 16-89-103(b) does not apply or that any other relief, such as a continuance, should have been granted. From our review of the record, we cannot conclude that the circuit court abused its discretion under the statute in declining to hold a trial and leaving the municipal court's judgment intact.

Affirmed.

ROGERS, J., agrees.

COOPER, J., concurs.

Virginia Snyder ADAMS *v.* SOUTHERN STEEL & WIRE and Cigna Insurance Company

CA 93-1093 866 S.W.2d 432

Court of Appeals of Arkansas
En Banc
Opinion delivered December 8, 1993

[redacted]

[redacted]

[redacted]

Robert S. Blatt, for appellant.

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

PER CURIAM. In this workers' compensation case, the employer, Southern Steel & Wire, and its insurance carrier, Cigna Insurance Company, have filed a motion to dismiss the appeal filed in this court.

From the briefs filed by the appellees and the appellant, we learn that the Workers' Compensation Commission filed an opinion in this case on August 19, 1992, in which the Commission reversed an administrative law judge's order directing that the claimant-appellant undergo a psychiatric or psychological evaluation at the appellees' expense. The Commission's order stated that appellant had suffered a compensable injury while working for the employer-appellee, and at a hearing on permanent disability entitlement, the law judge stated he believed the claimant might be suffering from depression and ordered that she be evaluated by a doctor in that regard. The Commission's order found that the law judge had abused his discretion in ordering the independent psychological examination.

After this order of the Commission was filed on August 19, 1992, the claimant submitted various psychological evaluations to the law judge, and over the employer's objection, the law judge issued a prehearing order scheduling a second hearing on the permanent disability issue at which the psychological evaluations would be admissible. This order was appealed to the Commission and in an opinion filed on September 1, 1993, the Commission held that the law judge had "abused his discretion by setting this matter for a second hearing" and he was "directed, on remand, to render a decision based upon the evidence" which

was presented at the first hearing on claimant's permanent disability entitlement.

The claimant has filed a notice of appeal to this court appealing this September 1, 1993, decision of the Commission. The employer and its insurance carrier (appellees) have filed a motion to dismiss the appeal based on their contention that the Commission's September 1, 1993, order was "not a final order."

Appellees cite *Baldor Electric Company* v. *Jones*, 29 Ark. App. 80, 777 S.W.2d 586 (1989), in support of their contention. In that case the Commission had remanded the matter to the law judge to take "such additional evidence that may be necessary in order to determine the full extent of any benefits to which the appellee is entitled." We held this was not a final, appealable order, and we dismissed the appeal. This issue of what constitutes an appealable order in workers' compensation cases has not always been a unanimous decision in this court. *See, e.g.*, the dissenting opinion in *TEC* v. *Falkner*, 38 Ark. App. 13, 827 S.W.2d 661 (1992). However, we do not think the Commission has entered a final, appealable order in this case even under the "separable branch" concept of an appealable order as discussed in the dissent in *TEC* v. *Falkner*.

The effect of the Commission's action in this case, regardless of its intention, has been to require the law judge to determine the appellant's entitlement to permanent disability without evidence of psychological injury or evaluation. Evidence in that regard has already been proffered and additional evidence may be proffered, but the law judge cannot consider such evidence in making his determination as to permanent disability. When this determination has been made by the Commission there will then be a final, appealable order in this case, and whether the Commission was in error in excluding the psychological evidence can then be decided on appeal to this court.

Appeal dismissed.

Geritha HARGRETT *v.*
DIRECTOR, Employment Security Department

E 93-244 866 S.W.2d 432

Court of Appeals of Arkansas
En Banc
Opinion delivered December 8, 1993

[redacted]

No response.

Ronald A. Calkins, for appellee.

PER CURIAM. The appellee has filed a motion to dismiss this appeal from the Board of Review on the grounds that the Board determined that the claimant's last employer was First Environmental Services rather than Lafayette Partnership.

However, the Board did not dismiss the appellant's claim for unemployment benefits but simply remanded the issue for the Agency "to issue a determination based on the claimant's employment with First Environmental Services."

The real issue in this case, based on the claimant's notice of appeal to this court, is whether she is disqualified for benefits under Ark. Code. Ann.§ 11-10-513(a)(2) (1987). We do not think the Board's order of remand is a final, appealable order. Therefore, the appeal to this court is dismissed, and the Board's order of remand remains in effect.

Roger Lee MILLER *v.* STATE of Arkansas

CA CR 92-1028 868 S.W.2d 510

Court of Appeals of Arkansas
Division II
Opinion delivered December 15, 1993
[Rehearing denied January 19, 1994.]

Paul Petty and *Robert Meurer*, for appellant.

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

JOHN E. JENNINGS, Chief Judge. Roger Miller was charged with possession of a controlled substance (cocaine) with intent to deliver and driving on a suspended driver's license. After a pretrial motion to suppress evidence was denied, Miller entered a conditional plea of guilty under Ark. R. Crim. P. 24.3(b). He

was sentenced to twenty-five years imprisonment with ten years suspended on the drug charge, and was fined $500.00 for driving on a suspended license.

The primary argument on appeal is that the trial court erred in not finding that Miller's arrest was pretextual and therefore erred in not suppressing the evidence obtained as the result of the arrest. We find no error and affirm.

The facts are not in dispute. Most of the testimony at the suppression hearing was provided by Roger Ahlf, an Arkansas state police officer, who worked as a narcotics investigator. In December of 1991, Ahlf was working with David Drennan, a narcotics investigator for the Searcy Regional Drug Task Force. During that time Ahlf and Drennan were told by a confidential informant that the appellant was a cocaine dealer. Ahlf was also told by the confidential informant that appellant was driving a black van on a suspended driver's license, and Ahlf verified this information.

On December 18, 1991, Officer Ahlf stopped the appellant for driving on a suspended driver's license. Ahlf testified that he normally did not work traffic, that he wrote only two or three tickets per year, and that he stopped the appellant in hopes that he would find drugs. He testified that he frisked the appellant for weapons, that he knew appellant to be a drug user, and that he knew that people who use cocaine carry razor blades. In the course of the search of appellant's person, Ahlf found an address book containing marijuana residue, described as "probably less than 1-½ of a gram." Miller was taken into custody and the officer's search of the van turned up a plastic bag containing cocaine.

The circuit court in denying the motion to suppress said, "While Investigator Ahlf may have had motives in addition to a traffic stop, the evidence does not establish that the arrest would not have been made but for the drug and search interest of Investigator Ahlf."

Appellant relies primarily on *Richardson* v. *State*, 288 Ark. 407, 706 S.W.2d 363 (1986). There, the supreme court quoted from *McKnight* v. *United States*, 183 F.2d 977 (D.C. Cir. 1950):

> The Supreme Court has specifically held that "an arrest may not be used as a pretext to search for evidence." *United States* v. *Lefkowitz*, 285 U.S. 452 (1932). . . . It is settled law that "when it appears, as it does here, that the search and not the arrest was the real object of the officers in entering upon the premises, and that the arrest was a pretext for or at the most an incident of the search," the search was not reasonable within the meaning of the Constitution. *Henderson* v. *United States*, 12 F.2d 528 (4th Cir. 1926).

Appellant also notes the supreme court's approval of a statement found in *Brown* v. *State*, 442 N.E.2d 1109 (Ind. 1982), that "the issue of pretext arrest only arises when the surrounding circumstances show that the arrest is only a sham being used as an excuse for making a search for evidence of a different and more serious offense for which no probable cause exists."

While it is true that the issue of pretextual arrest was the subject of extended discussion in *Richardson*, it would seem that the real basis for the court's holding was a violation of the detention limits imposed by Rule 3.1 of the Arkansas Rules of Criminal Procedure. The court in *Richardson* said, "Regardless of whether we can technically justify the arrest on the charge of public intoxication, we can find no justification whatever for these rules violations."

Shortly after the decision in *Richardson*, the supreme court decided *Hines* v. *State*, 289 Ark. 50, 709 S.W.2d 65 (1986). After distinguishing *Richardson*, the court, in a unanimous decision, said:

> Claims of pretextual arrest raise a unique problem in the law — deciding whether an ulterior motive prompted an arrest which otherwise would not have occurred. Confusion can be avoided by applying a "but for" approach, that is, would the arrest not have occurred but for the other, typically the more serious, crime. Where the police have a dual motive in making an arrest, what might be termed the covert motive is not tainted by the overt motive, even though the covert motive may be dominant, so long as the arrest would have been carried out had the covert motive

> been absent. Professor LaFave, Criminal Procedure, § 3.1(d), p. 144, describes this as the correct result. Because the action would have been taken in any event, he states, "[T]here is no conduct which ought to have been deterred and, thus, no reason to bring the Fourth Amendment exclusionary rule into play." *Abel* v. *United States*, 362 U.S. 217 (1966). *See People* v. *Guido*, 95 Misc.2d 47, 407 NYS 2130 (1978).

See also, Ray v. *State*, 304 Ark. 489, 803 S.W.2d 894 (1991). As the decision in *Hines* at least implies, the test should be an objective one. Virtually all courts that have recently considered the question agree. *See, e.g., United States* v. *Rivera*, 906 F.2d 319 (7th Cir. 1990) (an officer's subjective intent is irrelevant); *United States* v. *Trigg*, 925 F.2d 1064 (7th Cir. 1991); *United States* v. *Rivera*, 867 F.2d 1261 (10th Cir. 1989); (an objective analysis of the facts and circumstances of a pretextual stop is appropriate, rather than an inquiry into the officer's subjective intent); *United States* v. *Guzman*, 864 F.2d 1512 (10th Cir. 1988); *United States* v. *Causey*, 834 F.2d 1179 (5th Cir. 1987); *United States* v. *Gallo*, 927 F.2d 815 (5th Cir. 1991); *United States* v. *Bates*, 840 F.2d 858 (11th Cir. 1988); State v. Mease, 842 S.W.2d 98 (Mo. 1992); *State* v. *Olsen*, 482 N.W.2d 212 (Minn. 1992); *State* v. *Garcia*, 461 N.W.2d 460 (Iowa 1991). These decisions and others are based, at least in part, on statements made by the United States Supreme Court. In *Scott* v. *United States*, 436 U.S. 128 (1978), the Supreme Court said that police searches are to be tested "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." In *Horton* v. *California*, 496 U.S. 128 (1990), the Court said that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Professor LaFave puts it this way:

> Likewise, if the police stop X's car for minor offense A, and they "subjectively hoped to discover contraband during the stop" so as to establish serious offense B, the stop is nonetheless lawful if "a reasonable officer *would* have made the stop in the absence of the invalid purpose."

1 Wayne R. LaFave, *Search and Seizure* (Supp. 1994 at 22). We

conclude that this is the test to be applied.[1] We think this test is consonant with the most recent decisions of the Arkansas Supreme Court in *Hines* and *Ray*, and with the statements of the United States Supreme Court in *Horton* v. *California*. It was also the test utilized by the trial court here.

In the case at bar it is quite clear that Officer Ahlf's primary purpose in stopping appellant was to search for drugs. As the supreme court said in *Hines*, however, the arrest is not "tainted" by this fact "so long as the arrest would have been carried out" anyway. We think that the trial court's finding that the arrest would have occurred in any event is not clearly erroneous. The test is whether a "reasonable officer" would have made the traffic stop — not whether this particular officer would have made the stop absent his ulterior motive. The Constitution does not prohibit officers assigned to work on particular types of offenses to refrain from arresting those who commit offenses outside the officers' area of specialty.

If, as we have held, the stop and arrest of the appellant was valid, there remains the question of the validity of the subsequent search. Officer Ahlf characterized the search as both an "inventory" and as a search incident to arrest. Our decision on this point is clearly governed by *New York* v. *Belton*, 450 U.S. 1028 (1981). There the Court held that when a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. *See also, Campbell* v. *State*, 294 Ark. 639, 746 S.W.2d 37 (1988); *Williams* v. *State*, 4 Ark. App. 24, 627 S.W.2d 28 (1982). Because this was a valid search incident to arrest under *Belton* we need not reach the issue of whether a valid inventory was conducted. *See Stevens* v. *State*, 38 Ark. App. 209, 832 S.W.2d 275 (1992).

For the reasons stated the decision of the trial court is affirmed.

ROBBINS and MAYFIELD, JJ., agree.

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[1]The Eighth Circuit Court of Appeals has held that the test is whether the officer *could* validly have made the stop and that "so long as the police are doing no more than they are legally permitted and objectively authorized to so, [the resulting stop or] arrest is constitutional." *United States* v. *Cummins*, 920 F.2d 498 (8th Cir. 1990) (quoting *United States* v. *Trigg*, 878 F.2d 1037 (7th Cir. 1989)).

Johnnie LAMBERT *v.* BALDOR ELECTRIC

CA 93-76 868 S.W.2d 513

Court of Appeals of Arkansas
Division I
Opinion delivered December 15, 1993

[redacted]

[redacted]

Walker Law Firm, by: *Eddie H. Walker, Jr.* and *William J. Kropp, III*, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *James A. Arnold II*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Johnnie Lambert was awarded permanent and total disability benefits against appellees Baldor Electric Company and the Second Injury Fund by the Workers' Compensation Commission on October 23, 1992. Ruling that appellees did not controvert Mr. Lambert's entitlement to permanent and total disability benefits, the Commission denied appellant's request for attorney's fees from Baldor Electric Company and the Second Injury Fund. Mr. Lambert now appeals, arguing that the Commission erred in refusing to award attorney's fees. In addition, appellant contends that it is a violation of due process for the Commission to decide cases involving the Second Injury Trust Fund because the Administrator of the fund is an employee of the Workers' Compensation Commission and because the Commission has a financial stake in the outcome of litigation involving the fund. We find no error and affirm.

The facts of the case are not in dispute. Mr. Lambert had been diagnosed with athetoid cerebral palsy with a severe scoliosis prior to beginning work for Baldor Electric in 1968. In 1981, Mr. Lambert suffered a compensable injury to his right shoulder and neck. He sustained subsequent injuries in 1986, and in 1989 he again experienced medical problems and sought temporary disability benefits and medical expenses. Baldor Electric controverted Mr. Lambert's 1989 claim, but on January 4, 1990, the Administrative Law Judge found that the 1989 claim involved a recurrence of the compensable injury. As a result, Mr. Lambert was awarded temporary disability benefits and attorney's fees.

Mr. Lambert later became unable to work, and on August 8, 1990, he submitted his resignation. On October 10, 1990, he

informed appellees that he was permanently and totally disabled and requested that the Second Injury Fund state its position regarding its responsibility for the permanent disability benefits. On October 19, 1990, Lambert submitted a settlement offer of $60,000 plus attorney's fees. On October 23, 1990, the Second Injury Fund counter-offered to pay $30,000. On October 30, 1990, Lambert stated that the case could be settled for $50,000. On the same day, Lambert requested a hearing. The Second Injury Fund immediately acknowledged permanent and total disability. Accepting the claim as uncontroverted, the Administrative Law Judge awarded permanent and total disability against the Second Injury Fund.

Mr. Lambert's constitutional argument is essentially that it is a violation of due process for the Commission to decide cases involving the Second Injury Trust Fund. He claims that he was denied due process rights guaranteed him by the Arkansas Constitution, Article 2, Section 8, and the United States Constitution, Amendments 5 and 14. Specifically, he asserts that the Commission is not an impartial decision maker in that Ark. Code Ann. § 11-9-301 (1987) gives the Commission authority to administer, disburse, and invest funds within the Second Injury Trust Fund. In addition, he argues that the Commission is prejudiced because Judy Jolley, administrator of the fund, is an employee of the Workers' Compensation Commission.

In support of his argument, Lambert relies on *Tumey* v. *Ohio*, 273 U.S. 510 (1927). In that case, the United States Supreme Court held that a mayor who received a portion of fines levied on convicted persons could not constitutionally preside over their trials. The Court stated that "it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523. Appellant also cites *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), a case in which the Court held that it is a violation of due process for a mayor to sit as a judge when a major part of the village income is derived from fines, forfeitures, costs, and fees. In that case, the mayor was required to account annually for village finances and the revenue produced by the mayor's court was of such importance that when legisla-

tion threatened its loss, the village retained a management consultant for advice regarding the problem. The court in *Tumey* stated that the test as to whether due process is violated is whether the situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused." 273 U.S. at 532. Applying this standard, the court in *Ward* ruled that, due to the mayor's interest in maintaining village finances and the high level of revenue from the mayor's court, the "possible temptation" to rule improperly constitutionally prevented the mayor from acting as judge. Appellant also cites *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), a case in which a state board composed solely of optometrists was constitutionally unable to bring a disciplinary action against other optometrists due to the possible pecuniary interest involved in excluding competitors.

Relying on the above authority, Lambert asserts that the Commission is not impartial when ruling on cases that involve possible Second Injury Fund liability. He correctly states that he is constitutionally entitled to the benefit of an impartial decision maker. However, we do not agree that the Commission is not impartial with regard to Second Injury Fund cases.

We look to decisions from courts of sister states because neither we nor our supreme court has had occasion to address this issue. *Ison* v. *Western Vegetable Distrib.*, 59 P.2d 649 (Ariz. 1936), is a case in which a claimant argued that the Arizona Workmens' Compensation Act was unconstitutional. The constitutional attack in that case was similar to the one in the case at bar in that the appellant argued that the Industrial Commission was not impartial when deciding cases involving compensation to be paid out of the state compensation fund. The Arizona Supreme Court rejected appellant's due process argument, stating that the Commissioners had no "direct, personal, substantial, pecuniary interest" in the outcome of claims. *Id.* at 656. The court noted that the state compensation fund was not raised by taxation upon citizens in general, but rather came from employers protected by the fund. This is the case with the Arkansas Second Injury Fund. In addition, the Arizona Supreme Court noted that the Commissioners' salaries are neither increased nor decreased by any conclusion they reach regarding compensation.

This is also true with regard to the Arkansas Workers' Compensation Commission. In short, the court held that the Arizona Industrial Commission was not biased even though it was charged with the care and custody of the state compensation fund.

Ison was later cited by the Oklahoma Supreme Court in *Duff* v. *Osage County*, 70 P.2d 80 (Okla. 1937). That case involved a constitutional challenge to the State Industrial Commission's control and management over the State Insurance Fund. Following the reasoning in *Ison*, the court held that even though the Commission controlled the fund, it was not biased against awarding claimants compensation from the fund. The holding in *Ison* was again followed in *Jenners* v. *Industrial Comm'n*, 491 P.2d 31 (Ariz. App. 1972).

In the instant case it is clear that the Arkansas Workers' Compensation Commissioners gain no direct benefit in ruling one way or another in Second Injury Fund cases. Their decisions cannot alter their salary nor confer any other benefit on themselves. *Ward* v. *Village of Monroeville, supra*, stands for the proposition that even when no direct benefit is conferred on a judge, he may be constitutionally disqualified if subjected to a "possible temptation" to rule in a biased manner. However, in the case at bar, not only can Commissioners receive no direct benefit, but there exists no "possible temptation" to rule in an unjust fashion. Mr. Lambert does not argue, nor is it evident, that the Commission or its employees are affected by the balance of the Second Injury Fund. Even if the administrator of the Second Injury Fund was somehow harmed by a depletion of its funds, the Commission would still have no incentive to rule contrary to the law. Therefore, there is no conflict in the Commission's handling of cases involving the Second Injury Fund.

Further evidence of impartiality can be seen in the numerous cases in which the Commission has awarded benefits against the Second Injury Fund, only to be reversed by this court on appeal. In fact, the Commission did not hesitate in awarding permanent and total disability benefits against the Second Injury Fund in the instant case. Except for his attorney's fees, Mr. Lambert received all benefits that he sought from the Fund. It is clear that in practice, the Commission is not partial to the Second Injury Fund.

There is a presumption of constitutionality attendant to every legislative enactment, and all doubts concerning it must be resolved in favor of constitutionality. *Holland* v. *Willis*, 293 Ark. 518, 793 S.W.2d 529 (1987). The party challenging a statute has the burden of proving it unconstitutional. *Id.* In the case at bar Lambert has failed to meet his burden of proving that his constitutional right to due process was violated.

Mr. Lambert's remaining argument is that attorney's fees should have been awarded against the Second Injury Fund or Baldor Electric because the Second Injury Fund controverted his claim by engaging in settlement negotiations. Arkansas Code Annotated § 11-9-715(a)(2)(A) (1987) states that attorney's fees should be awarded against the Second Injury Fund if the claim against it is controverted. It is undisputed that the Second Injury Fund acknowledged permanent and total disability immediately after Mr. Lambert requested a hearing before the Commission. However, he argues that the Second Injury Fund's failure to admit to the claim prior to a request for the hearing amounted to a controversion of the claim. In support, Lambert relies on *Aluminum Co. of America* v. *Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976). In that case, an employer was deemed to have controverted a claim even though the employer stated that it would not controvert the claim after it was actually filed with the Commission. The court made this determination based on the fact that the employer denied that the claimant's injury was work-related or compensable until after a claim was filed. The court based its reasoning on the legitimate social purposes of discouraging oppressive delay, deterring arbitrary denials of claims, and assuring claimants of competent representation.

The instant case is distinguishable from *Henning*. On September 6, 1990, the Second Injury Fund acknowledged by letter that Mr. Lambert appeared to be entitled to permanent and total disability or a reasonable settlement of his claim. Special Funds Administrator Judy Jolley asserted that a settlement might better serve Mr. Lambert's needs due to a possible Social Security offset. It was Lambert's attorney who opened settlement negotiations the following month by requesting $60,000 plus attorney's fees. The Second Injury Fund counter-offered to pay $30,000, and Lambert then stated he would accept $50,000. After Lambert requested a hearing, the Second Injury Fund acknowledged

permanent and total disability. Ms. Jolley testified that the only reason this was not formally acknowledged earlier is because settlement negotiations were still pending.

[redacted] It is clear from the above facts that the Second Injury Fund never intended to dispute the ultimate claim as was done in *Henning*. Mr. Lambert contends that the $30,000 settlement offer was so low that one should infer that the claim of total disability was being controverted. However, he would have settled for $50,000 and some offset questions existed. We agree with the Commission's assertion that such settlement negotiations should be encouraged to avoid needless litigation. When a settlement was not reached, Lambert requested a hearing. The Second Injury Fund immediately acknowledged the claim. We conclude that there is substantial evidence to support the Commission's finding that the Second Injury Fund did not controvert Lambert's claim.

[redacted] Alternatively, Mr. Lambert argues that if the Second Injury Fund is not liable for attorney's fees, then Baldor Electric should be held liable for such fees. Baldor Electric had previously controverted temporary benefits and was ordered to pay attorney's fees. Lambert now contends that because Baldor Electric controverted disability at a prior hearing such controversion should extend to any disability benefits awarded at any subsequent hearing. This argument is without merit because Baldor Electric did not controvert Lambert's claim for permanent benefits. While Baldor Electric disputed a claim for temporary benefits at an earlier hearing, to impose perpetual attorney's fees for any subsequent award of benefits at any later hearing would be contrary to the purposes of the statute that provides for such attorney's fees. At the August 5, 1991 hearing Baldor Electric did not controvert Lambert's claim. Therefore, Baldor Electric is not liable for his attorney's fees for recovering the benefits awarded at that hearing.

For the above reasons, we affirm.

JENNINGS, C.J., and ROGERS, J. agree.

Lee SCALLION *v.* James Thomas WHITEAKER IV
and Marian Scallion

CA 93-194 868 S.W.2d 89

Court of Appeals of Arkansas
Division II
Opinion delivered December 15, 1993

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Jones & Petty, for appellant.

Dover & Dixon, P.A., by: *W. Michael Reif* and *Monte D. Estes*, for appellees.

MELVIN MAYFIELD, Judge. Lee Scallion appeals from the Jefferson County Chancery Court's dismissal of his petition to be declared the natural father of Hannah Whiteaker, born on January 30, 1990. Appellant argues that it was error for the chancellor to hold his claim barred by the doctrine of res judicata. We agree and therefore reverse and remand this cause.

The record shows that when Hannah was conceived and born, the appellees, James Whiteaker and Marian Whiteaker (now Scallion), were married. In 1991, James Whiteaker filed a divorce complaint against Marian Whiteaker and sought custody of the parties' two children, one of whom was Hannah. In her answer and counterclaim, Mrs. Whiteaker stated that the two children were born of the marriage, but in an amendment to the counterclaim, she stated that Hannah was not the child of James Whiteaker. In the divorce decree of July 19, 1991, the chancellor found that the two children were born of the marriage and custody of the children was awarded to Mr. Whiteaker.

On August 5, 1992, the appellant, Lee Scallion, filed his petition seeking blood tests to establish paternity of Hannah. Although Marian Scallion was named a defendant in the petition, she waived appearance at the trial court level and has not filed a brief in the appeal of this case. In his petition, the appellant stated that he and Marian Whiteaker had married and that she had attempted to testify at the divorce hearing that James Whiteaker was not the father of the child but her testimony was excluded by the chancellor. By an amended answer, Mr. Whiteaker pleaded the defense of res judicata.

After hearing arguments of counsel on the issue of res judicata, the chancellor found the mother and appellant in privity because of their marriage, and he stated that appellant "does not have the legal right to pursue this action because of the prior

decree between his present wife and her former husband concerning paternity." He concluded that res judicata barred appellant's action.

Under the doctrine of res judicata, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim or cause of action. *Department of Human Servs.* v. *Seamster*, 36 Ark. App. 202, 204, 820 S.W.2d 298, 299 (1991). The doctrine of collateral estoppel or issue preclusion bars the relitigation of issues of law or fact actually litigated by the parties in the first suit. *Id.* There is no question that, in the courts of this state, the parents of the child are bound by the doctrine of res judicata when the issue of paternity has been litigated in a prior action between them. *Id.*

The parties here agree that appellant was not a party to the divorce action. However, Mr. Whiteaker contends on appeal that appellant was not a stranger to the action because he appeared at the hearing and testified that he was Hannah's father, and that his failure to intervene in the divorce action precludes his claim. We disagree. One who does not intervene, whether or not by right, is not at risk of being bound by the litigation, and is not subject to res judicata. *UHS of Arkansas, Inc.*, v. *City of Sherwood*, 296 Ark. 97, 103, 752 S.W.2d 36, 39 (1988).

We also disagree with appellee's assertion that *Jack* v. *Jack*, 796 S.W.2d 543 (Tex. Ct. App. 1990), supports his argument that appellant's claim was barred by res judicata. In that case, as in the case at bar, a divorce decree named two children of a marriage, and the mother's husband on remarriage petitioned for a finding of paternity of the younger child. The court found that for the claim to be barred by res judicata, the petitioner must have had an opportunity to participate in, or must have somehow been a part of, the divorce proceedings and the fact that the mother and the petitioner were married less than six months after her divorce from the presumed father failed to establish privity between the mother and the petitioner. *Id.* at 547. Although the court concluded that the claim was not barred by res judicata, it held the trial court properly dismissed the petitioner's claim because Texas law did not allow a person in the petitioner's position to rebut the marital presumption.

Although we do not find Arkansas cases addressing this precise issue, other courts have applied the same principles that the Texas court applied in factually similar cases. In *Nostrand* v. *Olivieri*, 427 So.2d 374 (Fla. Dist. Ct. App. 1983), the mother acknowledged in a marital separation agreement that the child was born of her marriage and therefore the court found she was estopped from denying her former position. Noting that courts of other states were in accord, the court held that the same principles did not apply to the mother's present husband because he was not a party to the marital settlement agreement or the proceedings which dissolved the prior marriage. *Id.* at 376. Also, in a Tennessee case, *In re Adoption of Johnson*, 678 S.W.2d 65 (Tenn. Ct. App. 1984), the current husband of the mother sought to adopt the child that the mother had acknowledged as a child born of her prior marriage. The alleged natural father (who was not the former husband) agreed to the adoption. The former husband argued the adoption petition was barred by res judicata. The court found that the mother was estopped to deny that the child was born of the former marriage; however, the court found that the current husband and the alleged natural father were not parties to the prior litigation and therefore did not suffer from the same infirmities. *Id.* at 68. *See also Gatt* v. *Gedeon*, 20 Ohio App.3d 285, 485 N.E.2d 1059 (1984).

In his order, the chancellor in the case at bar found that actual privity is not a prerequisite to the application of res judicata under Arkansas law and cited *Nichols Brothers Investments* v. *Rector-Phillips-Morse, Inc.*, 33 Ark. App. 47, 801 S.W.2d 308 (1990), in support of this finding. However, that case involved a finding of agency, and the court held that a judgment in favor of the principal, sued alone, is res judicata in a subsequent action against the agent. 33 Ark. App. at 50, 801 S.W.2d at 310. The court found that the appellees were sufficiently identified with the plaintiff in the former action to avail themselves of res judicata in the second action. *Id.* The supreme court and this court have found that precisely identical parties are not required and a substantial identification is sufficient in cases where only the capacity of the party differs. When a party to one action in his individual capacity and to a second action in his representative capacity is, in both cases, asserting or protecting his individual rights, the doctrine of res judicata binds him. See *Terry* v. *Tay-*

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lor, 293 Ark. 237, 239, 737 S.W.2d 437, 438 (1987); *Estate of Knott* v. *Jones*, 14 Ark. App. 271, 274, 687 S.W.2d 529, 531 (1985). We do not find the same substantial identification in the case at bar.

[redacted] We agree with appellant's argument that his petition was not barred by res judicata, and we therefore reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

JENNINGS, C.J., and ROBBINS, J., agree.

[redacted]

Tammy Suanne STAAB v. Thomas Wesley HURST

CA 93-442 868 S.W.2d 517

Court of Appeals of Arkansas
En Banc
Opinion delivered January 19, 1994

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John W. Settle Law Firm, by: *John W. Settle*, for appellant.

Brenda Horn Austin, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant, Tammy Suanne Staab, appeals from an order denying her request for permission to move from Fort Smith, Arkansas, to Wellington, Texas, with the parties' fifteen-month-old daughter. The appellee, Thomas Wesley Hurst, opposed the move contending that he would effectively be denied visitation because of the geographical distance. For the reasons which follow, we reverse and remand for proceedings consistent with this opinion.

The parties divorced in June 1992. Appellant was awarded custody of their minor daughter subject to appellee's visitation every Wednesday evening, every other weekend, alternating holidays, and two weeks in the summer. The decree further provided that the child was not to be permanently removed from the jurisdiction of the court without the court's permission.

Appellant subsequently filed petitions to have appellee cited for contempt and for permission to remove the child from the jurisdiction of the court. At a hearing held in October 1992, appellant testified that she was seeking permission to move to Wellington, Texas, so that she could attend nursing school. Appellant testified that her income consisted of child support and various entitlements that she and the child receive from federal assis-

tance programs. She testified that appellee had made limited economic contributions, was behind in his child support obligation, and that she had difficulty meeting her basic financial needs. Appellant testified that she had applied to local nursing schools in Fort Smith and, while she met admission criteria, she was not selected to be admitted because the competition for the limited number of openings was so great. She stated that she learned through friends in Wellington, Texas, that she might be able to gain entry into the nursing program there. Appellant testified that she drove the six hours to Wellington, spoke to nursing school administrators, took a pre-test for admission into the nursing program, and was told that she did well enough to gain admittance. Appellant stated that, while the next academic year would not begin until August 1993, she had to be present for another necessary examination in February 1993 and that she had already found a home there and a job as a nurse's aide in a hospital near the nursing school.

Appellee did not seek to gain custody of the child. He requested only that appellant not be allowed to move with their daughter. He stated that on his take home pay of approximately $170.00 per week he would be unable to afford the six-hour drive to Wellington. He stated that since the divorce he had missed only one scheduled visit with the child, and that he was sick on that occasion. He stated that he thought it would not be in the parties' daughter's best interest to be moved some distance from him and from her grandparents, and he expressed concern that he might not see her for several months at a time. Appellee conceded that he was behind in his child support obligation and that he had failed to comply with the previous court order that he pay an outstanding medical bill. Appellee testified that he was a licensed mortician, capable of practicing in over thirty states, but was not currently working as a mortician. He testified that he was presently working for a wood-working company, admittedly making less than half the income he had made as a mortician. He testified that he had quit his last job as a mortician some ten months prior to the October hearing because he wanted a "break." He testified that he was actively seeking to return to that field, was considering possibilities both in Little Rock and in Houston, Texas, and likely would himself soon be moving to secure such employment.

At the conclusion of the hearing, the court held appellee in contempt of court. Appellee was ordered to pay over $700.00 in back child support and previously ordered attorney's fees, and $45.00 per month towards outstanding medical bills. The court denied appellant's petition to move to Texas with the child, stating as follows:

> I just can't see that it would be in this baby's best interest who is a little over a year old to be removed from this area where her father where, because of the distance of approximately 500 miles [sic]. . . would make it impractical for him to be able to exercise his visitation rights. Also, the child has had a very close relationship with both grandparents, and it would virtually greatly reduce if not eliminate the contact with the grandparents. I think that is important to the child's development. I think there are numerous educational opportunities available in this immediate area that the mother can pursue. I appreciate her desires to better herself and get a degree in something, but I think there are numerous avenues that can be explored. Whether or not she can get into a nursing program in this area, that I don't know. It may be that she may need to reevaluate what she wants to do there. The father has been diligent in exercising his visitation. I think the testimony was he has only missed one visit and that was because he was sick. The Court finds that the mother has no family members living in the Wellington, Texas area. Another thing that concerns the Court is the schooling that she is wanting to enter into out there is not even scheduled to start until August of 1993.

Appellant appeals from this denial of her petition.

The first issue that we must consider in this case is the standard to be applied by a trial court in determining when a custodial parent may relocate outside the jurisdiction of the court. Obviously, there can be no precise formula that will resolve each case. Until now, while expressing concern for the non-custodial parent's rights of visitation, our courts have said little more than that "the parent having custody of a child is ordinarily entitled to move to another state and to take the child to the new domicile." *Ising* v. *Ward*, 231 Ark. 767, 768, 332 S.W.2d 495

(1960); *Gooch* v. *Seamans*, 6 Ark. App. 219, 220, 639 S.W.2d 541 (1982). While we agree with the chancellor that achieving the "best interests of the child" remains the ultimate objective in resolving all child custody and related matters, we believe that the standard must be more specific and instructive to address relocation disputes. In particular, we think it important to note that determining a child's best interests in the context of a relocation dispute requires consideration of issues that are not necessarily the same as in custody cases or more ordinary visitation cases.

[redacted] After a divorce and an initial custody determination, the determination of a child's best interests cannot be made in a vacuum, but requires that the interests of the custodial parent also be taken into account. In *D'Onofrio* v. *D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27, *aff'd* 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976), perhaps the leading case on custodial parent relocation and which we find persuasive, the court discussed this issue as follows:

> The children, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together. The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interest of the children. It is in the context of what is best for that family unit that the precise nature and terms of visitation and changes in visitation by the noncustodial parent must be considered.

D'Onofrio, 365 A.2d at 29-30. *See also Antonacci* v. *Antonacci*, 222 Ark. 881, 263 S.W.2d 484 (1954) (in approving the custodial parent's move from Arkansas to California, the supreme court specifically considered that she "prefer[ed]" to live in California and was "happy" there). The court in *D'Onofrio* was careful not to equate the best interest of the child with the best interest of the custodial parent. The court specifically recognized the importance of developing and maintaining a relationship with the non-custodial parent and the importance of visitation:

> Where the residence of the new family unit and that of the

> non-custodial parent are geographically close, some variation of visitation on a weekly basis is traditionally viewed as being most consistent with maintaining the parental relationship, and where, as here, that has been the visitation pattern, a court should be loathe to interfere with it by permitting removal of the children for frivolous or unpersuasive or inadequate reasons. . . .[Nevertheless,] the court should not insist that the advantages of the move be sacrificed and the opportunity for a better and more comfortable lifestyle for the [custodial parent] and children be forfeited solely to maintain weekly visitation by the [non-custodial parent] where reasonable alternative visitation is available and where the advantages of the move are substantial.

D'Onofrio, 365 A.2d at 30.

D'Onofrio also attempted to articulate a framework by which courts should be guided in deciding relocation disputes. It provides that, where the custodial parent seeks to move with the parties' children to a place so geographically distant as to render weekly visitation impossible or impractical, and where the non-custodial parent objects to the move, the custodial parent should have the burden of first demonstrating that some real advantage will result to the new family unit from the move. *D'Onofrio* further provides that, where the custodial parent meets this threshold burden, the court should then consider a number of factors in order to accommodate the compelling interests of all the family members. These factors should include: (1) the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children; (2) the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the non-custodial parent; (3) whether the custodial parent is likely to comply with substitute visitation orders; (4) the integrity of the non-custodial parent's motives in resisting the removal; and (5) whether, if removal is allowed, there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parent relationship with the non-custodial parent. *See also Cooper* v. *Cooper*, 99 N.J. 42, 491 A.2d 606 (1984).

We conclude that the criteria adopted in *D'Onofrio* are sound.[1] We also conclude, from our review of the chancellor's ruling, that he made his determination of the child's best interests without appropriate consideration of the interests and well-being of the custodial parent. It would also appear that no consideration was given to the possibility of alternatives to the existing visitation schedule.

Chancery cases are reviewed *de novo* on appeal, and we ordinarily render the decree here that should have been rendered below. The rule is not imperative, however, as this court has the power, in furtherance of justice, to remand any case in equity for further proceedings, including even the taking of additional evidence. *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979); *see Bradford* v. *Bradford*, 34 Ark. App. 247, 808 S.W.2d 794 (1991). Here, the theory on which the chancellor decided the case was somewhat erroneous, and did not take into account several aspects of the guidelines we adopt today. Because the case involves a minor child, it is also one of that class of cases in which the superior position, ability, and opportunity of the chancellor to observe the parties carries its greatest weight. *See Calhoun* v. *Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981). Under these circumstances, we think that the case should be remanded for the chancellor to have the opportunity to decide the issues in accordance with the standards set forth in this opinion. We emphasize that we express no opinion as to the determination that should be made by the chancellor. We recognize that the parties' circumstances have changed in the fourteen months

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[1]Several of our sister states also follow *D'Onofrio. See, e.g., Bachman* v. *Bachman*, 539 So.2d 1182 (Fla. 4th Dist. Ct. App. 1989); *Matilla* v. *Matilla*, 474 So.2d 306 (Fla. 3rd Dist. Ct. App. 1985); *Yannas* v. *Frondistou-Yannas*, 395 Mass. 704, 481 N.E.2d 1153 (1985); *Hale* v. *Hale*, 12 Mass. App. 812, 429 N.E.2d 340 (1981); *Anderson* v. *Anderson*, 170 Mich. App. 305, 427 N.W.2d 627 (1988); *Bielawski* v. *Bielawski*, 137 Mich App. 587, 358 N.W.2d 383 (1984); *Schwartz* v. *Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991); *Ramirez-Barker* v. *Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992); *Fortin* v. *Fortin*, 500 N.W.2d 229 (S.D. 1993); *Taylor* v. *Taylor*, 849 S.W.2d 319 (Tenn. 1993); *Lane* v. *Schenck*, 614 A.2d 786 (Vt. 1992); *Love* v. *Love*, 851 P.2d 1283 (Wyo. 1993). We recognize that New Jersey has a statute that provides that children cannot be removed from the jurisdiction without the consent of the non-custodial parent "unless the court, upon good cause shown, shall otherwise order." N.J.S.A. 9:2-2. Although Arkansas has no such statute, we think that the factors outlined in *D'Onofrio* should apply to a chancellor's consideration of the issue of relocation. *See Bachman* v. *Bachman*, 539 So.2d 1182 (Fla 4th Dist. Ct. App. 1989).

since the original hearing. Therefore, further proceedings on remand should include hearing additional pertinent evidence that the parties may offer. *See Cooper* v. *Cooper*, 99 N.J. 42, 491 A.2d 606 (1984); *Hale* v. *Hale*, 12 Mass. App. 812, 429 N.E.2d 340 (1981).

Reversed and remanded.

ROGERS, J., concurs.

COOPER, J., dissents.

MAYFIELD, J., not participating.

ROGERS, J., concurring. I agree with and join in the reversal of the chancery court's decision. The dissent glosses over the facts that the noncustodial parent quit his job, did not pay support at times and that the custodial parent's desire to enter nursing school had been long standing and was interrupted by her pregnancy. The training was only of a year's duration and was an honest attempt for this woman to place herself in a position where she could more ably support herself and her child. Additionally, the child was not of school age and more flexible, longer time periods with each parent could accomplish the same ends as prohibiting the mother from leaving the jurisdiction. She was faced with a true dilemma and like the biblical mother sacrificed herself for her child.

COOPER, J., dissenting. I dissent from the prevailing opinion of this Court because I do not believe the case should be reversed and remanded. Although we review chancery cases *de novo*, we do not reverse the chancellor's decision unless it is clearly against the preponderance of the evidence. *Kerby* v. *Kerby*, 31 Ark. App. 260, 792 S.W.2d 364 (1990). Here, the chancellor found that it was not in the best interest of the child to be moved to Texas, and the prevailing opinion does not find that this conclusion is clearly erroneous or against the preponderance of the evidence.

The majority's opinion adopts the criteria set out in *D'Onofrio* v. *D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27, *aff'd* 144 N.J. Super. 352, 365 A. 2d 716 (App. Div. 1976), as guidelines to be used in custodial parent relocation cases. However, I believe that this is not necessary since our standard of review is

ultimately the best interest of the child. Minors are wards of the chancery court, and it is the duty of these courts to make all orders which will properly safeguard their rights. *Clark* v. *Reiss*, 38 Ark. App. 150, 831 S.W.2d 622 (1992). The prime concern and controlling factor is the best interest of the child, and the court in its sound discretion will look into the peculiar circumstances of each case and act as the welfare of the child appears to require. *Id.* I believe that this is what the chancellor did below.

Although our Supreme Court has allowed custodial parents to remove their children to other states, the decisions in the earlier cases were based upon improvement of financial, living, or other conditions or the ability of the noncustodial parent to exercise visitation. *See Ising* v. *Ward*, 231 Ark. 767, 332 S.W.2d 495 (1960); *Antonacci* v. *Antonacci*, 222 Ark. 881, 263 S.W.2d 484 (1954). In *Gooch* v. *Seamans*, 6 Ark. App. 219, 639 S.W.2d 541 (1982), we said "[e]xcept for the visitation difficulties which are created by the move to Oklahoma, we find nothing in the record which supports the trial court's denial of appellant's removing the children from the state." However, this is not the situation in the case at bar. The chancellor based his decision on the child's young age, the distance to Wellington, Texas which would make it impractical for the father to exercise his visitation rights, the child's close relationship to her grandparents, the loss of contact with her extended family and lack thereof in Texas, the father's diligent exercise of his visitation rights, and the fact that the nursing school was not scheduled to start until August of 1993, ten months after the hearing. Also, it should be noted that the appellant had yet to take an entrance examination scheduled for February 1993, and while she had secured employment in Texas, the record reveals that her hourly wage would be the same as that which she earned at a job in Arkansas which she voluntarily left in October 1992. Therefore, the appellant would not even meet the threshold burden in *D'Onofrio* requiring the custodial parent to demonstrate some real advantage resulting from the move. I find nothing in this case to warrant remand, thereby allowing the appellant another bite at the apple. Furthermore, the issue may now be moot since the nursing school was to begin in August 1993.

I would review the case *de novo* on the record, and even applying the standards suggested in *D'Onofrio*, I would affirm.

Charles ROBIN *v.* STATE of Arkansas

CA CR 92-733 870 S.W.2d 395

Court of Appeals of Arkansas
En Banc
Opinion delivered January 26, 1994

James B. Bennett, for appellant.

No response.

PER CURIAM. Rehearing is denied.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. The majority of this court has today denied the appellant's petition for rehearing in the above case. I concur for reasons which will be discussed.

In an unpublished opinion handed down on September 29, 1993, a three-judge division of this court affirmed the appellant's convictions for driving while intoxicated, second offense, and driving on a suspended driver's license. The opinion states:

> Appellant argues that the trial court erred in finding Ark. Code Ann. § 5-65-202(a)(1) (Supp. 1991) applicable, and further, he contends that the results of the breathalyzer should have been suppressed because officer James Howell had no reasonable cause to administer a breathalyzer test.

This court's opinion then stated that it was not necessary to decide the first argument of the appellant because:

> The evidence here demonstrates reasonable cause for the officer to have administered a breathalyzer test under Ark. Code Ann. § 5-65-203; therefore, we hold the trial court did not err in allowing the introduction of the test results.

I think the opinion of this court reached the right result, but its reasoning was wrong. I first note that the incident giving rise

to this case occurred in 1992. Ark. Code Ann. § 5-65-203 (Supp. 1991), in effect at that time, authorized a police officer to direct that tests be made to determine the alcoholic content of a person's blood. The book containing the official Acts of the 1987 General Assembly shows that Act 75 of 1987 contained provisions that the 1987 Arkansas Code Annotated divided into two different sections. One section is Ark. Code Ann. § 5-65-202 and deals with "Implied Consent." The other section is Ark. Code Ann. § 5-65-203 and deals with "Administration." This background makes it clear that the provision in Ark. Code Ann. § 5-65-203 that authorizes a police officer to administer blood alcohol tests if the officer has "reasonable cause to believe the person to have been operating or in actual physical control of a motor vehicle while intoxicated" came from Act 75 of 1987 which also included the Ark. Code Ann. § 5-65-202 language which provides 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. . . ." (Emphasis in the original). Thus, the officer who is authorized to direct that tests be administered must have the "reasonable cause" referred to in § 5-65-203, but the person to be tested must have given consent to that testing, either by actual consent or by implied consent as set out in § 5-65-202.

There are three conditions set out in Ark. Code Ann. § 5-65-202(a) (Supp. 1991). Under the evidence in the case under consideration the only condition that the trial court found applicable was the first one. It will give implied consent 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[.]

In this case a police officer testified that he stopped the appellant because he had no tail lights and, when the officer approached the appellant's car, the officer "smelled alcohol" on appellant's breath; therefore, the officer gave appellant a field breathalyzer test, which appellant failed. The officer said he took appellant to the police department; told appellant he was under arrest for DWI; and then caused appellant to submit to a breathalyzer test, which registered 0.11%.

The appellant filed a motion to suppress the result of the test alleging that under Ark. Code Ann. §§ 5-65-202 and -203 (Supp. 1991) there was no reasonable cause to administer the test. The court decided against appellant on the finding that the appellant had given implied consent for the test under the provisions of Ark. Code Ann. § 5-65-202(a)(1) (Supp. 1991).

As I have stated, I think the opinion of the court of appeals which affirmed the trial court reached the right result, but it should not have been based upon the finding that the officer had reasonable cause to require the appellant to take the breathalyzer test. That is because the officer's reasonable belief did not come into play unless the appellant gave implied consent (there is no contention that he gave actual consent) for the test under § 5-65-202 (Supp. 1991). It is true that the United States Supreme Court held in *Schmerber* v. *California*, 384 U.S. 757 (1966), that a state could force a defendant to submit to a blood alcohol test without violating the defendant's Fifth Amendment right against self-incrimination. That, however, does not solve the question here because it is also true that a state may suppress evidence obtained without compliance with its law even though it was obtained without violating the United States Constitution. In *Cooper* v. *California*, 386 U.S. 58, 62 (1967), the Court said: "Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so." In Whitebread and Slobogin, *Criminal Procedure* § 34.05 at 962 (3d ed. 1993), it is noted that "as the U.S. Supreme Court has retrenched on Warren Court precedent, many state courts have repudiated federal law in favor of more protective rules based on state constitutions." And in 1 LaFave, *Search and Seizures* § 1.5(a) at 100 (2d ed. 1987), it is observed that "Just as federal courts may suppress improperly obtained evidence upon other than constitutional grounds in federal prosecutions, state courts may likewise require suppression merely because the search or seizure failed to comply with state law."

That Arkansas is willing to impose higher standards than required by the federal constitution or courts is demonstrated by *State* v. *Anderson*, 286 Ark. 58, 688 S.W.2d 947 (1985), where the court did not apply the good faith exception to the exclusionary rule enunciated by the United States Supreme Court in *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), and *United*

States v. *Leon*, 468 U.S. 897 (1984), but applied the Arkansas Rules of Criminal Procedure and held that the evidence should be suppressed. *See also Roberts* v. *State*, 287 Ark. 451, 701 S.W.2d 112 (1985), where the court affirmed a DWI conviction because the appellant was found in actual physical control of a car while he was intoxicated, but his conviction for refusing to take a blood alcohol test was reversed because there was no implied consent, under the statutory law of this state, to take the test.

Thus, I think the opinion of the court of appeals, which affirmed the trial court in the instant case, was based upon the wrong reason. We should have affirmed for the reason that appellant gave implied consent for the breathalyzer test under Ark. Code Ann. § 5-65-202 (1987).

In my dissent in *Huitt* v. *State*, 39 Ark. App. 69, 837 S.W.2d 482 (1992), I discussed my view of the law on this point. Without repeating that discussion in full, I would simply point out that my view was that the Arkansas General Assembly by not amending what became Ark. Code Ann. § 5-65-202 (1987) in either of the two sessions that occurred after the court of appeal's decision in *Gober* v. *State*, 22 Ark. App. 121, 736 S.W.2d 18 (1987), strongly indicated that the *Gober* decision was in accord with the intent of the legislature.

Gober held that the only condition in § 5-65-202 that could have worked to grant implied consent in that case was the first condition which granted consent if a driver was arrested for any offense arising out of acts alleged to have been committed while driving while intoxicated or while having a blood alcohol content of 0.10% or more. It is my view, as explained in my dissent in *Huitt*, that unless the driver is "arrested" for acts committed while he or she is, in fact, so intoxicated, the condition is not met. In other words, under this condition, a driver does not give implied consent for a blood alcohol test simply because he or she is arrested by a law enforcement officer who *alleges* that the driver was arrested for an act committed while intoxicated. I also said in *Huitt* that I did not think that the driver had to be *convicted* of DWI for the first condition to be met, but I thought it must be established that the driver was, in fact, driving while intoxicated.

In the present case, the appellant moved before trial to sup-

press the results of the breathalyzer test, and the trial court denied that motion. Although the trial court said its finding was based upon implied consent as provided under the first condition of Ark. Code Ann. § 5-65-201(a) (Supp. 1991), the trial court did not make a finding, at the time it ruled on the motion, that appellant was driving while intoxicated. We affirm, however, if the court's ruling was correct even if its reason was wrong. *See Higginbottom* v. *Waugh*, 313 Ark. 558, 856 S.W.2d 7 (1993). Therefore, I concur in the decision of the court of appeals in denying the appellant's petition for rehearing.

We reached the right result although *our* opinion was also based on the wrong reason. I think we should have said that, in determining whether the trial court erred in denying the motion to suppress, the issue is whether the appellant was arrested for *any* offense committed while driving while intoxicated. In reviewing the trial court's decision on a motion to suppress we make an independent determination based on the totality of the circumstances and reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Magar* v. *State*, 308 Ark. 380, 382, 826 S.W.2d 221, 222 (1992). Thus, we should have said that viewed in that light, there was evidence at the hearing on the motion to suppress to support a finding that the appellant was arrested for an offense committed while he was, in fact, driving while intoxicated.

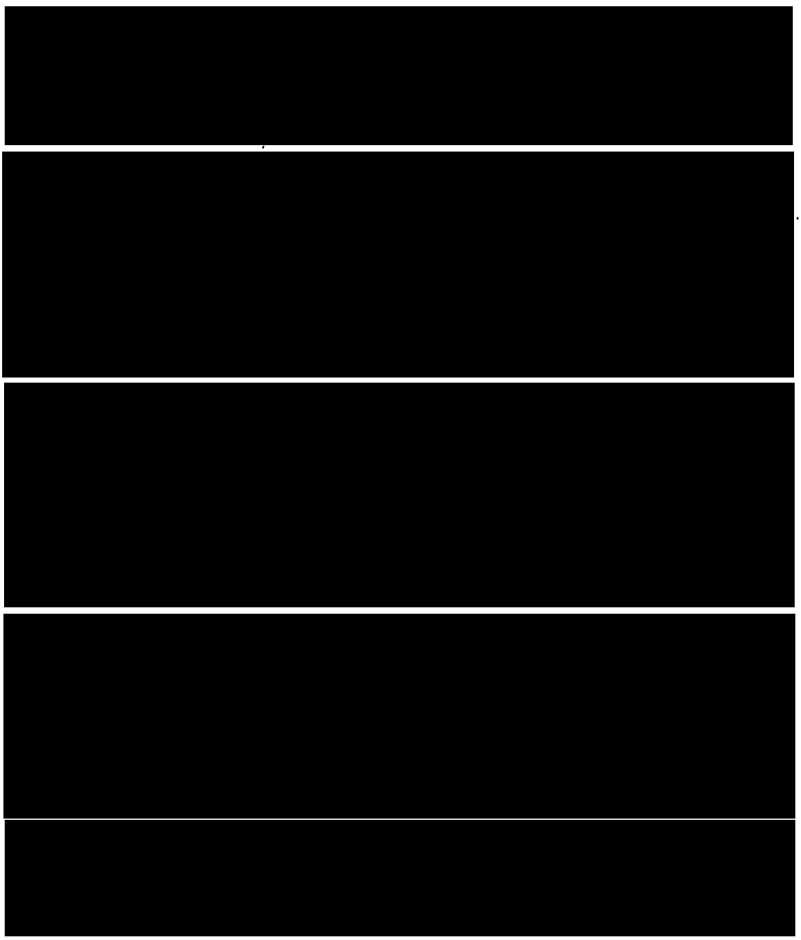
The offense for which the appellant was arrested was driving while intoxicated. He could have been arrested for that offense regardless of Ark. Code Ann. § 5-65-202. However, he could not have been required to take the breathalyzer test if he had not given implied consent under Ark. Code Ann. § 5-65-202. That is the view of the law that I stated in my dissent in *Huitt. See* 39 Ark. App. at 75-76 and 837 S.W.2d at 486. And it is interesting that Act 132 of 1993 has now changed the law so that Ark. Code Ann. § 5-65-202(a)(3) (Supp. 1993) now provides that any person who operates a motor vehicle in Arkansas is deemed to have given consent for a blood alcohol test if at the time the person is arrested for driving while intoxicated the officer has reasonable cause to believe that the person was driving while intoxicated.

Because our opinion in this case reached the right result, I concur in denying the petition for rehearing.

FIRST NATIONAL BANK of Eastern Arkansas *v.*
ARKANSAS DEVELOPMENT FINANCE AUTHORITY,
First Commercial Mortgage Company,
and Verex Assurance, Inc.

CA 92-1249 870 S.W.2d 400

Court of Appeals of Arkansas
Division I
Opinion delivered February 2, 1994
[Rehearing denied March 2, 1994.]



[redacted]

Butler, Hicky & Long, for appellant.

Donald H. Henry and *Jana Kim Keller*, for appellees.

JOHN E. JENNINGS, Chief Judge. The Arkansas Development Finance Authority is an independent instrumentality of the State of Arkansas created to assist in the financing of residential housing. The appellant, First National Bank of Eastern Arkansas, qualified with the Finance Authority to participate in the Arkansas 1983 Series D Bond Program. First Commercial Mortgage Company is an Arkansas corporation which services loans for the Finance Authority. Verex Assurance, Inc. is a mortgage loan insurer.

In early 1984, Mr. and Mrs. Randall Horner applied to First National for a loan to buy a home in Forrest City. In connection with the loan First National submitted documents to Verex indicat-

ing that the purchase price for the house was $68,000.00; that the loan was to be for $64,600.00, or 95% of the purchase price; and that the Horners were making a 5% down payment. Included in the documents was a "gift letter" purportedly signed by Randall Horner's mother stating that she would give him $7,500.00 for the down payment and closing costs. Verex approved the application for the purpose of issuing mortgage loan insurance, and First National approved the loan and took a mortgage on the property. At the same time, First National made an additional loan of $7,500.00 to the Horners, payable in thirty-six monthly installments and secured by a second mortgage on the property. Both mortgages were promptly recorded. On that same day, May 14, 1984, First National assigned the $64,600.00 note and mortgage to the Finance Authority. The Finance Authority later transferred the loan to First Commercial for servicing.

In February 1987, the Horners paid the $7,500.00 note in full. In late 1987 the Horners defaulted on the larger note. First Commercial, on behalf of the Finance Authority, filed suit for foreclosure and obtained a decree. The Finance Authority bought the property at sale for $69,738.00, the full amount of the judgment including interest, costs, and attorneys fees. The Finance Authority subsequently sold the property for approximately $35,000.00.

In August 1988, First Commercial filed a claim of loss with Verex under the mortgage insurance policy. In May 1989, Verex denied the claim based on its investigation, which showed that the "gift letter" had been forged and that the Horners' down payment had apparently been financed by the $7,500.00 loan from First National.

In May 1990, First Commercial and the Finance Authority sued First National and Verex. All parties filed motions for summary judgment. The chancellor dismissed the complaint as against Verex, but granted the plaintiffs' summary judgment against First National in the amount of $64,000.00 together with interest and attorney's fees.

One issue raised on appeal requires reversal. Part of the agreement between First National and the Finance Authority is contained in a document known as the Conventional Mortgage Lender's Guide. The lender's guide provided:

> [T]he Mortgage Lender, by its entering into a Mortgage Loan Purchase Agreement, hereby waives any claim or defense of any statute of limitations which might otherwise be raised in defense to any repurchase obligation of the Mortgage Lender or damage claim of the Agency related thereto.

[redacted] The chancellor held in the order granting summary judgment that First National thereby waived the statute of limitations as a defense. The precise issue is whether an agreement to waive the statute of limitations for all time, made at the inception of the contract, is void because it violates public policy. We hold that such an agreement is void and unenforceable.

The question appears to be one of first impression in this state. Professor Arthur Corbin states that an express agreement, made at the time of the original contract, never to plead the statute of limitations as a defense, is generally regarded as against public policy and void. 6A Arthur L. Corbin, *Corbin on Contracts* § 1515, at 729 (1962). *See also* 1A *Corbin on Contracts* § 218; 1 Samuel Williston, *Treatise on the Law of Contracts* § 183 (Walter H. Jaeger ed., 3d ed. 1957). As the court said in *John J. Kassner & Co.* v. *City of New York*, 46 N.Y.2d 544, 415 N.Y.S.2d 785, 389 N.E.2d 99 (1979):

> Although the Statute of Limitations is generally viewed as a personal defense "to afford protection to defendants against defending stale claims", it also expresses a societal interest or public policy "of giving repose to human affairs". Because of the combined private and public interests involved, individual parties are not entirely free to waive . . . the statutory defense.

415 N.Y.S.2d at 789, 389 N.E.2d at 103 (citations omitted). *See also* Corbin, *supra*; Williston, *supra; Hirtler* v. *Hirtler*, 566 P.2d 1231 (Utah 1977); *Crane* v. *French*, 38 Miss. 503 (1860).

Other decisions supporting the rule include *Titus* v. *Wells Fargo Bank & Union Trust Co.*, 134 F.2d 223 (5th Cir. 1943); *Munter* v. *Lankford*, 127 F.Supp. 630 (D.C. 1955), aff'd 232 F.2d 373 (1956); *Ross* v. *Ross*, 96 Ariz. 249, 393 P.2d 933 (1964); *Squyres* v. *Christian*, 253 S.W.2d 470 (Tex. Civ. App. 1952); *Simpson* v. *McDonald*, 142 Tex. 444, 179 S.W.2d 239

(1944); *National Bond & Investment Co.* v. *Flaiger*, 322 Mass. 431, 77 N.E.2d 772 (1948); *First National Bank of La Junta* v. *Mock*, 70 Colo. 517, 203 P. 272 (1921); *Segond* v. *Landry*, 1 Rob. 335 (La. 1842). *See also Bell* v. *Morrison*, 26 U.S. 351 (1828) (Story, J.); *Dunlop Tire & Rubber Corp.* v. *Ryan*, 171 Neb. 820, 108 N.W.2d 84 (1961); *Kentucky River Coal & Feed Co.* v. *McConkey*, 271 Ky. 261, 111 S.W.2d 418 (1937); *Kellogg* v. *Dickinson*, 147 Mass. 432, 18 N.E. 223 (1888); *Moore* v. *Taylor*, 2 Tenn. Ch. App. 556 (1897).

There are decisions to the contrary: *Simpson* v. *Hudson County National Bank*, 141 N.J. Eq. 353, 57 A.2d 473 (1948); *Brownrigg* v. *De Frees*, 196 Cal. 534, 238 P. 714 (1925) (superseded by statute as stated in *Carlton Brown & Co.* v. *Superior Court*, 210 Cal. App. 3d 35, 258 Cal. Rptr. 118 (1989)); *Parchen* v. *Chessman*, 49 Mont. 326, 142 P. 631 (1914); *State Trust Co.* v. *Sheldon*, 68 Vt. 259, 35 A. 177 (1896). Professor Corbin suggests that these cases should now be disregarded, and we do not find them persuasive. We hold that it was error for the chancellor to rule that the statute of limitations had been waived.

The Finance Authority contends, in the alternative, that the statute of limitations was tolled as a result of fraudulent concealment on the part of First National. *See, e.g., Dupree* v. *Twin City Bank*, 300 Ark. 188, 777 S.W.2d 856 (1989). But the chancellor did not decide the case on this basis and the record is not sufficiently developed to permit us to decide the issue de novo on appeal. Therefore the case must be remanded.

First National also contends that venue was not proper in Pulaski County. The argument is that proper venue for a suit against a national banking association is set by 12 U.S.C. § 94 and that First National was subject to suit only in the county in which it is located, in this case St. Francis County, Arkansas. It is undisputed, however, that First National agreed, under the terms of the lender's guide, to be subject to suit in Pulaski County. Venue may be waived. *Thompson* v. *Dunlap*, 244 Ark. 178, 424 S.W.2d 360 (1968). That is what occurred here.

Appellant next argues that the chancery court lacked subject matter jurisdiction. We disagree.

In *Banning* v. *State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987), we discussed the nature of subject matter jurisdiction:

> 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 parti-cular 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. If it was within the court's jurisdiction to act upon the subject matter, that action is binding until reversed or set aside.

In the case at bar the "subject matter" of the litigation is a contract between the parties. First National's argument is based on its contention that the action is merely one for damages and therefore an adequate remedy exists at law.

It is apparent from decisions of the Arkansas Supreme Court that the existence of an adequate remedy at law does not deprive the chancery court of subject matter jurisdiction. In *Towell* v. *Shepherd*, 286 Ark. 143, 689 S.W.2d 564 (1985), the supreme court said, "[W]hen a suit is improperly brought in equity it should not be dismissed, but should be transferred to the law court and . . . if no motion to transfer is made, the objection is deemed waived, unless there is total lack of jurisdiction, such as a criminal case or probate of a will." 286 Ark. at 145, citing *Stolz* v. *Franklin*, 258 Ark. 999, 531 S.W.2d 1 (1975). In *Stolz* the court said, "In the absence of such a motion [to transfer], the chancery court may, in its discretion, transfer the case on its own motion or proceed to trial on the merits." In *Priddy* v. *Mayer Aviation, Inc.*, 260 Ark. 3, 537 S.W.2d 370 (1976), the court said "[F]ailure to plead lack of jurisdiction in equity because of an adequate remedy at law waives this objection to jurisdiction on appeal." And in *Reid* v.

Karoley, 232 Ark. 261, 337 S.W.2d 648 (1960), the court said that when the basis of an objection to equity jurisdiction is the existence of an adequate remedy at law, the "proper method of procedure . . . is by a motion to transfer and not by demurrer."

By definition, subject matter jurisdiction cannot be waived. *Hilburn* v. *First State Bank of Springdale*, 259 Ark. 569, 535 S.W.2d 810 (1976); *In re Estate of Puddy* v. *Gillam*, 30 Ark. App. 238, 785 S.W.2d 254 (1990). But clearly under the decisions of the Arkansas Supreme Court an objection to the exercise of equity jurisdiction on the basis of the existence of an adequate remedy at law can be waived. In the case at bar, no motion to transfer to law court was filed. Accordingly, this objection was waived. *See Towell* v. *Shepherd*, 286 Ark. 143, 689 S.W.2d 564 (1985).

Appellant raises several other issues but those issues are either moot in light of our decision on the question of the statute of limitations or are without merit. We do agree with the contention of Verex that it is "not a proper party to this appeal." *See Buck* v. *Monsanto Co.*, 254 Ark. 821, 497 S.W.2d 664 (1973).

For the reasons stated, the judgment appealed from is reversed and the case is remanded for further proceedings.

Reversed and Remanded.

ROBBINS, J., agrees; MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the result reached by the opinion written by Chief Judge Jennings in this case. However, for understanding and explanation I would substitute the following language for the last, one-sentence paragraph in Judge Jennings' opinion:

In summary, the trial court's judgment found "there exists no genuine issue of material fact in this case" and granted summary judgment in favor of Arkansas Development Finance Authority, First Commercial Mortgage Company, and Verex Assurance, Inc. The only notice of appeal filed was by First National Bank of Arkansas. We affirm the judgment in favor of Verex. We reverse the judgment in favor of Arkansas Development Finance Authority and First Commercial Mortgage

Company because of the trial court's holding that First National Bank waived any objection or defense it may have had based on any statute of limitation that might otherwise apply. We hold against First National on its arguments that venue was improper and that the chancery court, which tried this case, lacked subject matter jurisdiction. We remand on all other issues.

Affirmed in part, and reversed and remanded in part.

A & C SERVICES, INC. *v.* Johnny SOWELL

CA 93-133 870 S.W.2d 764

Court of Appeals of Arkansas
En Banc
Opinion delivered February 2, 1994

[redacted]

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *E. Diane Graham*, for appellant.

Johnny Sowell, Pro Se.

JOHN B. ROBBINS, Judge. Appellant A&C Services Inc. (A&C) appeals from a decision of the Arkansas Workers' Compensation Commission finding that appellee Johnny Sowell was entitled to benefits of $166.68 per week, pursuant to Ark. Code Ann. § 11-9-518(a)(1) (1987). A&C contends that the Commission erred in basing Sowell's average weekly wage on a forty-hour workweek in arriving at his weekly benefit rate. We agree, and reverse.

Sowell was employed by A&C on August 12, 1991, and worked until he was injured on the job at Goodwin Construction on September 10, 1991. The case was submitted to the Commission on stipulated facts and, essentially, involved only a question of law as to the method of computing weekly benefit rates of an employee of a temporary employment agency. The evidence before the Commission consisted solely of the following stipulation:

> That the Respondent Employer is a temporary employment agency which provides employment opportunities for individuals by referring them to employment which is available with others who contract with the Respondent Employer to provide temporary employees in their businesses. That the Claimant, Johnny Lee Sowell, applied for employment with the Respondent Employer on August 12, 1991, and filled out an Application for Employment which is attached hereto as Exhibit "A." That subsequent to August 12, 1991, the Claimant was provided employment through the Respondent Employer as follows:

Week Ending	Employment Provided	Hours Worked	Wages Recv'd
8/18/91	Goodwin Construction	40	$250.00
8/25/91	Goodwin Construction	43	278.14
9/01/91	Arkansas Proteins/ Rymer Foods	32	160.00
9/08/91	Goodwin Construction	16	100.00
9/15/91	Goodwin Construction	18	112.50

The Claimant returned to work for Goodwin Construction Company on September 5, 1991, worked eight hours on Thursday, September 5, 1991, eight hours on Friday, September 6, 1991, for a total of 16 hours, pay period ending Sunday, September 8, 1991. The Claimant worked ten hours Monday, September 9, 1991, and eight hours, Tuesday, September 10, 1991, for a total of 18 hours for the week ending September 15, 1991. The Claimant obtained medical treatment at the Convenient Medical Center on the date of his injury. The Claimant's wage rate was Six Dollars and 25/100 ($6.25) per hour.

Sowell argued before the Commission that his weekly benefit rate should be based upon a forty-hour workweek. A&C contended that Sowell's weekly benefit rate should be calculated by determining the actual number of hours worked and then averaging them over the number of weeks worked. The Administrative Law Judge treated the last two partial weeks of employment as one week, and divided four weeks into the total number of hours worked (149) to arrive at an average number of hours worked per week of 37.25. He found that Sowell was entitled to a weekly benefit rate of $155.20. The full Commission considered only Sowell's employment history with Goodwin Construction, where he was working at the time of his injury, and found that he was working at least eight hours per day, five days per week for the weeks ending August 18 and August 25, 1991. The Commission found that appellee returned to work for Goodwin Construction on September 5, 1991, and worked eight hours on each day remaining in that particular pay period, and when the new period began on September 9, appellee was working "full-time," or at least eight hours per day until his injury. The Commission went on to find that:

> "Thus, the evidence indicates that the contract for hire with Goodwin Construction in force at the time of the accident was for at least eight hours per day, five days per week. Therefore, pursuant to Ark. Code Ann. § 11-9-518(a)(1) claimant's average weekly wage should be computed on a full-time workweek in the employment.

A&C appealed this determination.

The applicable statute is found in Ark. Code Ann. § 11-9-518 which provides as follows:

> (a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of accident and in no case shall be computed on less than a full-time workweek in the employment.
>
> (2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in full-time workweek in the employment.
>
> (b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.
>
> (c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

[redacted] We and the supreme court have recently had occasion to address the method of determining a temporary worker's weekly benefit rate. *Metro Temporaries* v. *Boyd*, 41 Ark. App. 12, 846 S.W.2d 668 (1993), *aff'd*, 314 Ark. 479, 863 S.W.2d 316

(1993). In *Metro*, the supreme court stated:

> *Travelers Ins. Co.* v. *Perry*, [262 Ark. 398, 557 S.W.2d 200 (1977)] holds that an injured worker like Boyd [a temporary worker] cannot receive benefits based on a forty-hour week without actually having worked forty hours, unless the worker can prove he or she was bound by contract to work the forty hours if the work were made available. *Perry*, 262 Ark. [at] 400, 557 S.W.2d at 201.
>
> . . . .
>
> In *Marianna School District* v. *Vanderburg*, the court of appeals held that the statute provides for benefits based upon the combining of wages and hours worked at different jobs, if the different jobs are performed for the same employer. *Vanderburg*, 16 Ark. App. at 274, 700 S.W.2d at 383. In this case Metro understood that it was the employer because it paid Boyd's wages, obtained compensation coverage, and stipulated that it was the employer. Metro anticipated assigning Boyd to different jobs, with different hours, and at different wages. Metro assigned Boyd to different jobs pursuant to the contract of hire in force at the time of the accident. Under the cases interpreting the statute, Boyd is entitled to receive benefits based upon averaging the hours worked at the different jobs.

Metro Temporaries, 314 Ark. at 485, 863 S.W.2d at 319.

We hold that the Commission's conclusion is in error for two reasons. First, the stipulated fact is that Sowell's contract of hire was with A&C, not Goodwin. Furthermore, the only proof before the Commission is that contained in the parties' stipulation, and this stipulation did not include any representation that Sowell worked forty hours each week for A&C, nor that Sowell was bound by contract with A&C to work forty hours each workweek if the work was made available to him. Sowell had the burden of proving that he was bound by contract to work forty hours each workweek if the work was made available. *Travelers Ins. Co.* v. *Perry, supra.* Consequently, pursuant to *Metro Temporaries* v. *Boyd, supra*, Sowell is entitled to receive benefits based upon an averaging of the hours worked and wages

received at the different jobs to which he was assigned by A&C. We reverse the Commission's holding that Sowell is entitled to benefits of $166.68 per week, and remand for the Commission to average the hours worked and wages received by Sowell for the weeks worked for A&C ending August 18, 1991, August 25, 1991, September 1, 1991, and September 8, 1991. The week ending September 15, 1991, should not be considered inasmuch as Sowell's employment was interrupted by his injury two days into that pay period and was not a "full workweek." *See* Ark. Code Ann. § 11-9-518(c).

Reversed and remanded.

MAYFIELD, J., concurs.

JENNINGS, C.J., and ROGERS, J., dissent.

MELVIN MAYFIELD, Judge, concurring. I concur in the decision to reverse and remand. In my opinion this result is required by the Arkansas Supreme Court's decision in *Metro Temporaries* v. *Boyd*, 314 Ark. 479, 863 S.W.2d 316 (1993).

However, I would point out that I find no conflict between that opinion and our opinion in *TEC* v. *Underwood*, 33 Ark. 116, 802 S.W.2d 481 (1991). Although *TEC* was a temporary employment company for whom the appellee worked, the opinion reveals that the appellee testified she had actually worked a forty-hour week for the two employers to whom she had been assigned. Moreover, the opinion does not show that the language pertaining to the "weekly wage earned . . . under the contract of hire in force at the time of accident," found in Ark. Code Ann. § 11-9-518(a)(1) (1987), was relied upon by the appellant. To the contrary, the opinion states that the appellant wanted to use a wage rate based upon the appellee's work for both employers to whom she was assigned because this would be "fair and just" under Ark. Code Ann. § 11-9-518(c) (1987).

Robert SHELTON *v.* STATE of Arkansas

CA CR 93-23 870 S.W.2d 398

Court of Appeals of Arkansas
Division II
Opinion delivered February 2, 1994

Ronald L. Griggs, for appellant.

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

MELVIN MAYFIELD, Judge. On January 27, 1987, appellant Robert Shelton entered a plea of nolo contendere to two charges of delivery of a controlled substance, marijuana, and was placed

on probation for five years and fined $1,000.00 plus costs. He was also ordered to reimburse the Arkansas State Police for $40.00 "buy money," and to serve ninety (90) days in jail.

By an order entered on January 27, 1992, it was found that appellant had paid all fines and costs assessed against him and had otherwise fully complied with the terms and conditions of his probation. He was, therefore, discharged from probation. On April 7, 1992, appellant filed a motion alleging that since he entered his plea he had fully complied with all the conditions of his probation and had been discharged, and he sought to have his record of conviction of the felony expunged. A hearing was held on August 21, 1992, in which appellant testified that this was the first time he had been charged with violating the law; that after his plea he strictly complied with all the terms of his probation; that he had married and had two children; that he had worked regularly for his father earning approximately $30,000.00 a year; that he had no further contact with the law since the plea; that he had quit running around, playing with a band, smoking marijuana, etc.; and that he had become a stable family man who works, enjoys the home life, and attends church regularly.

In a letter opinion delivered September 4, 1992, the trial judge held that he was without authority to expunge the appellant's record. The judge noted that appellant was not sentenced under Act 346 of 1975, Ark. Code Ann. § 16-93-301 through 303. Ark. Code Ann. § 16-93-303(a)(1) (1987) provides:

> Whenever an accused enters a plea of guilty or nolo contendere prior to an adjudication of guilt, the judge of the circuit or municipal court, criminal or traffic division, in the case of a defendant who has not been previously convicted of a felony, *without entering a judgment of guilt* and with the consent of the defendant, may defer further proceedings and place the defendant on probation for a period of not less than one (1) year, under such terms and conditions as may be set by the court. [Emphasis added.]

And Ark. Code Ann. § 16-93-303(b)(1) through (b)(4) provides for expunging the defendant's record upon fulfillment of the terms and conditions of the probation. The trial judge held that because appellant had entered his plea of nolo contendere to

felony delivery of marijuana without reference to the above Act or statute and because appellant was sentenced to pay a fine of $1,000, the provisions of Ark. Code Ann. § 16-93-303(a)(1) were not followed and appellant's record could not be expunged. Furthermore, according to Ark. Code Ann. § 5-4-301(d), the imposition of a fine constituted a conviction and this also prevented him from expunging appellant's record.

On appeal appellant concedes that he was not sentenced pursuant to the provisions of Ark. Code Ann. § 16-93-303(a)(1) or Ark. Code Ann. § 16-93-502(6)(B) (1987), and that the imposition of the fine constituted a conviction. Appellant argues, however, that he should be afforded some remedy for his exemplary behavior besides having to apply to the Governor for a pardon. He claims that by refusing to expunge his record, the trial court abandoned the inherent powers of the court to act when statutory provisions are incomplete.

Arkansas Code Annotated section 5-64-407 (1987), the Uniform Controlled Substances Act, also provides for expunging the record. Without entering a judgment of guilt and with the consent of the accused the court may defer further proceedings and place the defendant on probation. After successful completion of probation, discharge and dismissal under this section, the defendant shall be without adjudication of guilt and the charge is not considered a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for a second or subsequent convictions under Ark. Code Ann. § 5-64-410. However, this disposition is not available for the offense of delivery of marijuana; it applies only to *possession* of a controlled substance. *See Whitener* v. *State*, 311 Ark. 377, 380, 843 S.W.2d 853, 854 (1992).

Appellant cites Ark. Code Ann. § 16-13-204(b) (1987) which gives the circuit courts the "power to issue all writs, orders, and process which may be necessary in the exercise of their jurisdiction, according to the principles and usages of law"; Ark. Code Ann. § 16-13-201 which states, "Where those actions and proceedings are not expressly provided for by statute, the actions and proceedings may be had and conducted by the circuit courts and judges, in accordance with the course, rules, and jurisdic-

tion of the common law"; and Ark. Code Ann. § 16-65-119(a) which provides, "A judgment rendered, or final order made, in the circuit or chancery court may be reversed, vacated, or modified, either by the Supreme Court or by the court in which the judgment was rendered, or order made." He argues that under these statutes the trial court should be able to issue a new order, sealing and expunging the court activity which occurred in 1987. Appellant asserts that the circuit court should balance appellant's one brush with the criminal justice system with his exemplary behavior since that time and exercise its inherent power, in the absence of a statute, to expunge his record of the conviction.

The Arkansas Supreme Court has repeatedly held that the extent of sentencing in criminal cases is controlled by the legislature and that Arkansas circuit courts have no inherent authority to fashion sentences. *See State* v. *Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993), in which the trial court ignored the mandate in Ark. Code Ann. § 5-4-104(a) and (e)(4) (1987) not to suspend imposition of sentence for habitual offenders and suspended a portion of appellant's sentence. On appeal by the State pursuant to Ark. R. Crim. P. 36.10(b-c) our supreme court stated:

> In *Southern* v. *State*, 284 Ark. 572, 683 S.W.2d 933 (1985), the court, quoting from *Sparrow* v. *State*, 284 Ark. 396, 683 S.W.2d 218 (1985), said, "It is well settled that it is for the legislative branch of a state or federal government to determine the kind of conduct that constitutes a crime and the nature and the extent of punishment which may be imposed." This court has repeatedly held that sentencing in Arkansas is entirely a matter of statute. *Richards* v. *State*, 309 Ark. 133, 827 S.W.2d 155 (1992); *Sherrer* v. *State*, 294 Ark. 227, 742 S.W.2d 877 (1988). This court has also held that the minimum sentences for habitual offenders are mandatory. *McKillion* v. *State*, 306 Ark. 511, 815 S.W.2d 936 (1991). Further, this court has held that the power to grant or withhold the authority of trial judges to suspend execution of sentence conditioned on the defendant's good behavior properly lies with the General Assembly. *Tausch* v. *State*, 285 Ark. 226, 685 S.W.2d 802 (1985); *Hill* v. *State*, 276 Ark. 300, 634 S.W.2d 120 (1982); *Davis* v. *State*, 169 Ark. 932, 277 S.W.2d 5 (1925); *Holden* v. *State*, 156 Ark. 521, 247 S.W.2d 768 (1923).

312 Ark. at 37, 846 S.W.2d at 661.

Appellee argues that since appellant may seek to have his record expunged by applying for a pardon from the Governor of Arkansas, pursuant to Ark. Const. art. 6, section 18, it would violate the doctrine of separation of powers for the judiciary to also be able to expunge records. The Arkansas Supreme Court has been very careful to consider the separation of powers when reviewing the authority of trial courts to reduce a defendant's sentence. Because of the power to pardon held by the Governor, courts have no authority to reduce a defendant's sentence on the basis that it is unduly harsh. *Parker* v. *State*, 302 Ark. 509, 790 S.W.2d 894 (1990); *Coones* v. *State*, 280 Ark. 321, 657 S.W.2d 553 (1983); *Rogers* v. *State*, 265 Ark. 945, 582 S.W.2d 7 (1979); *Abbott* v. *State*, 256 Ark. 558, 508 S.W.2d 733 (1974). Appellee submits that, "[I]f the doctrine of separation of powers prevents circuit courts from reducing sentences of imprisonment, *a fortiori*, this same doctrine will prevent circuit courts from expunging the convictions that were the legal bases for the sentences of imprisonment."

We find the decision of the trial court was correct. A trial court does not have the power to expunge appellant's record when appellant was not sentenced under one of the statutes which specifically provides for expunging the record.

Affirmed.

COOPER and PITTMAN, JJ., agree.