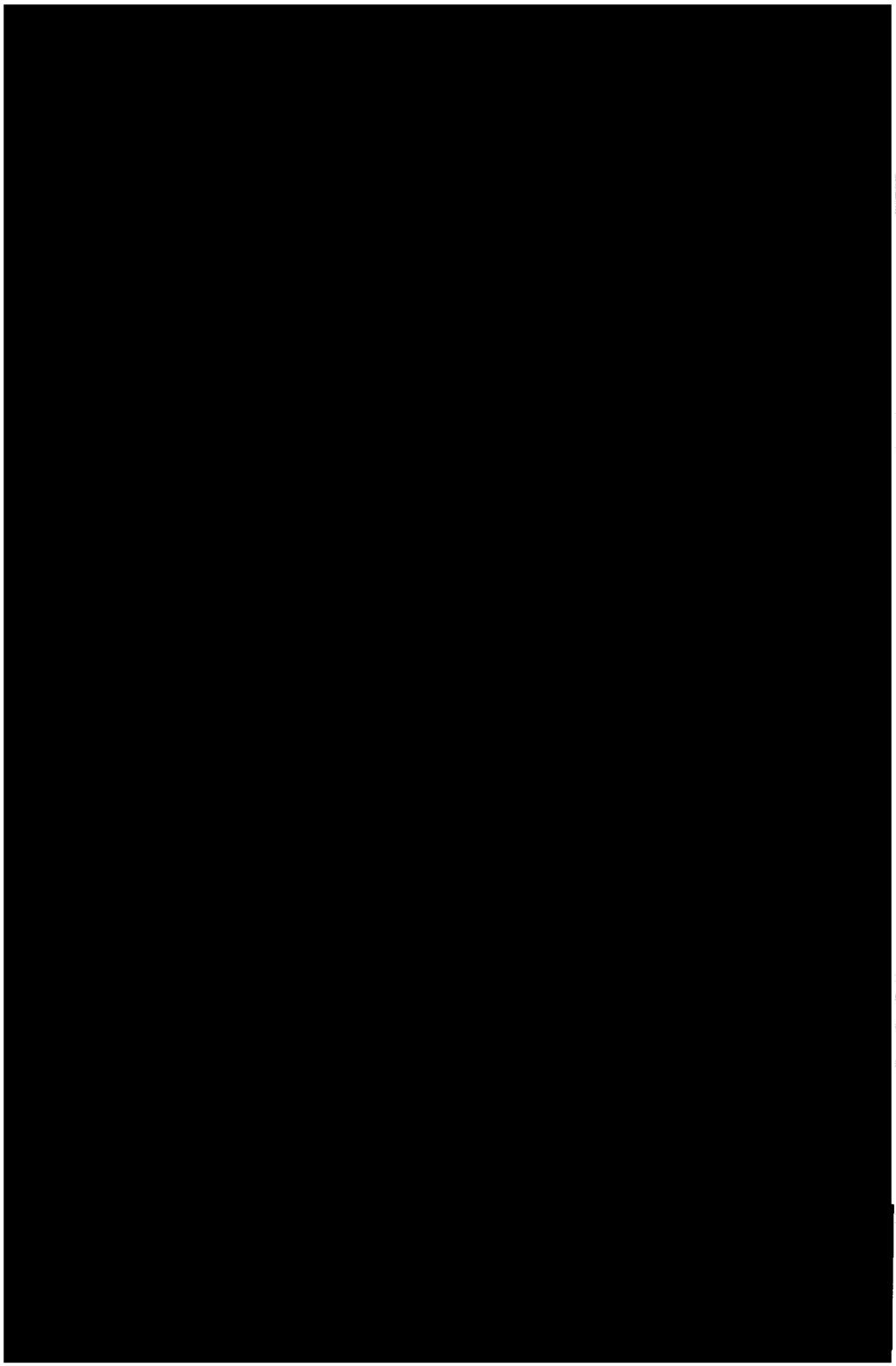

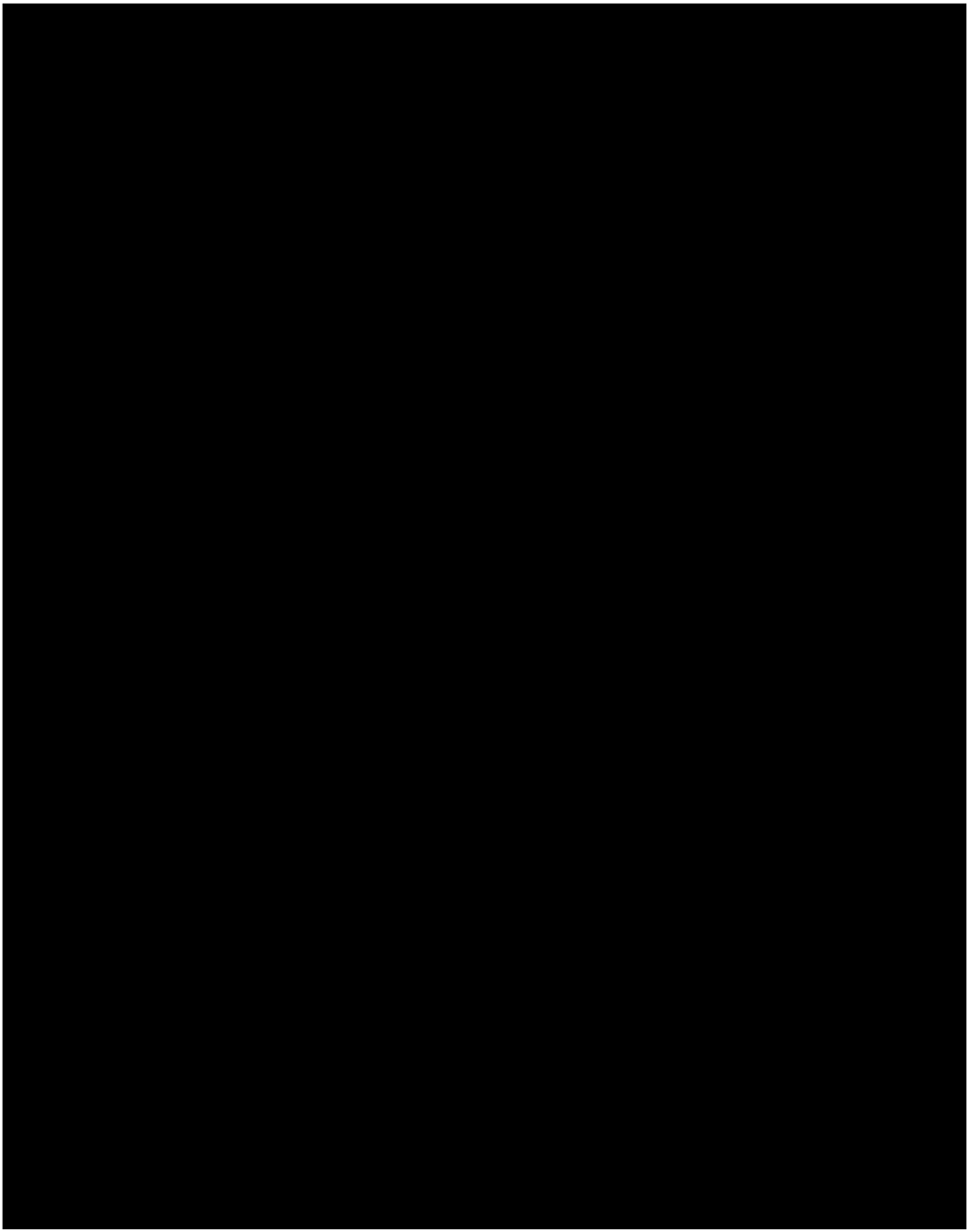

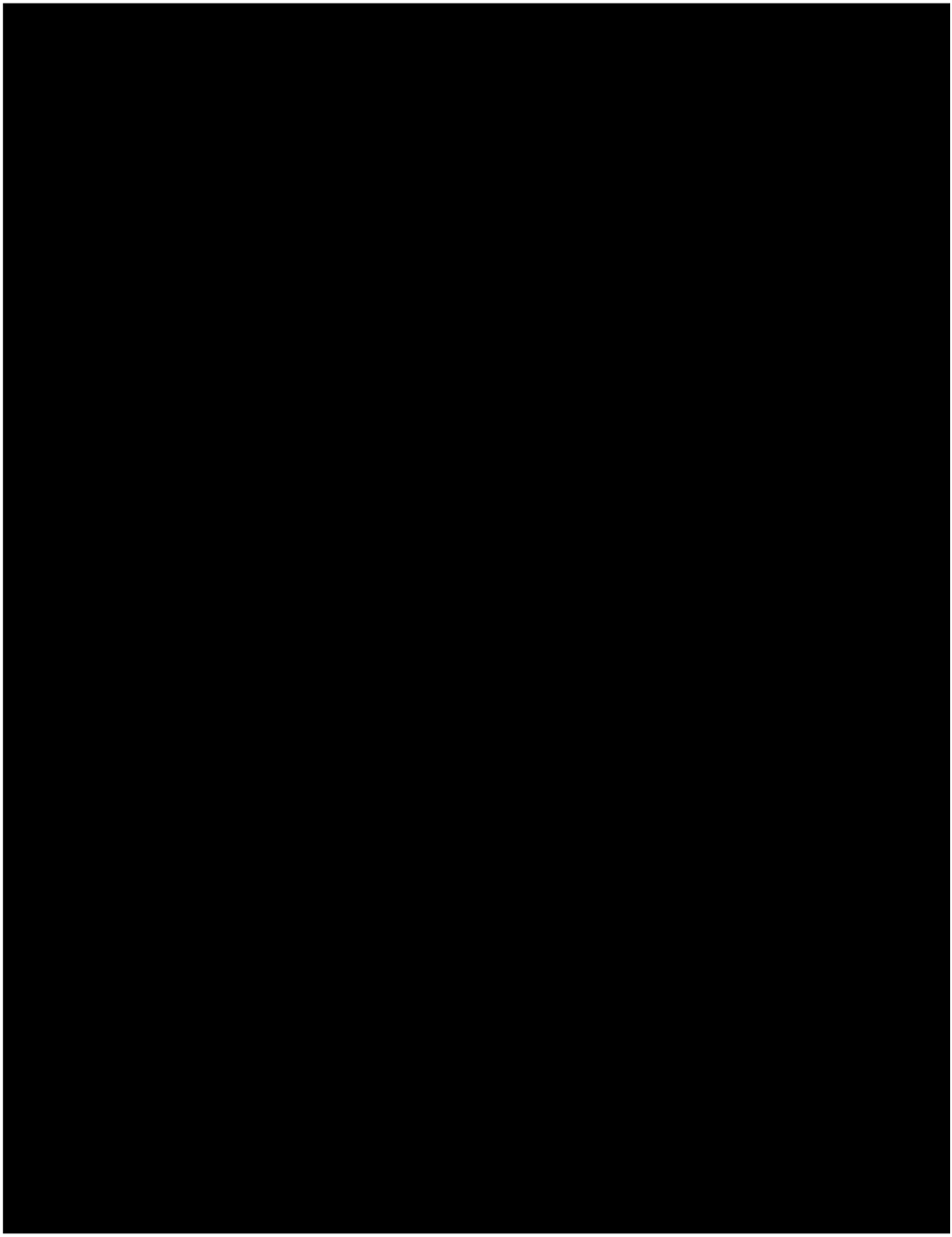

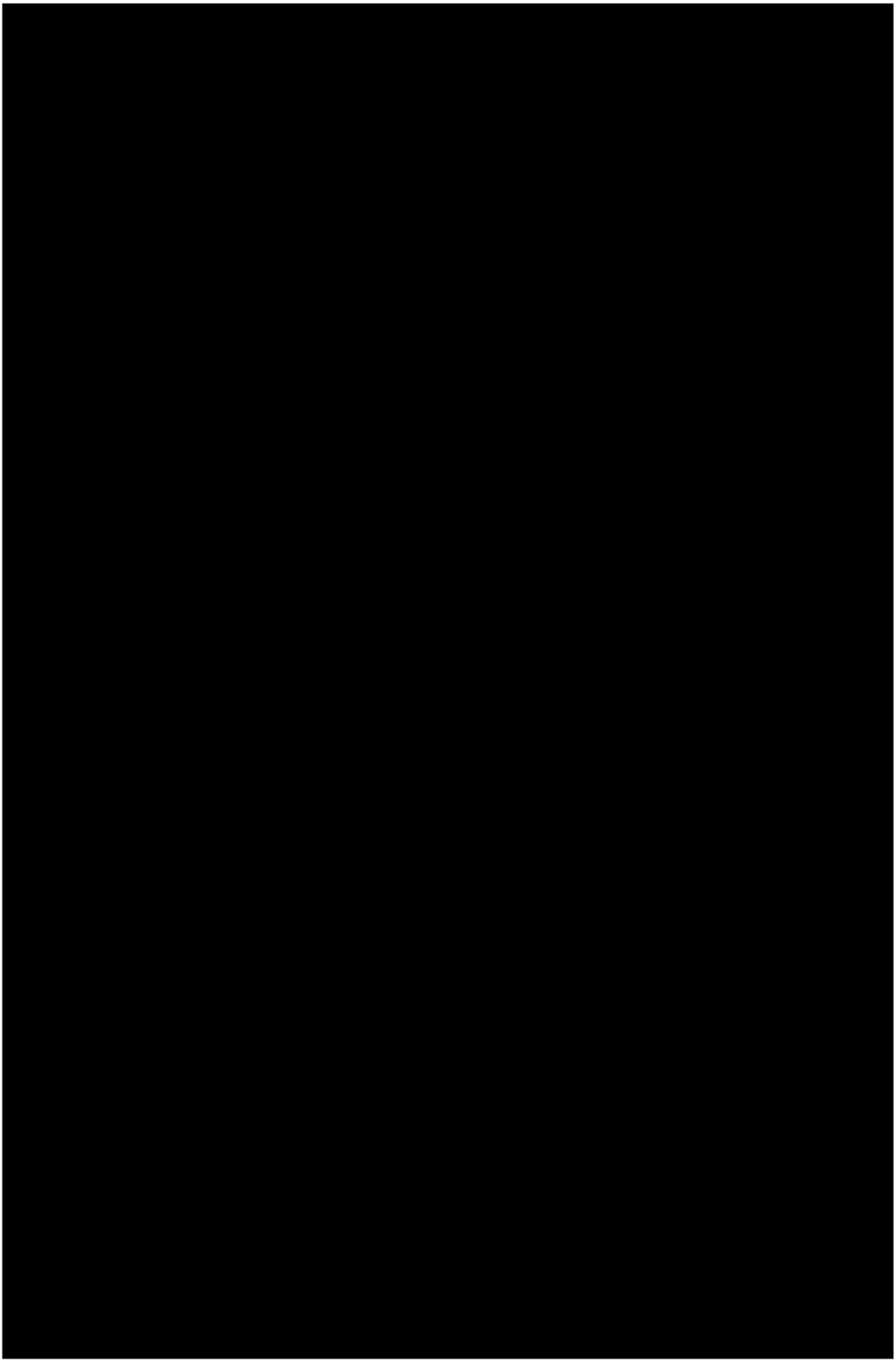

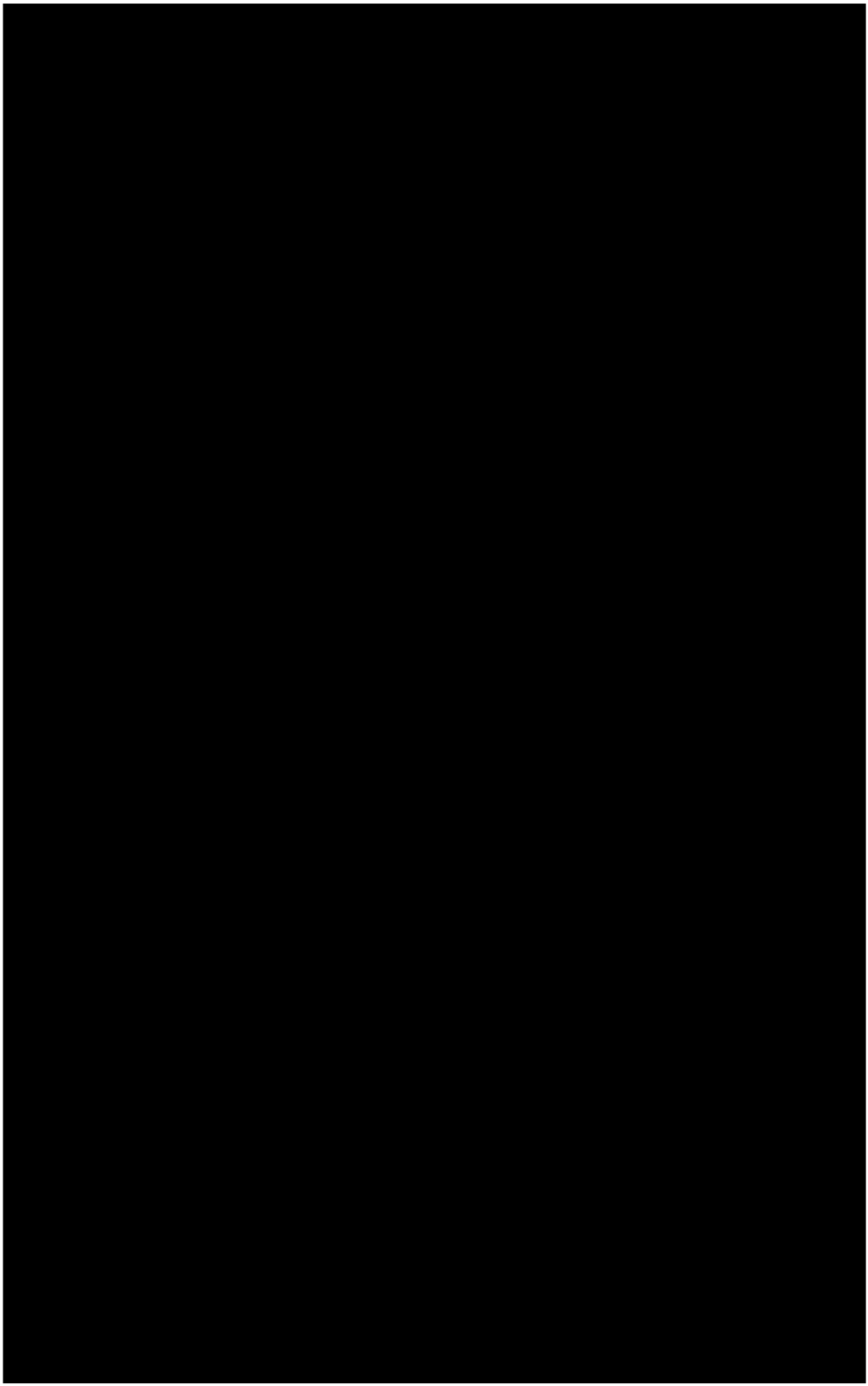

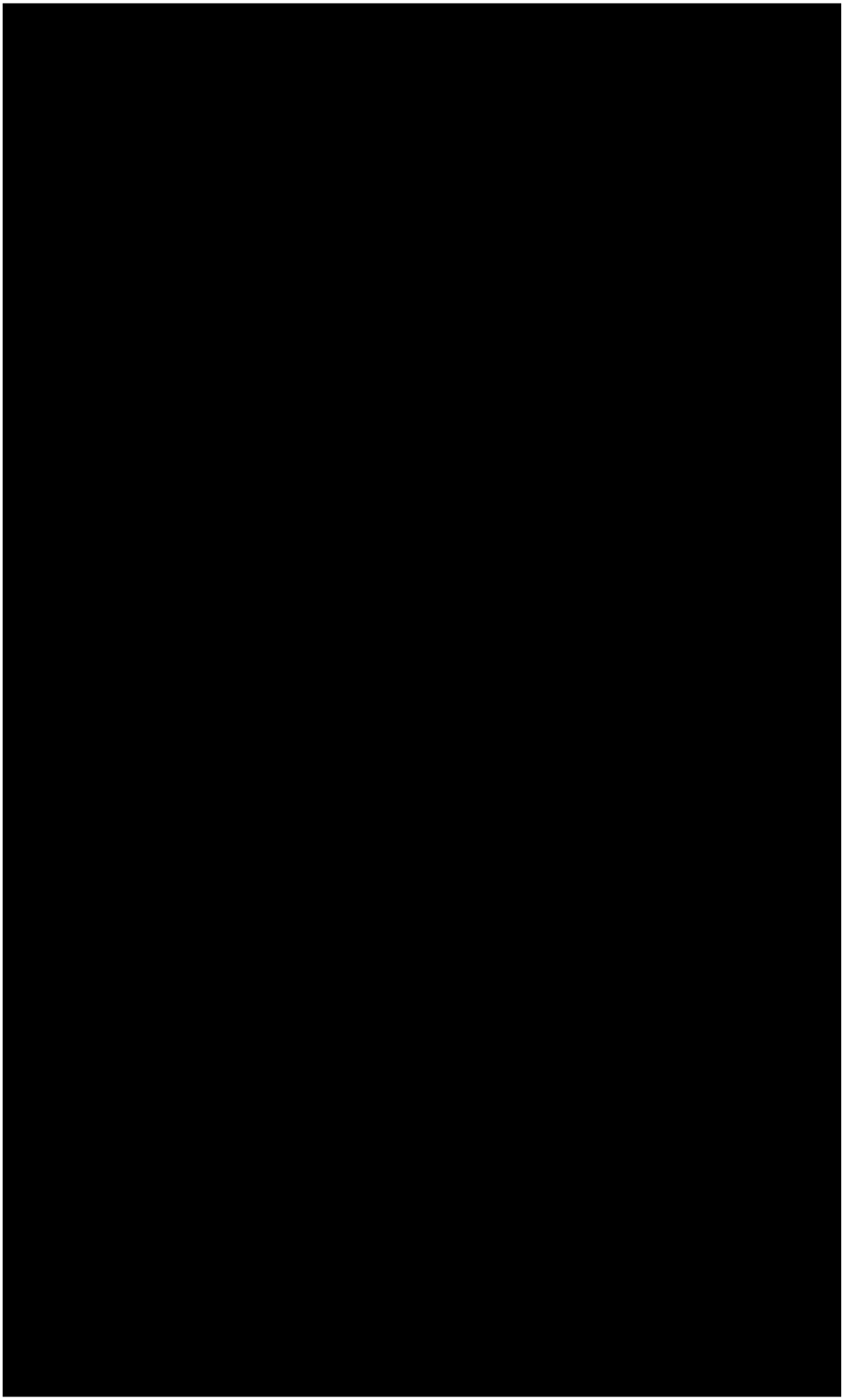

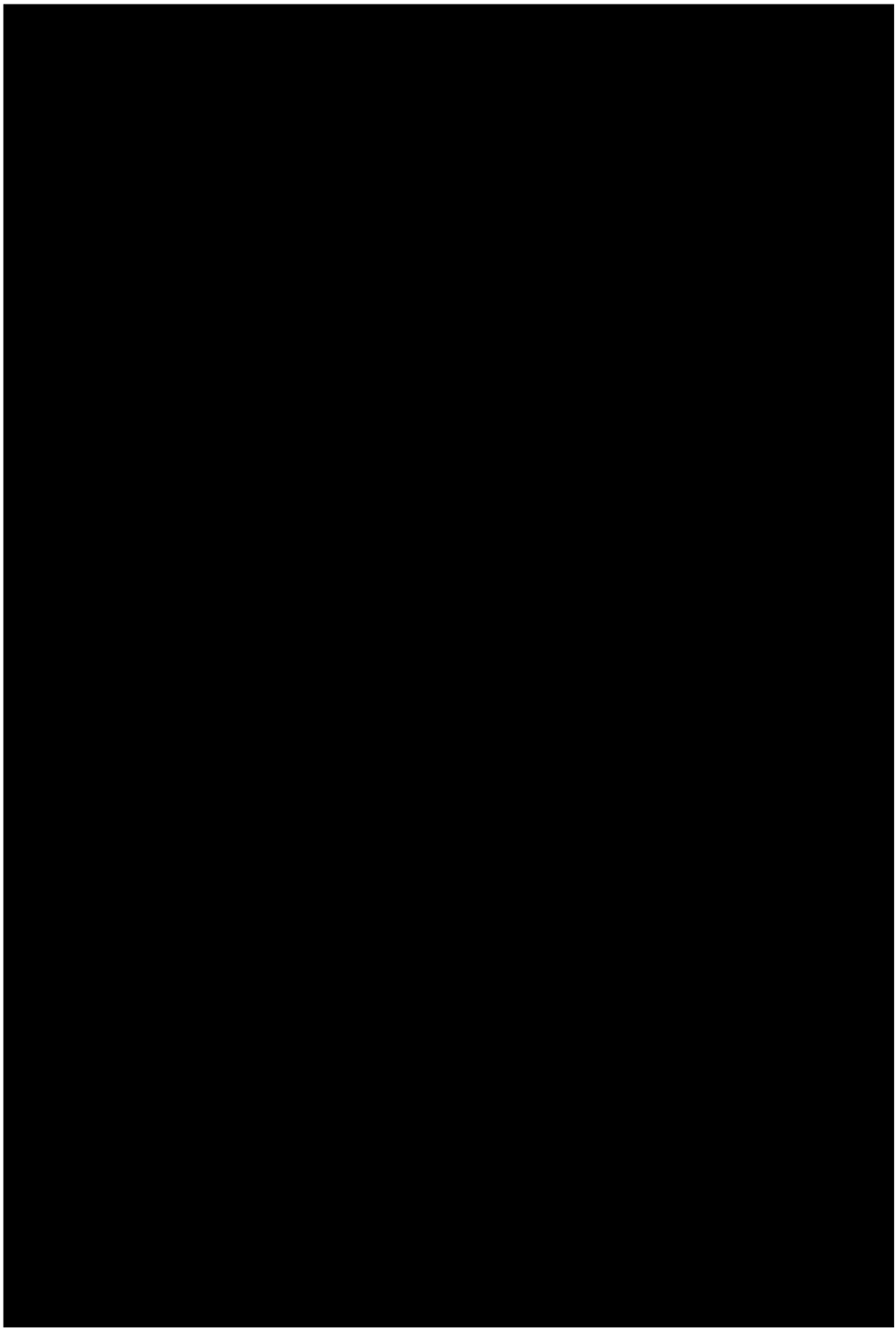

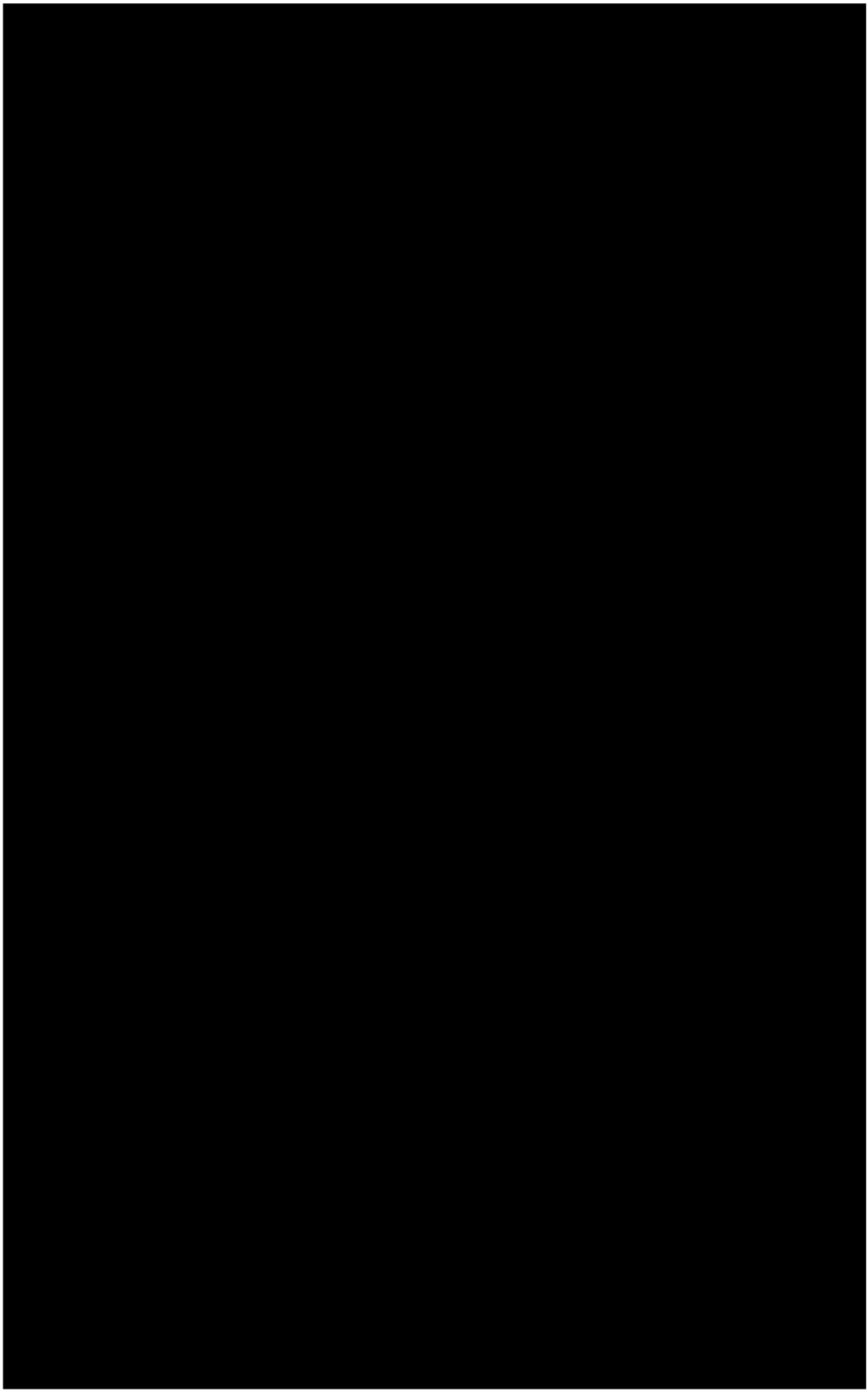

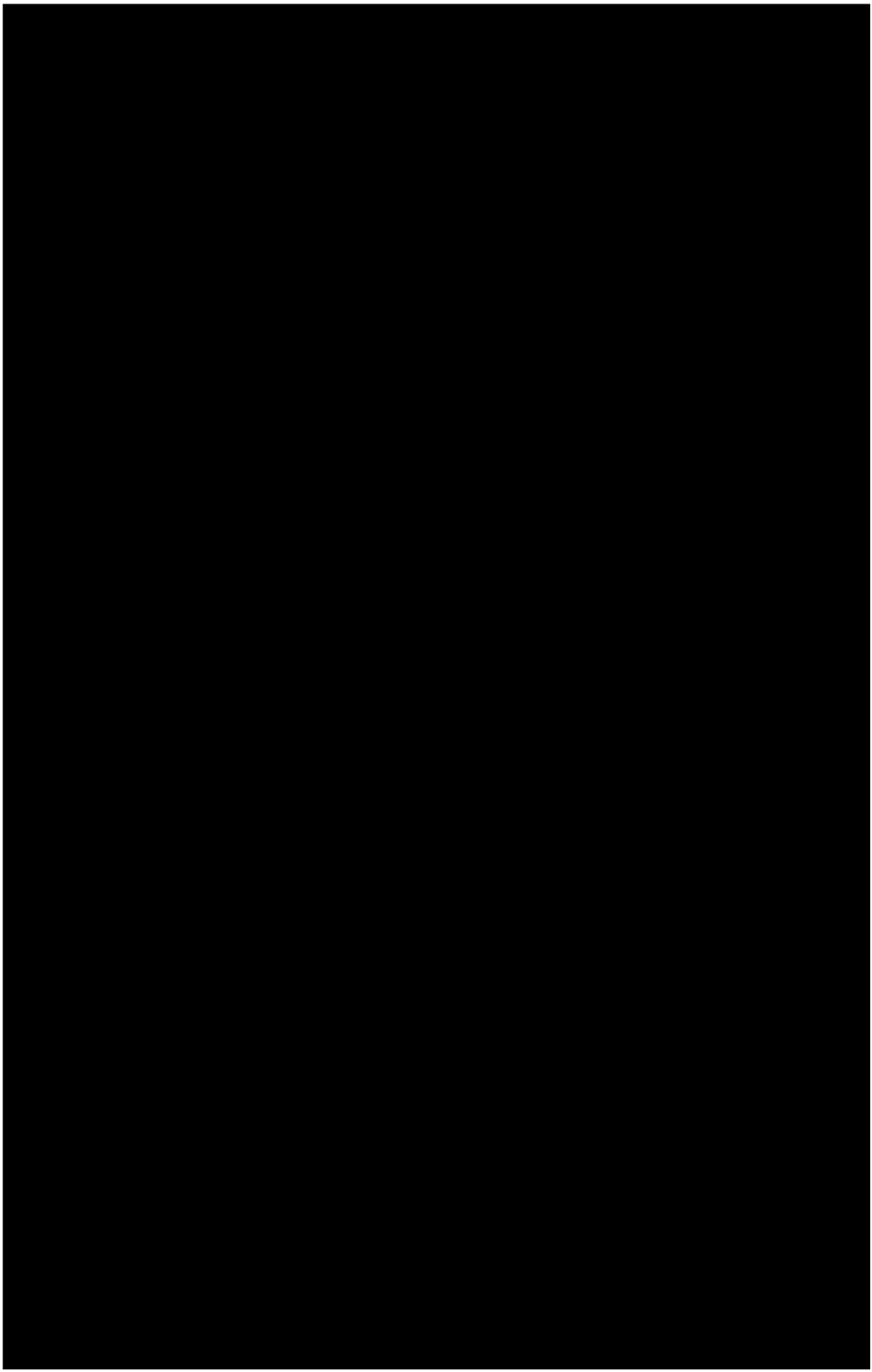

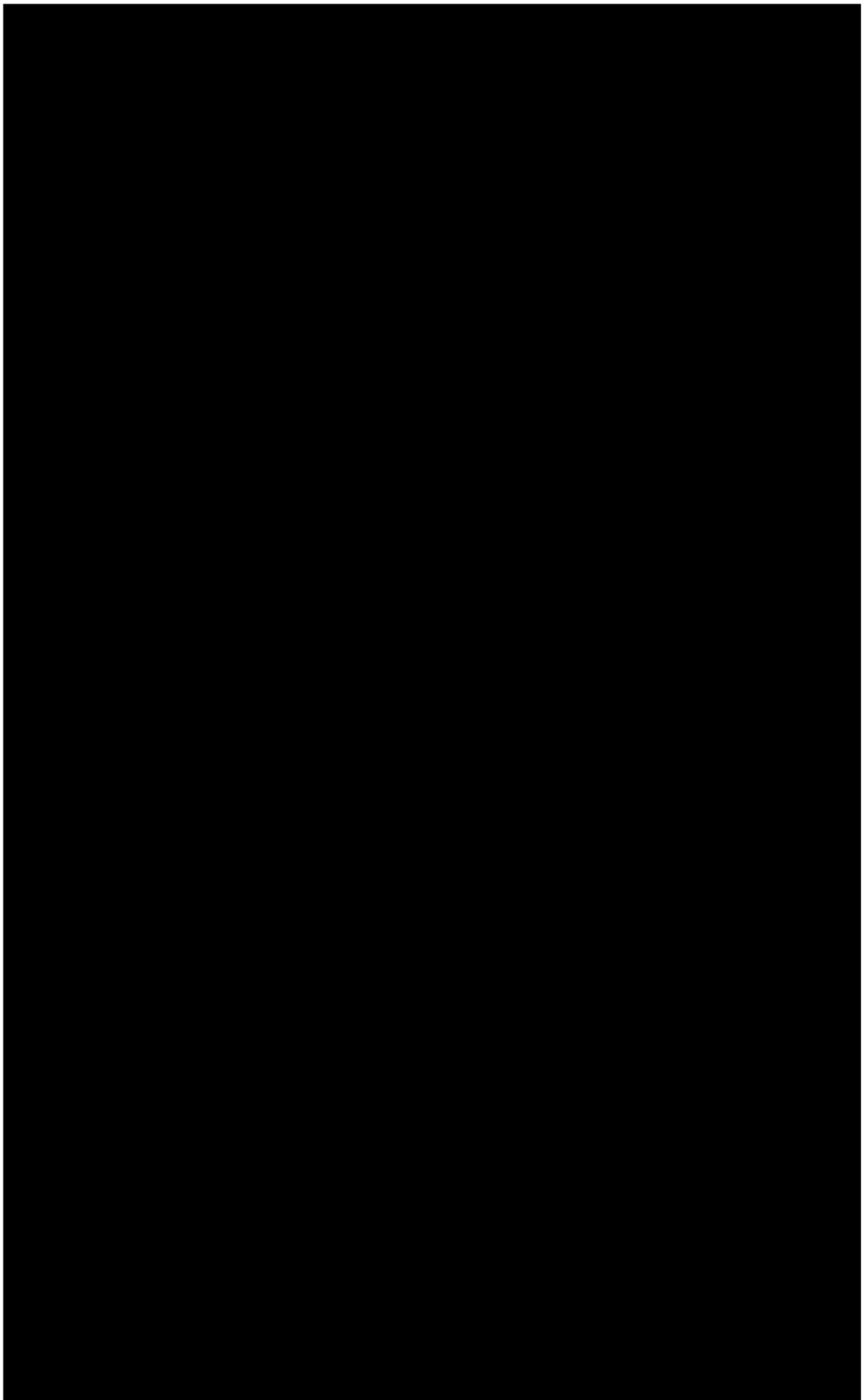

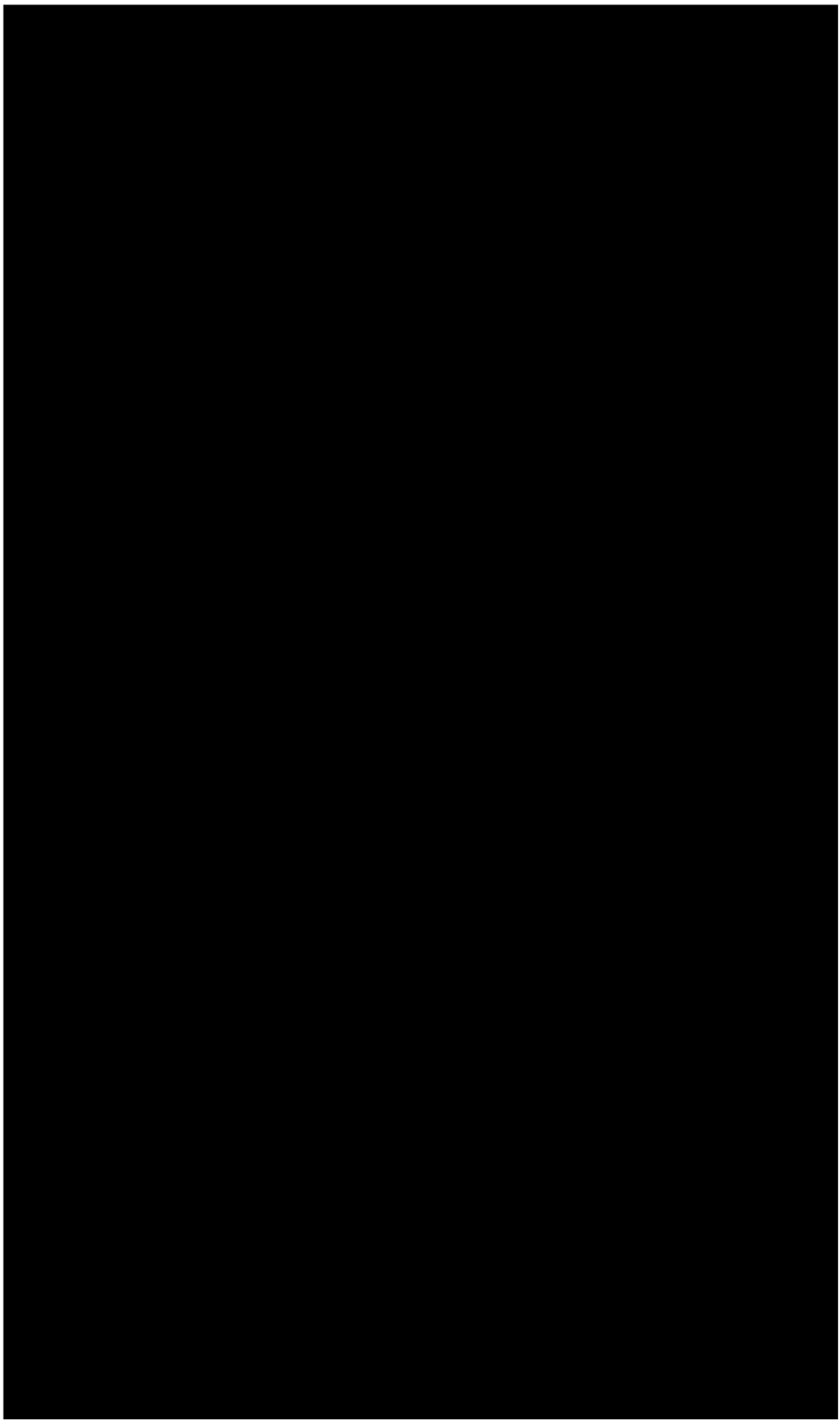

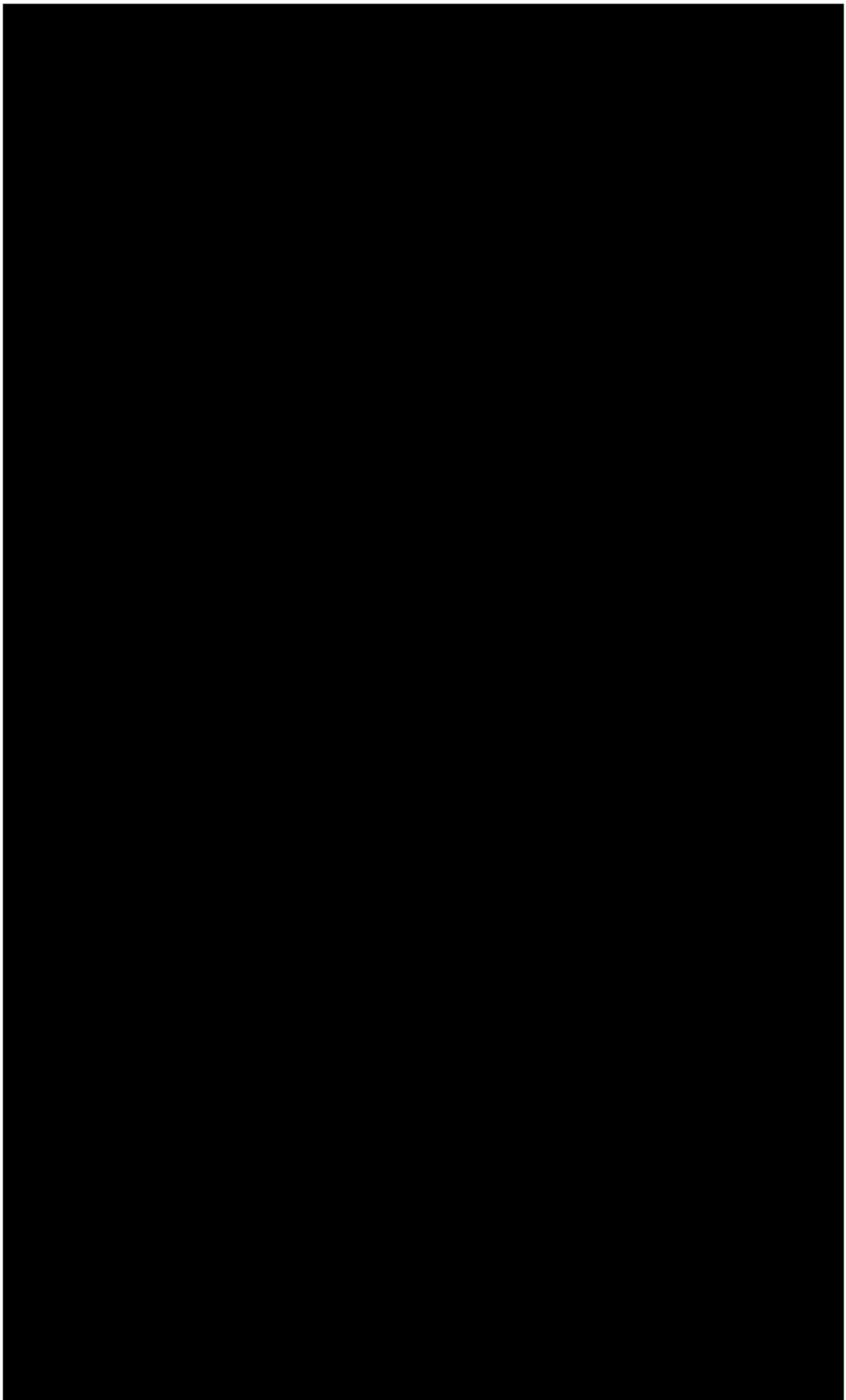

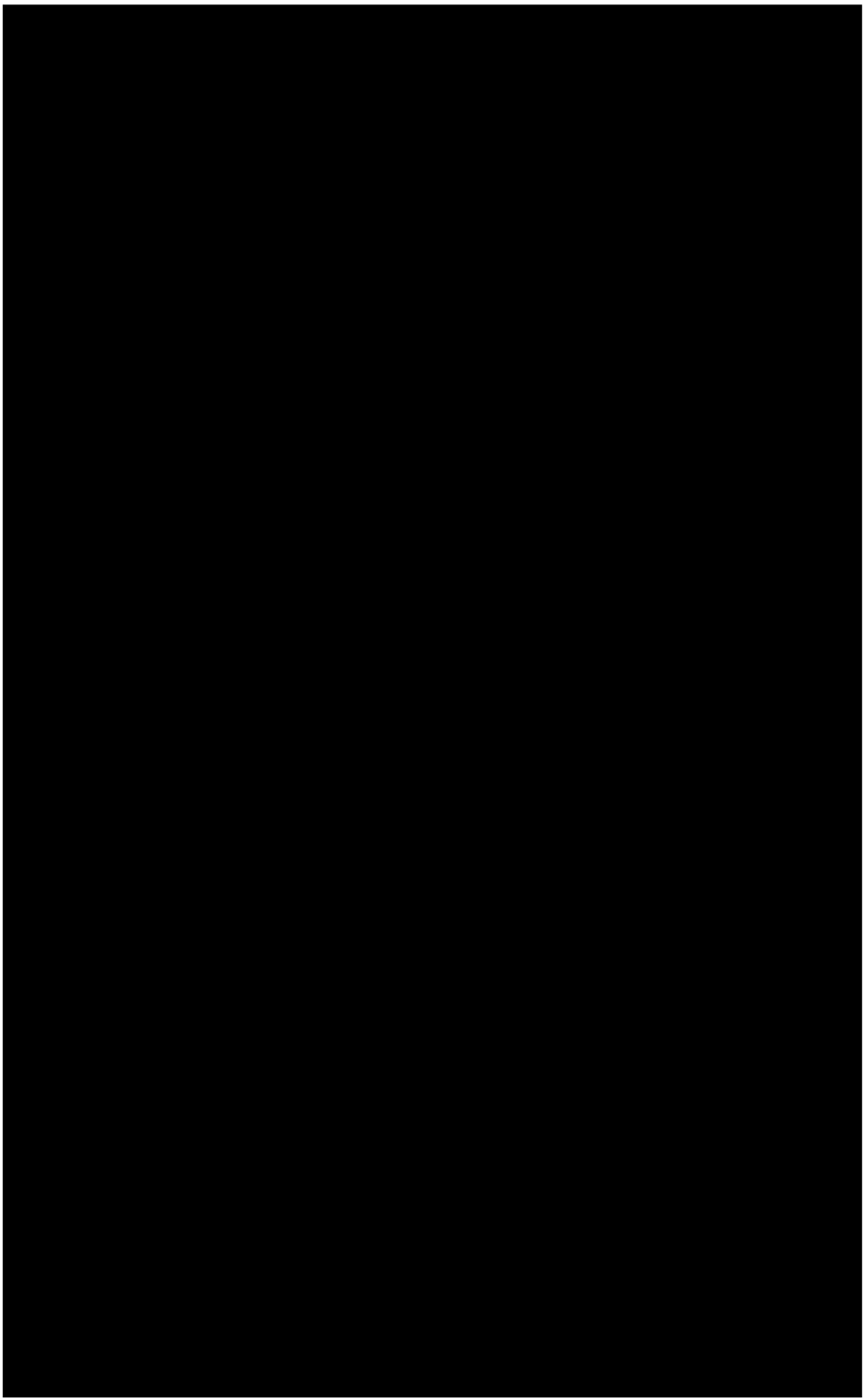

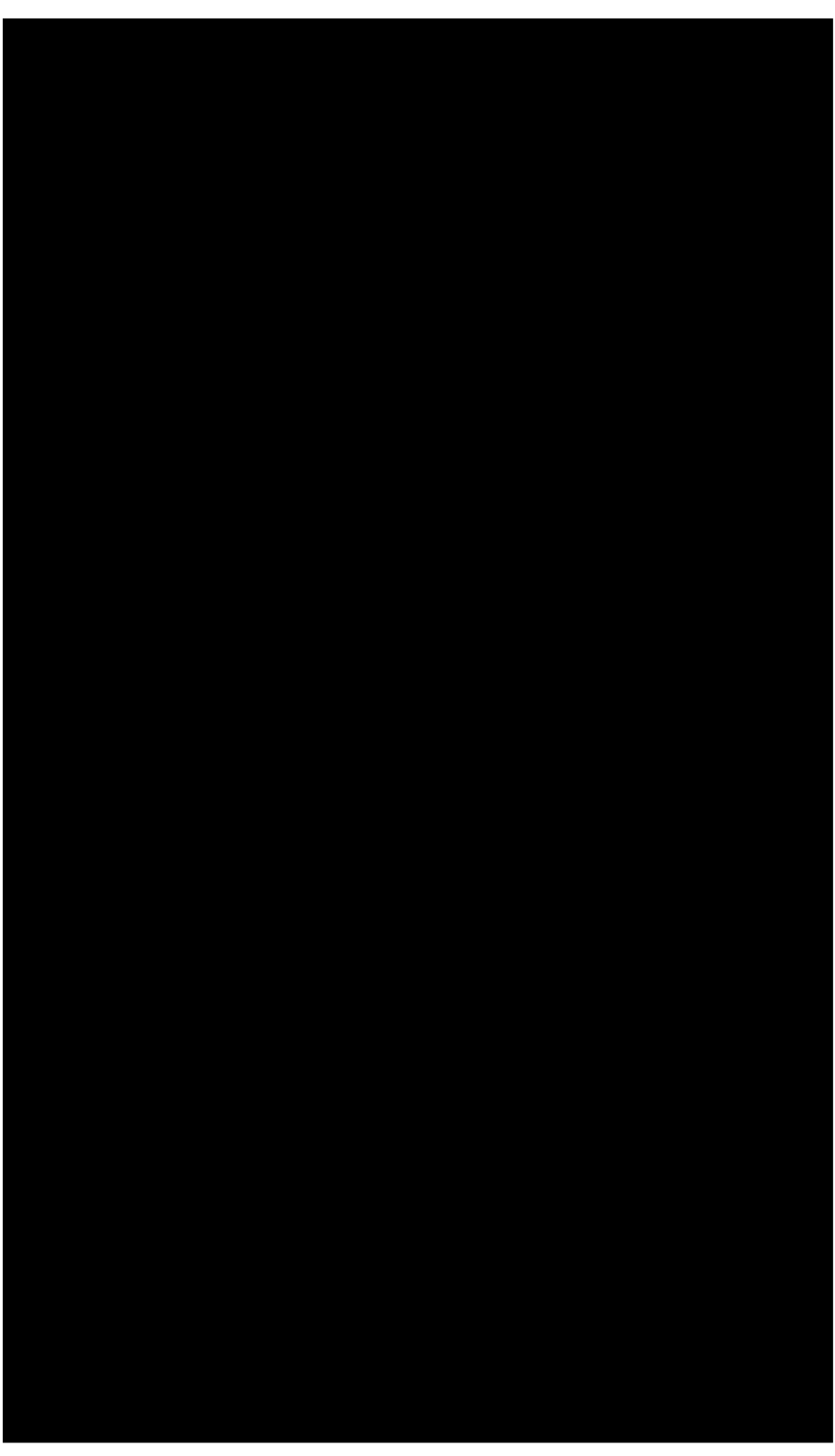

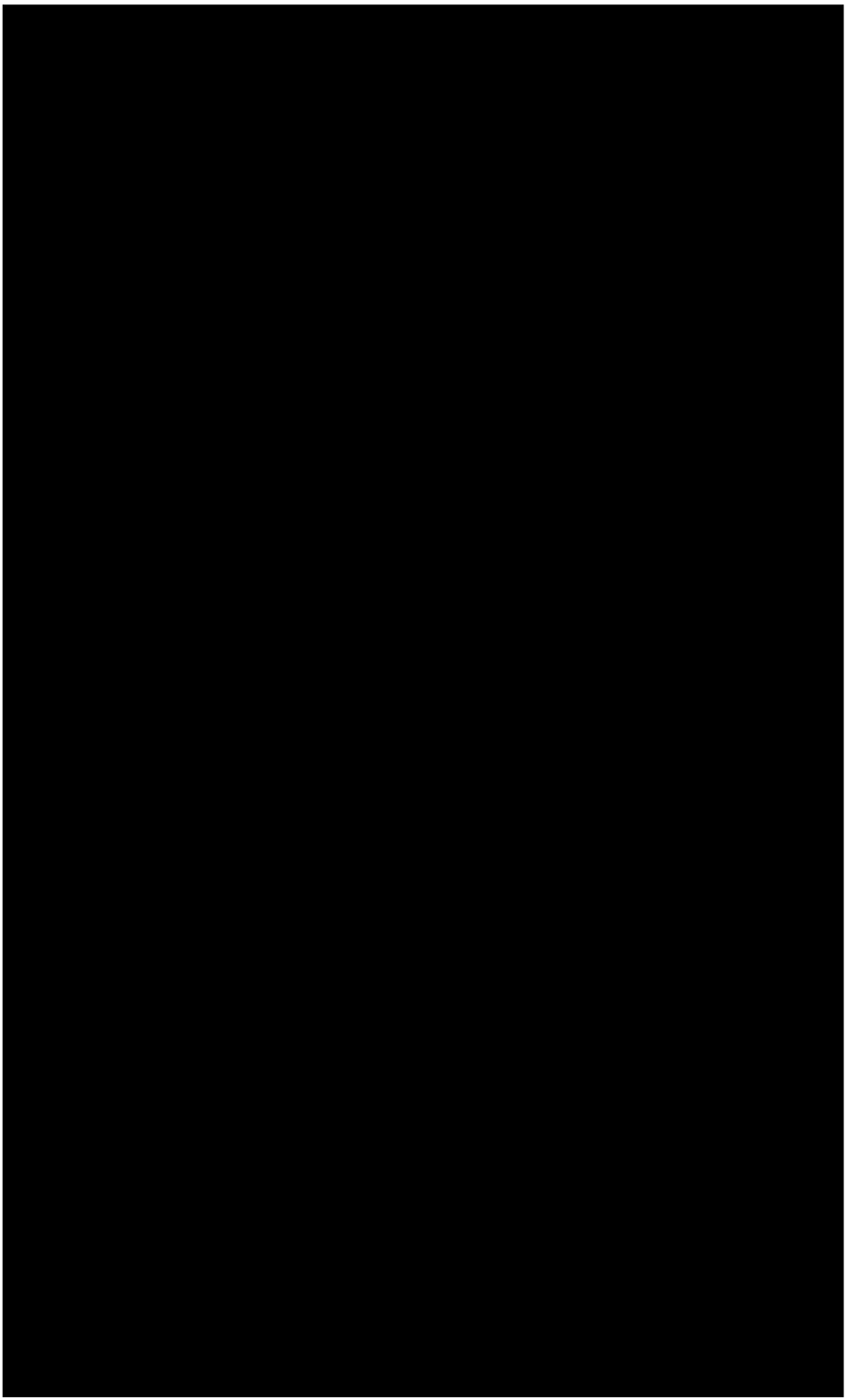

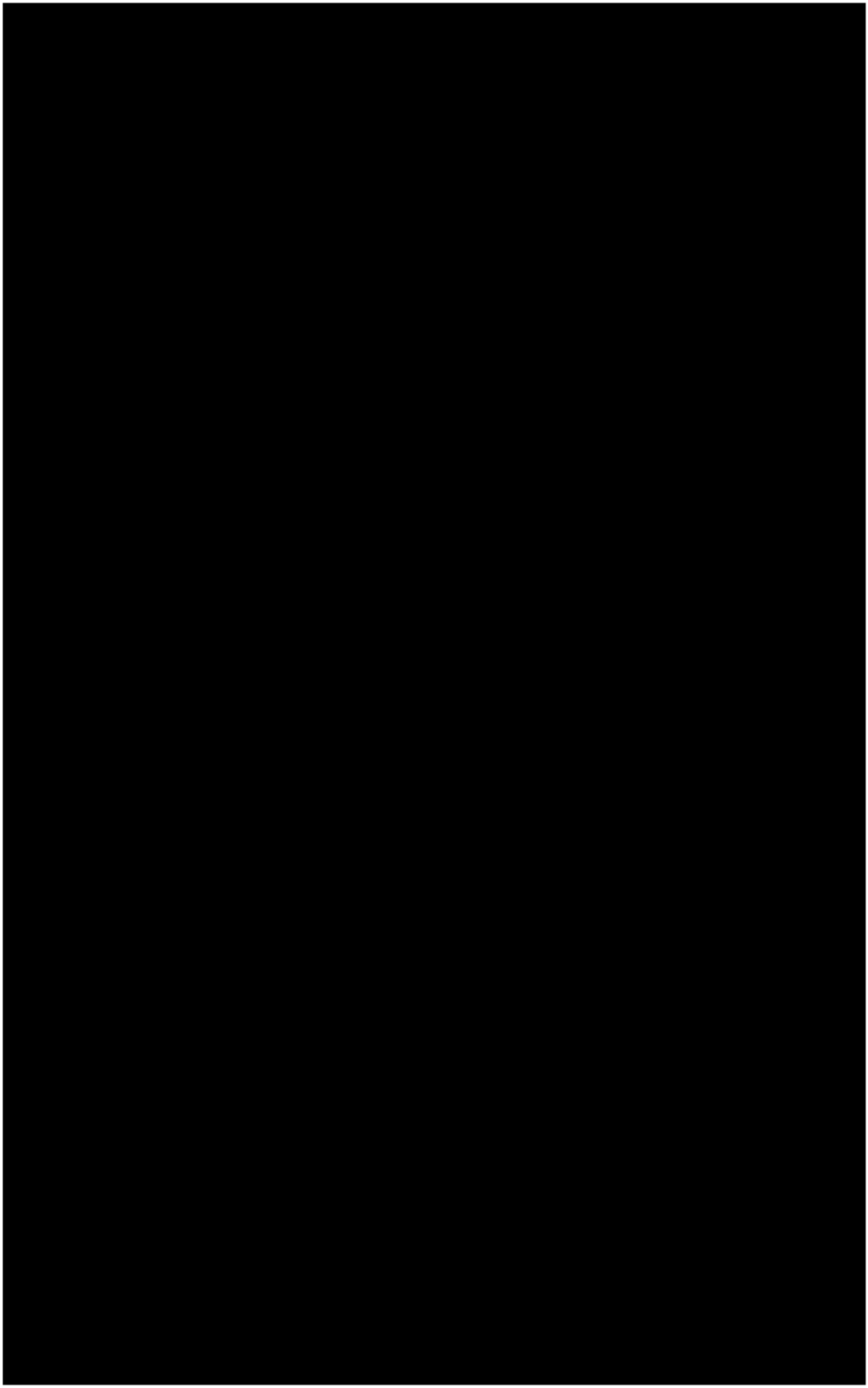

[redacted]

Jewell KISSINGER, et al. *v.* Henry TURNER

CA 94-384 894 S.W.2d 614

Court of Appeals of Arkansas
En Banc
Opinion delivered March 15, 1995
[Rehearing denied April 12, 1995.]

[redacted]

Blackman Law Firm, by: *Keith Blackman*, for appellant.

Mooney Law Firm, by: *Tom A. Bennett*, for appellee.

JOHN E. JENNINGS, Chief Judge. This case is a boundary line dispute. Because the record on appeal was not timely lodged, we have determined that we lack jurisdiction to hear the appeal and therefore it must be dismissed.

[redacted] The judgment in the case at bar was entered by the Craighead County Chancery Court on August 30, 1993. Appellants filed a timely notice of appeal on September 13, 1993. Appellants then obtained an order of the chancery court extend-

ing the time to file the record on appeal to April 11, 1994.[1] In this the trial court exceeded its authority because Rule 5(b) of the Rules of Appellate Procedure provides that "in no event shall the time be extended more than seven months from the date of entry of the decree. . . ."

The case at bar is indistinguishable from *Morris* v. *Stroud*, 317 Ark. 628, 831 S.W.2d 1 (1994). There, the supreme court held, in virtually identical circumstances, that the appeal must be dismissed for failure to timely lodge the record. We can find no basis to distinguish that case from this one and must therefore dismiss the appeal.

Dismissed.

COOPER and MAYFIELD, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I dissent because I do not agree that lodging the record in an untimely fashion deprives the appellate court of jurisdiction.

Act 555 of 1953 required the filing of a notice of appeal but specifically provided that "failure . . . to take any of the further steps to secure the review of the judgment appealed from shall not affect the validity of the appeal . . . but shall be grounds only for such action as the appellate court deems appropriate, which may include dismissal of the appeal . . . ." Ark. Stat. Ann. § 27-2106.1 (Repl. 1979). In *West* v. *Smith*, 224 Ark. 651, 278 S.W.2d 126 (1955), the Supreme Court held that, as in the case at bar, the trial court was without power to grant its extension of time to docket the record. Nevertheless, the Court held that it possessed the power to extend the time for filing the record.

This question should be distinguished from the issue presented in the case relied upon by the majority, *Morris* v. *Stroud*, 317 Ark. 628, 883 S.W.2d 1 (1994), which dealt with the authority of the trial court to extend the time for filing the record. Unquestionably, the trial court lacks authority to do so. This does not, however, speak to the authority of the appellate court to hear the appeal. If the timely lodging of the record on appeal was truly an element of the appellate court's jurisdiction, then it would follow that in cases such as *Thomas* v. *Arkansas State Plant*

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[1]The record was filed on April 7, 1994.

Board, 254 Ark. 997-A, 497 S.W.2d 9 (1973), where late filing of the record was permitted due to the Jonesboro tornado, the appellate court derived its jurisdiction from a natural calamity. I cannot believe that our jurisdiction is dependent upon the whims of the weather, and I dissent.

MAYFIELD, J., joins in this dissent.

MELVIN MAYFIELD, Judge, dissenting. I agree with Judge Cooper's dissent that the filing of a record in the appellate court is not jurisdictional. For an in-depth discussion of this point, although directed toward a different issue, see my dissent in *Novak* v. *J.B. Hunt Transport*, 48 Ark. App. 165, 892 S.W.2d 526 (1995).

[redacted]

James Andrew MILUM *v.* Marcia Eileen MILUM

CA 94-414 894 S.W.2d 611

Court of Appeals of Arkansas
En Banc
Opinion delivered March 15, 1995

[redacted]

[redacted]

Keith I. Billingsley, for appellant.

Suzanne Penn, Central Arkansas Legal Services, for appellee.

JOHN E. JENNINGS, Chief Judge. This is a child custody case. The parties, James and Marcia Milum, have two children, Tad born in September 1990, and Tiffany born in June 1992. In August 1993, Mr. Milum filed suit for divorce. In December 1993, the Pulaski County Chancery Court entered a decree of divorce in which it found that it was in the best interest of the children that Mrs. Milum be awarded primary custody of the children, subject to Mr. Milum's visitation rights.

On appeal, Mr. Milum contends that the court's finding that the best interests of the children require the award of custody to the mother was clearly contrary to a preponderance of the evidence. He also contends that the trial judge applied the so called "tender years doctrine." We affirm the chancellor's decision.

The applicable general rules and our standard of review are not in dispute. In *Fitzpatrick* v. *Fitzpatrick*, 29 Ark. App. 38, 776 S.W.2d 836 (1989), we said:

> [In custody cases], the primary consideration is the best interest and welfare of the child and all other considerations are secondary. Custody awards are not made or changed to gratify the desires of either parent, or to reward or punish either one of them. In determining matters of child custody, a chancellor has broad discretion, which will not be disturbed unless manifestly abused.
>
> . . .
>
> It is well-settled that although this Court reviews

> chancery cases *de novo* on the record, the chancellor's findings will not be disturbed unless clearly against the preponderance of the evidence. Since the question of the preponderance of the evidence turns largely upon the credibility of the witnesses, we defer to the superior position of the chancellor. This deference to the chancellor is even greater in cases involving child custody. In those cases a heavier burden is placed on the chancellor to utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony, and the child's best interest. We have often stated that we know of no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties carry as great a weight as those involving child custody.

Fitzpatrick, 29 Ark. App. at 39-40 (citations omitted).

In August 1993, the court entered an order providing for joint custody on a temporary basis. Mr. Milum then filed a "motion for emergency abatement of custody." Another temporary hearing was held on October 29, 1993. At that hearing Kelly Jones, Mrs. Milum's thirty-one year old sister, testified that she had expressed concern to Mr. Milum. She had told him that Marcia Milum was not capable of taking care of the children because she was spending the money Kelly Jones gave her on candy and Cokes for the children instead of milk. She also told Mr. Milum that Marcia was living with a known "crack" user.

Mrs. Jones testified that the information about Mrs. Milum living with a man was given to her by a third sister, Ticie Paulson, and that Ticie was not "a responsible person." Mrs. Jones testified that after she made the earlier statement she went to Mrs. Milum's apartment. She said the house was immaculate, the children were clean, and that there was adequate food. There was no sign of a man living in the apartment. She testified that she had "no problem" with the children remaining with Mrs. Milum.

Mrs. Milum testified that she was not having a relationship with any man. She said she was not employed and had not been since August, but that she was now receiving food stamps. She testified that she was attempting to find employment.

Mr. Milum testified that he worked for the North Little Rock Wastewater Company and made $18,000.00 per year. He was living in his mother's home and testified that he had the ability to provide an adequate home for the children. He testified that he was concerned about the fact that Ticie Paulson lived so close to Mrs. Milum and the children. He said that Ticie had a bunch of "drug friends." He testified that Mrs. Milum had two brothers who were then in prison.

Mrs. Milum's neighbor, Russell Glover, testified that when he and his wife had visited in Mrs. Milum's apartment the place and the children were clean and there was food in the icebox. On this evidence, the chancellor changed temporary custody to the father. The chancellor said:

> So I don't mean for one minute that I believe Mrs. Milum has the children in a dangerous situation, but she can't support them. And I'm going to order her to pay $30.00 a week child support beginning November 15th because I want her to get a job and I can guarantee you she is not to get custody of these children if she doesn't get a job.
>
> . . .
>
> I want to emphasize to you that this does not mean that that's what I am going to do on a final basis.

At the final hearing on December 2, 1993, Mrs. Milum testified that she had found a job with Service Masters in North Little Rock and was making $5.00 per hour on an as needed basis, cleaning houses that had been damaged by fire. Twenty hours a week was the most she had worked since her employment.

She testified that this was the first time she had ever really worked, and that during the marriage Mr. Milum did not want her to work. She testified that during the marriage she and her husband lived in his parents' home and that she stayed home and took care of the children. She testified that she was the one who changed the children's diapers. She testified that she had paid child support, as ordered, since the date of the last temporary hearing.

Mr. Milum testified that it was Marcia Milum's decision not to work and that she took care of the children while he worked.

He testified that he wanted custody of the children and that while he had had them during the last month, they were bathed every night. He and his mother shared the job of bathing the children.

He testified that "until recently," he thought that Mrs. Milum did a good job of taking care of the children. He testified that he was very close to his mother and that "right now" she was serving as "sort of a surrogate mother" to the children. He testified that he was now helping to change the youngest child's diapers. He also testified that he was capable of taking care of the children without his mother's help.

Mr. Milum's mother, Barbara, testified that it was she who had asked Marcia Milum not to work.

From the bench, the chancellor announced that she would grant the divorce to Mr. Milum and award primary custody of the children to Mrs. Milum. She then attempted to explain her thinking to the parties. During the course of her remarks, the chancellor realized she had not asked the attorney ad litem for her recommendation. The attorney ad litem stated:

> Basically, my recommendation, after speaking with different people and finding absolutely nothing wrong with the parenting skills or the love with either parent, after investigating the unfounded allegations of domestic abuse which I could not corroborate, and keeping with the best interest of the children mainly through environment, I recommended that they stay with Jim and with Barbara Milum.

[redacted] On this evidence, and after giving due deference to the superior position of the chancellor, we cannot say that her decision is clearly against a preponderance of the evidence. Appellant appears to argue that since temporary custody had been placed with him for the one month preceding the final hearing, the burden was on Mrs. Milum to show a "change of circumstances" justifying a modification of the earlier temporary order. No authority is cited for this proposition and we can find none.

[redacted] Appellant also notes that the chancellor specifically stated in her remarks from the bench that "the home environment, physical surroundings, are better with Mr. Milum." Certainly, this is a factor to be given appropriate weight by the chancellor. But it is clear that the primary basis for the chancellor's award

of custody was that Mrs. Milum had been the primary caretaker for the two children for most of their lives, and this fact is not in dispute. We cannot say that the chancellor was wrong in giving this factor more weight than the relative material circumstances of the parties.

[redacted] Appellant also contends that the trial court applied the so called "tender years doctrine." *See generally, Riddle* v. *Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989). Arkansas Code Annotated § 9-13-101 (Repl. 1993) provides that custody awards shall be made solely in accordance with the best interests of the children and without regard to the sex of either parent. Appellant points to the chancellor's remark from the bench that he had not been the primary caregiver "to two very small children who need the bonding with parents, not grandparents, and I don't have any question that you have not been a good caregiver. You have just not been the caregiver." We find nothing in the chancellor's statement to indicate that she based her decision on gender.

Affirmed.

COOPER, ROBBINS, and MAYFIELD, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. This is a relatively clear-cut case. Although the chancellor specifically noted that the father was a capable parent with stable employment, she awarded custody to the mother. In this context it should be noted that the mother had been on public assistance and had never worked until she temporarily lost custody of the children at the temporary hearing. After being prodded to obtain employment by the chancellor, she found her current part-time position with a janitorial service from which she earns approximately $100.00 a week. The father was clearly better able to provide economic security for the children with all that entails regarding their prospects in life. Both parties were found to be capable parents and caregivers. Nevertheless, the chancellor awarded custody to the mother on the strength of a finding that she had been the primary caregiver.

By way of explanation, the chancellor stated that these were "two very small children who need the bonding with parents, not grandparents." I submit that this phrase rings hollow when it is

considered that the real choice is between the children being raised by their father and grandmother, or by their mother and a day-care service. In either case, there will be bonding with a parent, and the presence of a concerned and involved grandparent should be seen as a factor favoring an award of custody to the father.

It may be argued that the mother should not be penalized for her limited economic potential because this was one of the sacrifices she made in order to care for her children. There is merit to this argument. Nevertheless, there is likewise merit to the argument that the father should not be penalized for not being the primary caregiver, because that is one of the sacrifices he made by devoting himself to securing the economic well-being of the family. But both arguments are beside the point, because the paramount concern in this case is the best interest of the children. To my mind, the overwhelming weight of the evidence points to the father as the custodian best able to provide for the children's best interests both in the short run and in the long run. In light of this disparity, and the chancellor's comments concerning the age of the children and their need to "bond" with a "parent" (as if the father were something other than a parent), I can only conclude that the chancellor reached this result by applying the tender years doctrine *sub silentio.*

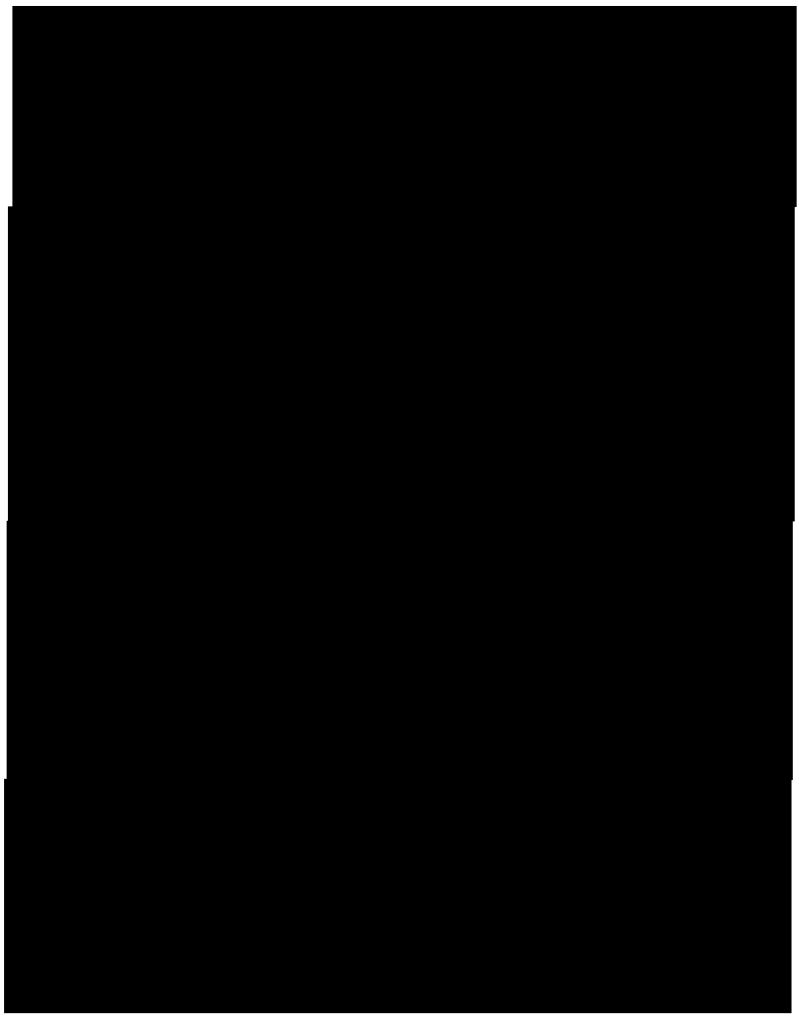
I dissent.

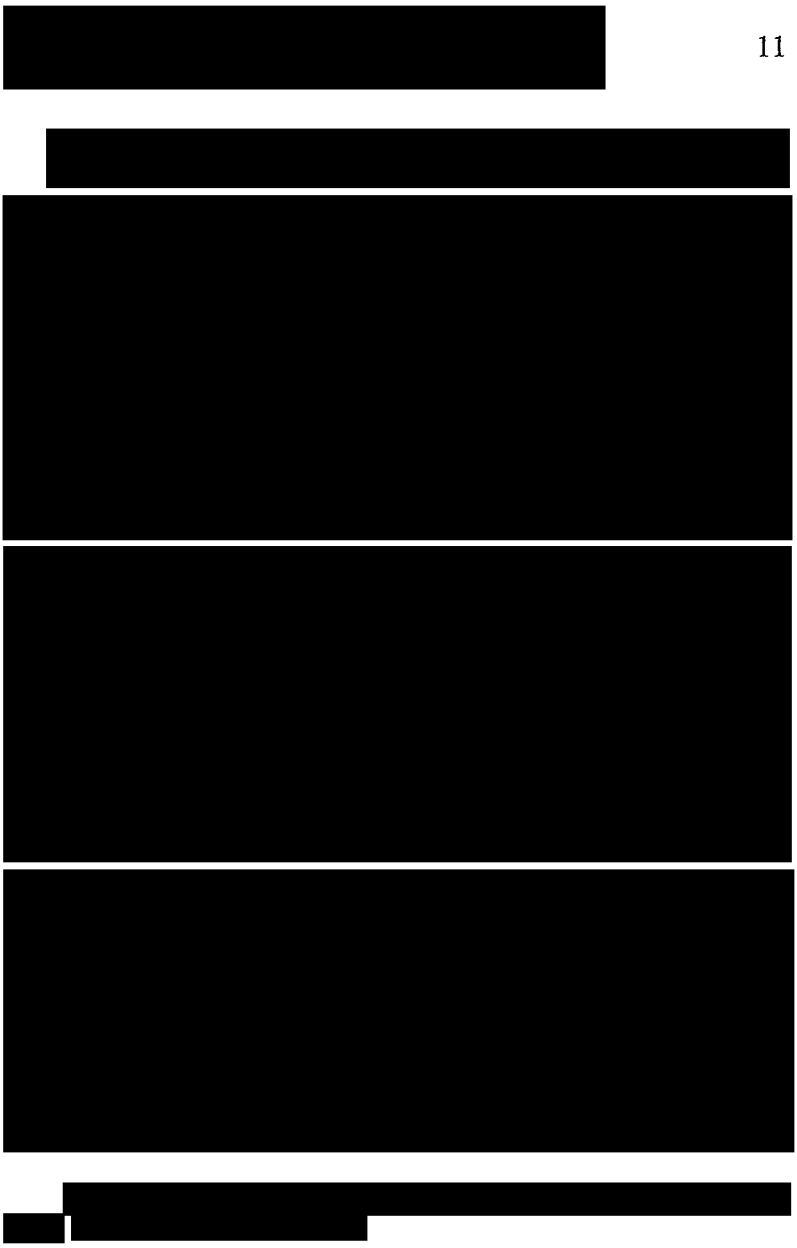
ROBBINS and MAYFIELD, JJ., join in this dissent.

Joanne WENTWORTH
v. SPARKS REGIONAL MEDICAL CENTER

CA 94-474 894 S.W.2d 956

Court of Appeals of Arkansas
En Banc
Opinion delivered March 15, 1995





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

Jones, Gilbreath, Jackson & Moll, by: *Charles R. Garner*, for appellee.

[redacted]

JOHN MAUZY PITTMAN, Judge. Appellant appeals a decision of the Arkansas Workers' Compensation Commission finding that she failed to prove that she sustained a work-related injury. She argues that the premises exception to the going and coming rule applies and the Commission erred in denying benefits. We agree and reverse.

[redacted] On appeal in workers' compensation cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and will affirm if those findings are supported by substantial evidence. *Wright* v. *ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

Appellant testified that on August 17, 1992, a few minutes before she was to report to work, she parked in the lot across the street from the hospital where she worked as a nurse. Appellant stated that she was taking the most direct route from the parking lot to the hospital and that, as she crossed the public street to get to the hospital from the parking lot, she was hit by a vehicle. Appellant said that this parking lot is owned and controlled by appellee and provided by appellee for the employees' and the public's use. She stated that she is not required by appellee to park on this lot or any other lot owned by appellee. However, she said there were only two options that she had to get to the hospital after parking that would not require crossing a street. One was to park alongside the street beside the hospital where only two or three spaces were available; the other was to park on the south lot and walk through an underground tunnel.

[redacted] The going and coming rule ordinarily precludes recovery for an injury sustained while an employee is going to or returning from his place of employment as the employee is not within the course of his employment while traveling to and from his job. *City of Sherwood* v. *Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982). The employee has the burden of showing that the going and coming rule is not applicable. *Brooks* v. *Wage*, 242 Ark. 486, 414 S.W.2d 100 (1967); *Johnson* v. *Clark*, 230 Ark. 275, 322 S.W.2d 72 (1959). Although an exception to the going and coming rule may operate to place an employee within the course of his employment, the employee must still show that his injury

arose out of his employment. *Woodard* v. *White Spot Cafe*, 30 Ark. App. 221, 785 S.W.2d 54 (1990).

[redacted]. One exception to the going and coming rule, and one that appellant argues is applicable here, is the "premises exception." It provides that, although an employee at the time of injury has not reached the place where his job duties are discharged, his injury is sustained within the course of his employment if the employee is injured while on the employer's premises or on nearby property either under the employer's control or so situated as to be regarded as actually or constructively a part of the employer's premises. *Johnson* v. *Clark, supra; Bales* v. *Service Club No. 1, Camp Chaffee*, 208 Ark. 692, 187 S.W.2d 321 (1945). Appellant argues further that this exception should be extended to include injuries sustained in a public street located between the employer's premises. In support of her argument, appellant cites 1 A. Larson, *The Law of Compensation*, § 15.14(b) (1994), which states:

> Since a parking lot owned or maintained by the employer is treated by most courts as part of the premises, most courts, but by no means all, hold that an injury in a public street or other off-premises place between the plant and the parking lot is in the course of employment, being on a necessary route between the two portions of the premises. But if the parking lot is a purely private one, the principle of passage between the two parts of the premises is not available, and an employee crossing a public street to get to the parking lot is not protected.

In *Bales* v. *Service Club No. 1, Camp Chaffee, supra*, an employee sustained an injury on a public sidewalk located near the building in which she worked and in an area over which the employer exercised some control. In reversing the denial of workers' compensation benefits, the Arkansas Supreme Court found that an exception applied to the going and coming rule for an employee who had reached a place so close to the employer's premises as to be considered a part thereof. The court stated, "The employment contemplated [the employee's] entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose." *Id.*, 208 Ark. at 699 (quoting *Cudahy Packing Co.* v. *Parramore*, 263 U.S. 418 (1923)). Further, in *Owens* v. *Southeast*

Arkansas Transp. Co., 216 Ark. 950, 228 S.W.2d 646 (1950), the court reversed the denial of benefits for an injury an employee sustained in a public street after leaving the employer's office in direct route to his employer's bus that customarily provided him with a ride home. The court said, "The employment is not limited to the exact moment when the workman reaches the place where he begins his work or to the moment he ceases that work. It necessarily includes a reasonable amount of time and space before starting and after ceasing actual employment." *Id.*, 216 Ark. at 957.

The majority of jurisdictions have broadened the premises exception to permit compensation for injuries sustained in a public street or other off-premises place between the employer's plant and parking lot. *Copeland* v. *Leaf, Inc.*, 829 S.W.2d 140 (Tenn. 1992). The best explanation for this short extension of the premises exception is that the employer is responsible for creating the necessity of his employees encountering particular hazards between a noncontiguous parking lot and the workplace. *Id.; Doctor's Business Service, Inc.* v. *Clark*, 498 So.2d 659 (Fla. App. 1986); 1 A. Larson, *The Law of Workmen's Compensation*, § 15.12(b) (1994).

In the case now before us, appellant testified that she had to cross a public street to reach the hospital from appellee's parking lot where she had parked. Although appellant was not required to park in any particular lot, the record includes a map of nearby parking areas provided by appellee which indicates that appellant would be required to cross a public street after parking in any of appellee's lots. In refusing to apply the premises exception, the Commission held that appellant could choose any route she desired to reach the hospital, that appellee had no control over the public street where the accident occurred, and that appellant was not under appellee's control at the time of the accident. We cannot conclude that there is substantial evidence to support the decision that appellant failed to prove that her injury arose out of and in the course of her employment. Appellee created the necessity of appellant crossing a public street by providing a parking lot noncontiguous to its hospital. *Copeland* v. *Leaf, Inc., supra.*

Moreover, in some jurisdictions, employment is deter-

mined to begin when the employee reaches the employer's parking lot and the employment relationship is not terminated while the employee takes the most direct route across a public street to the building where the employee works. *Lewis* v. *Worker's Compensation Appeals Board*, 542 P.2d 225 (Cal. 1975). However, this rule is applied only when crossing a public street is the most direct, necessary, usual, or customary means to reach the employer's building from the employer's parking lot. *PPG Industries* v. *W.C.A.B.*, 542 A.2d 621 (Pa. 1988); *Blair* v. *Daugherty*, 396 N.E.2d 238 (Ohio 1978); *see Smith* v. *Greenville Products Company*, 462 N.W.2d 789 (Mich. App. 1990); *Hughes* v. *Decatur General Hospital*, 514 So.2d 935 (Ala. 1987); *Baughman* v. *Eaton Corporation*, 402 N.E.2d 1201 (Ohio 1980).

The Arkansas Supreme Court's holding in *Beckerman* v. *Owosso Mfg. Company*, 233 Ark. 973, 350 S.W.2d 321 (1961), is consistent with these principles. There the court denied benefits to an employee's survivors when the court concluded that the employee had embarked on a personal mission when he left the employer's premises for lunch and while driving along a public street one block from the employer's plant, he was killed. The same principle was also applied in *Owens* v. *Southeast Arkansas Transportation Company, supra*, where the employee's injury was compensable because the employee chose the most direct route from his employer's building to the employer's bus.

[redacted] Appellee provided a parking lot that is noncontiguous with its hospital and it was undisputed that appellant chose the most direct route to the hospital from the lot by crossing the street. We conclude that the exception to the going and coming rule permitting recovery for injuries received by employees traveling between two parts of an employer's premises, such as by way of a public street, is applicable to the facts now before us.[1] Accordingly, we reverse and remand for an award of benefits.

Reversed and remanded.

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[1]We note that Arkansas Code Annotated § 11-9-102(5)(B)(iii) (1993 Supp.), applicable to injuries sustained after July 1, 1993, states that a "compensable injury" does not include an "injury which was inflicted upon the employee at a time when employment services were not being performed."

Johnny E. HENRY *v.* STATE of Arkansas

CA CR 94-498 894 S.W.2d 610

Court of Appeals of Arkansas
Division I
Opinion delivered March 15, 1995

[redacted]

Hubert W. Alexander, for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted in a bench trial on January 7, 1994, of driving while intoxicated. Judgment was entered on January 26, 1994. The appellant filed his notice of appeal on February 7, 1994. The appellant also filed a Motion to Reconsider Motion to Dismiss and Trial Verdict on February 7, 1994. No subsequent notice of appeal was filed. We do not address the argument raised by the appellant on appeal because we conclude that he failed to file a timely notice of appeal.

Arkansas Rule of Criminal Procedure 36.9 provides for the time and method for taking appeals in criminal cases as follows:

(a) Within thirty (30) days from

(1) the date of entry of a judgment; or

(2) the date of entry of an order denying a post-trial motion under Rule 36.22; or

(3) the date a post-trial motion under Rule 36.22 is deemed denied pursuant to Rule 4(c) of the Rules of Appellate Procedure;

(4) the date of entry of an order denying a petition for postconviction relief under Rule 37, the person desiring to appeal the judgment or order shall file with the trial court a notice of appeal identifying the parties taking the appeal and the judgment or order appealed.

(b) A notice of appeal is invalid if it is filed prior to the entry of the judgment or order appealed from or if it is filed on or before the date a post-trial motion under Rule 36.22 is deemed denied pursuant to Rule 4(c) of the Rules of Appellate Procedure.

Arkansas Rule of Criminal Procedure 36.22 provides that a person convicted of either a felony or misdemeanor may file a motion for a new trial, a motion in arrest of judgment, or any other application for relief, but all motions or applications must be filed prior to the time fixed to file a notice of appeal.

[redacted] A notice of appeal filed prior to the disposition of a post-trial motion has no effect, and a new notice of appeal must be filed within the prescribed time dated from the entry of the order dealing with the post-trial motion or from the expiration of the thirty days allowed in the absence of a ruling. *Lawrence Bros.* v. *R.J. Jones Excavating Contractor*, 318 Ark. 328, 884 S.W.2d 620 (1994). The timely filing of a notice of appeal is jurisdictional. *Giacona* v. *State*, 39 Ark. App. 101, 839 S.W.2d 228 (1992). We find that the appellant failed to file a timely notice of appeal and as a result, this Court lacks jurisdiction to entertain the matter. We, therefore, dismiss the appeal.

Appeal dismissed.

PITTMAN and ROGERS, JJ., agree.

JEFFERSON SMURFIT CORPORATION
v. Al HOPKINS d/b/a A. Hopkins Container, Inc.

CA 94-305 894 S.W.2d 951

Court of Appeals of Arkansas
Division I
Opinion delivered March 15, 1995

Friday, Eldredge & Clark, by: *Tonia P. Jones*, for appellant.

Southern, Allen & James, by: *Faye Bancroft*, for appellee.

JAMES R. COOPER, Judge. The appellee in this contract case was a broker and independent sales agent engaged in the business of selling cardboard container products. The appellant is a manufacturer of cardboard containers. In 1985, the appellee negotiated an agreement between the appellant's predecessor-in-interest (J&S Manufacturing Company) and Dahlonega Equipment & Supply Company. Pursuant to the agreement, J&S would manufacture egg packaging for Dahlonega. In addition, the appellee was to receive from J&S a five percent commission on all sales. Subsequently, the owner of J&S sold the business to the appellant. The appellant continued to manufacture egg packaging for Dahlonega. The appellant likewise continued to pay the appellee a five percent commission on all sales until, in November 1989, it informed the appellee that it would no longer pay him a commission on sales to Dahlonega. The appellee brought suit against the appellant for breach of contract, alleging that the appellant was liable for commissions on sales made to Dahlonega after November 1989. The case was tried to a jury, which returned a verdict for the appellee in the amount of $110,763.00. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in refusing to instruct the jury that a contract which has no fixed term is terminable at will. We find no error, and we affirm.

[redacted] We note that neither the agreement between J&S and the appellee, nor the agreement between the appellant and the appellee, had been reduced to writing. It is also apparent from the record that neither agreement specified a date certain on which the agreement would terminate. The appellant asserts that the contract was therefore one of indefinite duration which could be terminated at will by either party. We do not agree.

[redacted] The terms of the agreement regarding the termination of the parties' duties was the heart of this lawsuit, and the issue was not undisputed. For example, there was testimony to show that it was a custom and standard of the industry that a broker would receive commissions on an account so long as sales continued to be made. There was also evidence that the parties themselves placed such a construction on the contract prior to November 1989. Evidence of custom and usage, and course of dealing, is relevant where the meaning of a contract term is uncertain, and the meaning thereof becomes a question of fact for the jury. *See Precision Steel Warehouse* v. *Anderson-Martin*, 313

[redacted]

Ark. 258, 854 S.W.2d 321 (1993); *Joshua* v. *McBride*, 19 Ark. App. 31, 716 S.W.2d 215 (1986). In short, there was evidence to show that the agreement was not terminable at will, but was instead to continue as long as the appellant continued to make sales to Dahlonega. Therefore, even assuming *arguendo* that the instruction proffered by the appellant was a correct statement of the law in the context of an agreement which was not a contract of employment, the proposed instruction invaded the province of the jury by assuming a disputed fact. *See Weatherford* v. *Wommack*, 298 Ark. 274, 766 S.W.2d 922 (1989). No error is committed when a trial judge refuses to give an instruction which tends to mislead the jury by removing from their consideration a disputed question of fact. *Aluminum Co.* v. *Ramsey*, 89 Ark. 522, 117 S.W. 568 (1909), *aff'd* 222 U.S. 251.

Affirmed.

PITTMAN and ROGERS, JJ., agree.

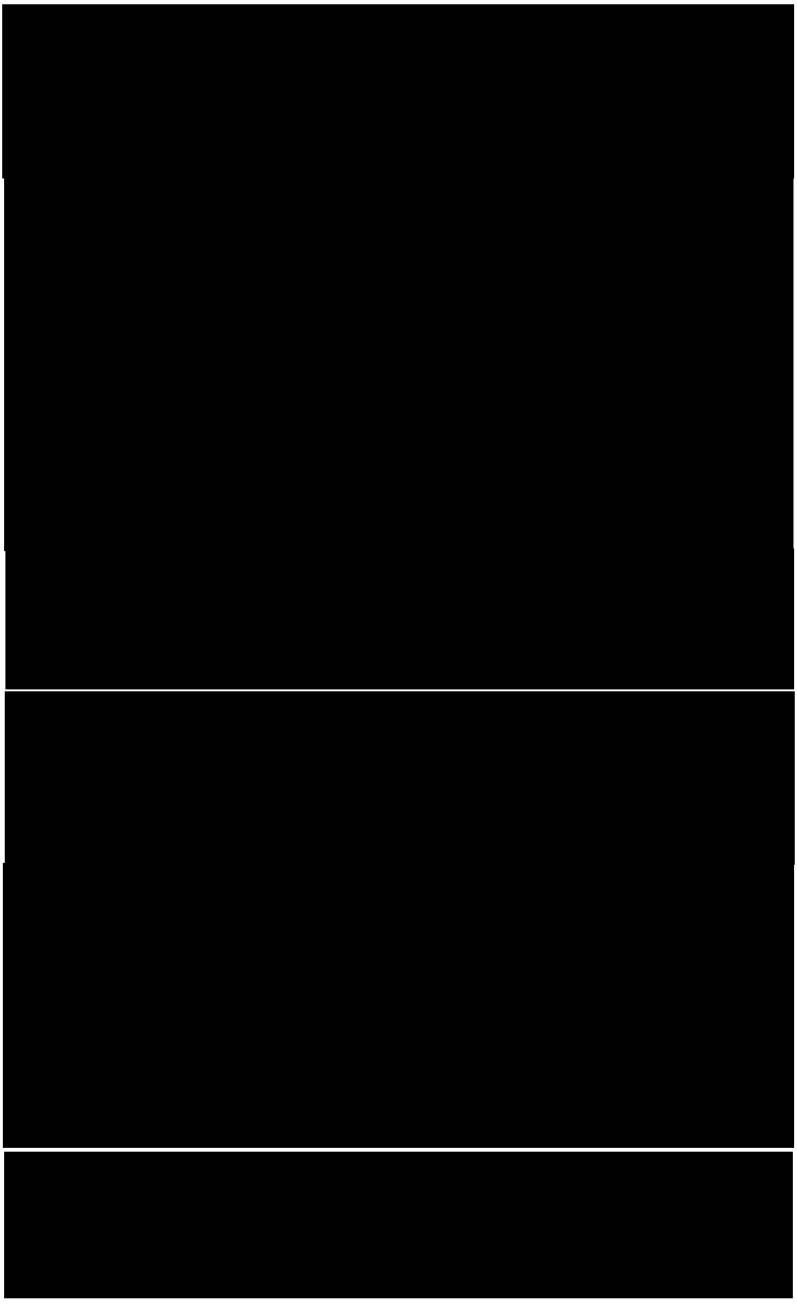
[redacted]

Avery Lynn KENNEDY *v.* STATE of Arkansas

CA CR 94-553 894 S.W.2d 952

Court of Appeals of Arkansas
Division II
Opinion delivered March 15, 1995

[redacted]



[redacted]

Haddock & Mazzanti, by: *James W. Haddock*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Avery Lynn Kennedy was convicted by a jury of felony theft by receiving. He was sentenced to ten years in the Arkansas Department of Correction and fined $5,000.00. Mr. Kennedy now appeals, arguing that the trial court erred in denying his motion for directed verdict. He also contends that the trial court erroneously allowed the prosecution to introduce evidence of his prior criminal conduct. We find no error and affirm.

[redacted] A motion for directed verdict is a challenge to the sufficiency of the evidence. *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982). When an appellant challenges the sufficiency of the evidence, we review the sufficiency argument prior to a review of any alleged trial errors. *Lukach* v. *State*, 310 Ark. 119, 835 S.W.2d 852 (1992). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas* v. *State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach* v. *State, supra*. In determining the sufficiency of the evidence, we review the proof in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Brown* v. *State*, 309 Ark. 503, 832 S.W.2d 477 (1992).

The evidence in this case shows that appellant's uncle and aunt, Randy and Edna Kennedy, were away from their trailer house when it was burglarized on the evening of January 20, 1993. Randy Kennedy discovered that four of his guns had been stolen and made an insurance claim for the missing weapons. However, at trial Randy Kennedy stated that a 22-250 Springfield rifle had been erroneously claimed as stolen and that he

intended to return the money which he had received from his insurance company for that rifle. He explained that, rather than being stolen, he had traded the 22-250 rifle to appellant's father for a calf. One gun, a .308 Remington Rifle, was recovered by police and admitted into evidence at trial. However, Randy Kennedy refused to cooperate with the prosecutor when the prosecutor attempted to establish that the .308 rifle was the same one stolen from Randy Kennedy's home. Randy Kennedy would not testify that it was the same gun, said that he did not want to testify in this case in the first place, and stated that he did not bring from home his list containing the serial numbers of the stolen guns. Presumably, this list could have been used to determine if the gun introduced into evidence was in fact one of those stolen from his trailer.

Keith Lamar White testified that, on the evening of the burglary, he came in contact with appellant and purchased a .308 hunting rifle from him. Mr. White called Deputy Larry Allen the following day and asked him to run a check on the gun. Deputy Allen took possession of the gun and read the serial number to investigator Ronnie Ferguson. Mr. Ferguson, who was the first to investigate this case, advised Deputy Allen to hold the .308 rifle, and it was eventually admitted as evidence.

Officer Ronnie Mankin testified that he stopped the appellant in the early morning hours of January 21, 1993. The appellant consented to a search of his truck, and Officer Mankin discovered a 22-250 rifle. The appellant explained that the gun belonged to his father, and on a later date told Officer Mankin that he did not know where the gun was but that he would not steal from his own family.

Arkansas Code Annotated § 5-36-106 (Repl. 1993) provides that "[a] person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen." The statute also provides that, if the value of the stolen property is greater than $200.00, or if the stolen property is a firearm valued at less than $2500.00, the offense is classified as a felony. The appellant now contends that there was insufficient evidence to support his conviction because ownership of the alleged stolen guns was not established. He also asserts that

the State failed to prove that the value of the property exceeded $200.00, and thus he was erroneously convicted of a felony.

[redacted] We find appellant's argument regarding lack of proof of ownership to be without merit. In the case at bar there was substantial evidence that one of the guns in his possession had belonged to his uncle and had been reported stolen. Randy Kennedy testified that he reported a 22-250 rifle stolen (SN# B 6155455) and that he received $599.00 for the theft of this rifle from his insurance company. Officer Mankin testified that he stopped the appellant on the evening of the burglary and discovered in his possession a 22-250 rifle with the same serial number as that reported stolen by Randy Kennedy. This established ownership of the rifle. Randy Kennedy testified at trial that he erroneously reported the rifle stolen and intended to return the $599.00, but the jury was not required to believe this testimony, particularly in light of the fact that Randy Kennedy openly admitted that he wanted the charges against his nephew dropped.

[redacted] We need not address the appellant's sufficiency argument on the value of the subject property because it is not preserved for our review. At the close of the State's case, appellant moved for a directed verdict. However, his argument in support of his motion failed to include any contention that the State failed to prove the value element of felony theft by receiving. In *Walker* v. *State*, 318 Ark. 107, 883 S.W.2d 831 (1994), the Arkansas Supreme Court held that, in order to preserve an insufficiency-of-the-evidence argument for review, the motion for directed verdict must "state the specific grounds therefor." Since appellant's motion for directed verdict was not specific as to the value element of felony theft by receiving, we decline to address this issue.

[redacted] The appellant's remaining argument is that the trial court erred in allowing the prosecution to introduce evidence of his prior criminal conduct. Rule 404(b) of the Arkansas Rules of Evidence provides:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident.

In order for evidence to be admissible under this rule, it must be independently relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice. *Carter* v. *State*, 295 Ark. 218, 748 S.W.2d 127 (1988). During the State's case, Jack Gibson testified about an incident which occurred approximately six months prior to the burglary of Randy and Edna Kennedy's home. Mr. Gibson stated that he and appellant were in the appellant's truck, rode to a pawn shop, and broke in and stole several guns. He further testified that he and appellant drove to Dumas to sell the guns and that they succeeded in selling the guns for drugs and money. The trial judge allowed Mr. Gibson's testimony on the basis that this evidence was being used to prove opportunity, motive, plan, preparation, mode of operation, or lack of mistake. Appellant argues that this evidence should have been suppressed because it was being introduced only to demonstrate that he was a person of bad character.

[redacted] The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *Jarrett* v. *State*, 310 Ark. 358, 833 S.W.2d 779 (1992). While we might have decided the issue differently as a trial judge in the case at bar, we do not find that the trial court abused its discretion in allowing evidence regarding Avery Kennedy's prior misconduct.

[redacted] In *Thrash* v. *State*, 291 Ark. 575, 726 S.W.2d 283 (1987), the Arkansas Supreme Court specifically held that evidence of a crime other than the one charged may be admitted to show that the appellant committed the crime charged where both crimes involved the same unique method of operation. The court in that case acknowledged that Rule 404(b) does not mention *modus operandi* as one of the bases for introducing evidence of other crimes, but noted that the list of exceptions contained in the rule is not exclusive. In the instant case, the appellant's prior illegal conduct was properly admitted to show a unique method of operation. There was evidence in the instant case, as in the earlier incident, that appellant was driving his truck with two other accomplices; that he and the others broke into a building with which they were familiar; that the men stole firearms; hid them

[redacted]

in Avery Kennedy's truck; and attempted to exchange them for drugs or money. Therefore, evidence regarding the prior misconduct suggested a unique method of operation. Moreover, we find no error in the trial court's determination that any danger of unfair prejudice did not substantially outweigh the probative value of the prior acts, particularly in light of the fact that the jury was twice admonished that it could not consider the prior bad acts as evidence of appellant's guilt in the present case.

Affirmed.

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

[redacted]

Sharon GILMORE *v.* Juanita BRYANT

CA 94-33 894 S.W.2d 607

Court of Appeals of Arkansas
Division II
Opinion delivered March 15, 1995

[redacted]

Stephen D. Ralph, for appellant.

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

MELVIN MAYFIELD, Judge. Sharon Gilmore appeals from an order of the Conway County Circuit Court that dismissed her complaint against appellee Juanita Bryant with prejudice.

On December 15, 1992, appellant filed suit against the appellee for injuries sustained in an automobile accident. The appellee filed a motion to dismiss alleging this was the third time the lawsuit had been filed; that the first dismissal was voluntary; that the second dismissal was for failure to obtain timely service under Ark. R. Civ. P. 4(i); and that, under Ark. R. Civ. P. 41, the second dismissal was an adjudication on the merits.

In a response to appellee's motion the appellant denied that the second dismissal was an adjudication on the merits and alleged that it was without prejudice.

At a hearing on September 14, 1993, the trial court held that the first dismissal was a nonsuit and that the second one was for failure to perfect service. Although the judge said he knew of no case on point, he was of the opinion that the second dismissal constituted an adjudication on the merits and the suit could not be refiled again. Therefore, the trial court dismissed appellant's complaint with prejudice.

On appeal, appellant argues the present cause of action is not barred by Ark. R. Civ. P. 41 because her second suit was dismissed for the reason that service had not occurred within 120 days. Appellant points out that under Ark. R. Civ. P. 4(i) it is specifically provided that if service of summons is not made within 120 days after the complaint is filed the action shall be dismissed "without prejudice." *Lyons* v. *Forrest City Machine Works*, 301 Ark. 559, 785 S.W.2d 220 (1990), is cited to support the appellant's reading of the rule. Appellant then cites *Carton* v. *Missouri Pacific Railroad*, 295 Ark. 126, 747 S.W.2d 93 (1988), where it was held that Ark. Rule Civ. P. 41(a) is not applicable where one of two dismissals is on the motion of the defendant and not the plaintiff. Rule 41(a) provides as follows:

> Subject to the provisions of Rule 23(d) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court, provided, however, that such dismissal operates as adju-

dication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, unless all parties agree by written stipulation that such dismissal is without prejudice.

The appellee contends, however, that the second dismissal in the instant case operated as a dismissal with prejudice under Ark. R. Civ. P. 41(b), which provides:

> In any case in which there has been a failure of the plaintiff to comply with these rules or any order of court or in which there has been no action shown on the record for the past 12 months, the court shall cause notice to be mailed to the attorneys of record, and to any party not represented by an attorney, that the case will be dismissed for want of prosecution unless on a stated day application is made, upon a showing of good cause, to continue the case on the court's docket. A dismissal under this subdivision is without prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits.

Appellee relies on *Dawson* v. *Gerritsen*, 295 Ark. 206, 748 S.W.2d 33 (1988). The opinion in that case refers to a previous case. Both cases were medical malpractice suits arising out of the same incident, and both cases sought damages for the wrongful death of Mary Frances Dawson. In order to commence the suits the plaintiffs were required to give a sixty-day notice. *See* Ark. Code Ann. § 16-114-204 (1987). In the first case, *Dawson* v. *Gerritsen*, 290 Ark. 499, 720 S.W.2d 714 (1986), the administrator of the estate filed suit without giving notice. When the defendants moved to dismiss, the administrator took a voluntary nonsuit. Five days later he filed another suit without giving the notice. Defendants again moved for dismissal and it was granted. On appeal, our supreme court held that the trial court was correct in dismissing the second suit because the required notice was never given.

Before the supreme court decided the appeal in the first *Dawson* case, suit was filed in the second case. This suit was filed on behalf of the minor sons of the deceased, and the sixty-

day notice was given. However, the trial court granted summary judgment for the defendants. This was affirmed by our supreme court on the basis that the cause of action alleged was the same cause of action alleged in the first case, and the second dismissal in the first case had operated as an adjudication on the merits under Ark. R. Civ. P. 41.

The appellee says that "the holding in *Dawson* is consistent with Rule 41(b)." That subdivision talks about the failure of a plaintiff to comply with "these rules or any order of court" and concludes by stating that a dismissal under that subdivision "is without prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits."

Without further discussion, it is plain to see that the *Carton* case involved the voluntary nonsuit of a case in federal district court which was refiled in that court and then dismissed by that court for lack of diversity. The suit was then filed in a state trial court which granted a motion to dismiss based upon the theory that the dismissal in federal court for lack of subject matter jurisdiction operated as an adjudication on the merits under Rule 41(a). On appeal to the Arkansas Supreme Court it was held that the trial court had erred because Rule 41(a) was not applicable.

On the other hand, in the first *Dawson* case it is clear there was a failure to comply with the 60-day notice rule, and the dismissal for that reason came after the suit had been voluntarily nonsuited. Under these circumstances, the supreme court said in the second *Dawson* case that the second dismissal in the first *Dawson* case was an adjudication on the merits under Rule 41(b).

[redacted] We are not, however, clear as to the rationale of the *Carton* and *Dawson* cases. But without attempting to interpret or apply either of them in this case, it seems to us that when this case was dismissed for failure to obtain timely service under Ark. R. Civ. P. 4(i), that subdivision provided the answer to the issue now before us. It states very simply, "If service of the summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant *without prejudice* upon motion or upon the court's initiative." (Emphasis supplied.) Thus, by the application of this specific

language we conclude that the trial court erred in dismissing the appellant's complaint with prejudice.

Reversed and remanded.

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

Kenneth GLOVER *v.* Paula Glover LANGFORD

CA 94-6 894 S.W.2d 959

Court of Appeals of Arkansas
Division I
Opinion delivered March 22, 1995
[Rehearing denied April 12, 1995.]

Bridewell & Bridewell, by: *Laurie A. Bridewell*, for appellant.

Paul K. Lancaster, for appellee.

JAMES R. COOPER, Judge. The appellant in this chancery case sought an appeal from an order of the Saline County Chancery Court entered June 17, 1993, and from the chancellor's denial of his motion for new trial filed on June 30, 1993. The appellant's initial notice of appeal, filed on July 12, 1993, was held to be premature, and thus untimely, by the trial court.

Consequently, the appellant filed a second notice of appeal on July 30, 1993, from the trial court's order of June 17, 1993, "and the failure of the Chancellor to rule on the Plaintiff's Motion for New Trial within thirty (30) days of the entry of the final order." Unfortunately, this second notice of appeal was also untimely, and we are constrained to dismiss this appeal.

[redacted] The appellant's first notice of appeal, filed as it was prior to the disposition of the post-trial motion, was without effect under Ark. R. App. P. 4(c). Under such circumstances, a new notice of appeal must be filed within the prescribed time dated from the entry of the order dealing with the post-trial motion or from the expiration of the thirty days allowed in the absence of a ruling. *Lawrence Brothers, Inc.* v. *R. J. "Bob" Jones Excavating Contractor, Inc.*, 318 Ark. 328, 884 S.W.2d 620 (1994).

[redacted] The appellant's second notice of appeal was filed exactly thirty days after his post-trial motion for a new trial was filed. The situation is identical to that presented in *Kimble* v. *Gray*, 40 Ark. App. 196, 842 S.W.2d 473 (1992), *aff'd*, 313 Ark. 373, 853 S.W.2d 890 (1993). In that case we held that a trial court retains jurisdiction of a post-trial motion until the end of the thirtieth day. Because a notice of appeal filed before the expiration of the thirty-day period has no effect under Rule 4(c), we held that the notice of appeal, filed on the thirtieth day, was untimely and ineffective.

Appeal dismissed.

PITTMAN and ROGERS, JJ., agree.

Gordon Dale BRADFORD *v.* Shelby Jean BRADFORD

CA 93-982 894 S.W.2d 616

Court of Appeals of Arkansas
Division II
Opinion delivered March 22, 1995

Ralph J. Blagg, for appellant.

Stephen E. James. P.A., by: *Stephen E. James*, for appellee.

JUDITH ROGERS, Judge. This appeal comes to us from the Chancery Court of Van Buren County. The appellant, Gordon Dale Bradford, appeals from an amended divorce decree entered by the court on February 18, 1993. For reversal, appellant contends that the trial court erred in making an unequal division of marital property and in awarding appellee alimony. In addition, appellant maintains that the Honorable David L. Reynolds, a cir-

cuit judge, was without legislative authority to hear this case in chancery court. We affirm.

This is the second appeal of this matter. After a trial on January 18, 1990, Judge Reynolds, who was a chancellor at that time, entered a decree of divorce in favor of appellee. On appeal to this court, appellant successfully argued that the chancellor had exceeded his authority by awarding real property held as tenancy by the entirety solely to appellee and in ordering appellant to execute a deed to appellee. We reversed and remanded stating that, because the award of that property was said to be in lieu of alimony, and since the marital residence was a significant part of the marital assets, the interests of justice would best be served by remanding the case for a complete resolution of the property rights of the parties, including the question of alimony. We also ruled that the chancellor could permit the introduction of such additional evidence as was necessary for a just resolution of the issues. *Bradford* v. *Bradford*, 34 Ark. App. 247, 808 S.W.2d 794 (1991).

From the briefs of the parties, we gather that Judge Reynolds was elected to the circuit court bench between the time of the original trial and the first appeal of this case. Also, the parties are in agreement, although it is not apparent from the record, that the judges of the Twentieth Judicial District entered into an exchange agreement on February 5, 1991, and that, pursuant to that agreement, Judge Reynolds sat as a chancellor at the supplemental hearing on remand, which was held on January 14, 1992. Judge Reynolds took the case under advisement, and on February 18, 1993, he entered an amended decree making an unequal division of marital property in which appellee was awarded, among other things, possession of the marital residence and alimony in the amount of $246.98 per month. This appeal followed.

As his first two issues, appellant contends that the trial court's decisions with regard to the unequal division of marital property and the award of alimony are not supported by the evidence. We are unable, however, to reach these issues because appellant's abstract is woefully inadequate.

At the supplemental hearing, a transcript of the original January 18, 1990, trial was introduced as Joint Exhibit No. 1. The amended decree makes it clear that the findings contained therein

were based upon evidence adduced at both the original trial and the supplemental hearing. Nevertheless, there is no copy of Joint Exhibit No. 1 in this record, and appellant has failed to abstract any of the evidence from the January 1990 trial. In addition, as appellee correctly points out, appellant also failed to include the cross-examination of appellant at the supplemental hearing, as well as a number of pertinent exhibits which were introduced at the supplemental hearing.

Rule 4-2(a)(6) of the Rules of the Supreme Court and Court of Appeals provides that appellant's abstract of record should consist of an impartial condensation, without comment or emphasis, of *only* such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the court for decision. The rule also states: "On a second or subsequent appeal, the abstract shall include a condensation of all pertinent portions of the record filed on any prior appeal." Further, Rule 4-2(b)(2) provides that, if this court finds the abstract to be flagrantly deficient, the judgment or decree may be affirmed for non-compliance with the rule.

It is the appellant's burden to produce a record exhibiting prejudicial error. *Adams* v. *Owen*, 316 Ark. 99, 870 S.W.2d 741 (1994). Without having the benefit of an abstract of the original trial and in the absence of a complete abstract of the supplemental hearing, we are not able to render an informed decision on the issues raised. We thus conclude that the abstract is flagrantly deficient and do not address appellant's arguments challenging the findings made in the amended decree. *Sturch* v. *Sturch*, 316 Ark. 53, 870 S.W.2d 720 (1994).

Turning to the last issue, appellant questions for the first time on appeal the authority of Judge Reynolds, a circuit judge, to hear this case in chancery court. Appellant refers to the supreme court's decision in *Lee* v. *McNeil*, 308 Ark. 114, 823 S.W.2d 837 (1992), where the supreme court held that judges lacked the legislative authority to enter into exchange agreements within their respective districts. He acknowledges, however, that the legislature subsequently amended Ark. Code Ann. 16-13-403 by passage of Act 51, § 3 of 1992 (1st Ex. Sess.) to permit such intradistrict exchanges, but he argues that the amendment does not apply

here because the supplemental hearing over which Judge Reynolds presided took place prior to the passage of Act 51. On the other hand, appellee points out that the amended decree was entered after the statute was amended, and argues further that the amendment should be applied retroactively.

[redacted] Although appellant characterizes this issue as being one of subject matter jurisdiction, which can be attacked for the first time on appeal, the supreme court has held that this objection is not a question of subject matter jurisdiction, and can thus be waived. *Simpson* v. *State*, 310 Ark. 493, 837 S.W.2d 475 (1992). In *Simpson*, the appellant challenged the authority of a chancery and probate judge to preside over his criminal trial. The issue had not been raised below, and the supreme court refused to consider the argument, stating:

> Subject matter jurisdiction, however, is determined from the pleadings, and once a proper charge is filed in circuit court, that court may exercise jurisdiction over that subject matter. *Walker* v. *State*, 309 Ark. 23, 827 S.W.2d 637 (1992). Moreover, jurisdiction is granted to a particular position, that is, to a particular court, and not to the person who fills it. *Nation* v. *State*, 283 Ark. 250, 674 S.W.2d 939 (1984). Here, the Faulkner County Circuit Court clearly had jurisdiction over the two rape charges and the issue raised by Simpson concerns the authority of the individual who filled that position. As was the case in *Nation*, that issue relates to the authority of the sitting judge and not to the jurisdiction of the circuit court.

Id. at 499, 837 S.W.2d at 478.

[redacted] Here, this matter was lodged in the Chancery Court of Van Buren County, and undoubtedly the chancery court had jurisdiction over this divorce matter. Because appellant only questions the status of the individual who presided over the proceedings, the chancery court's subject matter jurisdiction is not implicated. Therefore, since this issue was not raised below, it has not been preserved for appeal, and we decline to address the questions raised by the parties on this point.

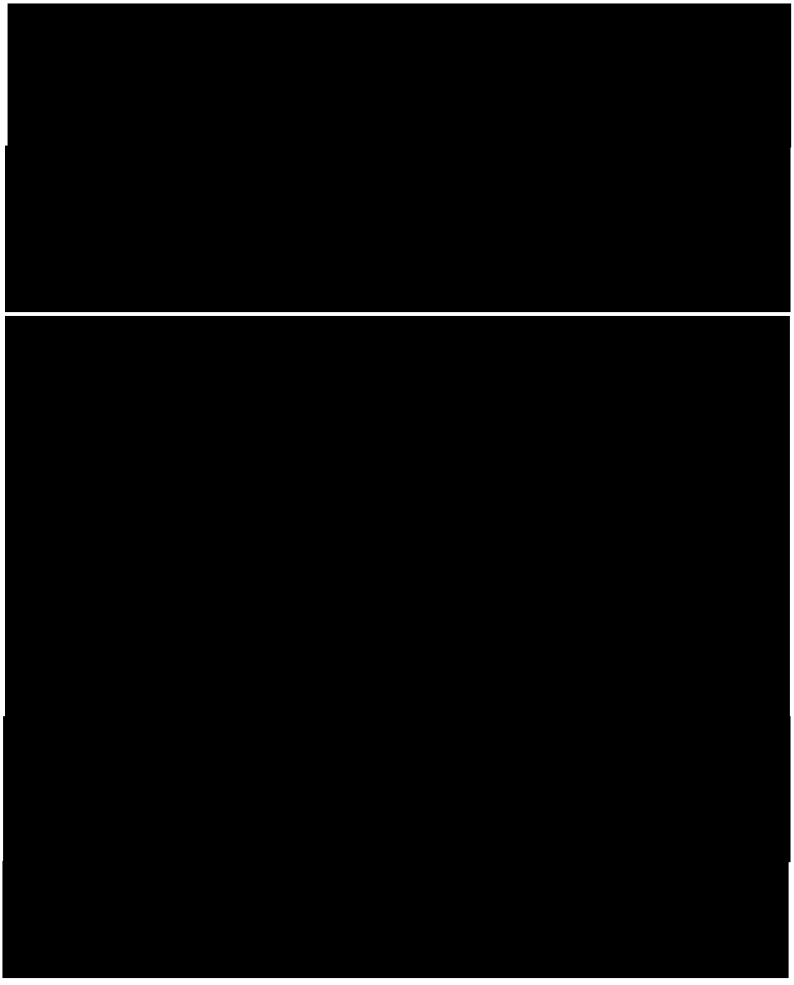
Affirmed.

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

Ivon G. SHEPHERD *v.*
VAN OHLEN TRUCKING and Liberty Mutual

CA 94-241 895 S.W.2d 945

Court of Appeals of Arkansas
En Banc
Opinion delivered March 29, 1995
[Supplemental Opinion on Denial of Rehearing
June 28, 1995.]



David H. McCormick, for appellant.

Friday, Eldredge & Clark, by: *J. Michael Pickens*, for appellee.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case was employed by the appellee trucking company on March 26, 1990, when his eighteen-wheel tractor trailer unit overturned. The appellant was injured in the accident and experienced pain in his back, right leg, and buttocks. A subsequent MRI scan revealed a herniated disc at L5-S1. The appellant was referred to a neurosurgeon for further evaluation, but the neurosurgeon decided that surgical intervention could not be considered until the appellant lost a substantial amount of weight. The appellant was referred to various medically-supervised weight loss programs and was, with this assistance, able to reduce his weight to approximately 300 pounds. These weight-loss efforts employing low calorie diets continued for over one year and, although the appellant was often successful in losing weight, he was unsuccessful in maintaining his weight loss. Consequently, the appellant's weight fluctuated between 350 and 300 pounds. On March 25, 1992, the appellees terminated the appellant's temporary total disability benefits and refused to pay for any further weight-loss treatment. The appellant sought benefits for a surgical stomach stapling procedure to aid his weight reduction efforts

and reinstatement of temporary total disability benefits. After a hearing, the Commission found that the stomach stapling surgery was not reasonably necessary for treatment of the appellant's compensable injury, and that the appellant's volitional overeating had caused his healing period to end so that he was not entitled to additional temporary total disability benefits. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in finding that he had failed to prove that the proposed stomach stapling procedure was reasonably necessary for treatment of his compensable injury, and in finding that his healing period ended by March 24, 1992, disqualifying him for any additional temporary total disability benefits beyond that date. We find no error, and we affirm.

Where the sufficiency of the evidence to support the findings of the Commission is challenged on appeal, we view the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Grimes* v. *North American Foundry*, 42 Ark. App. 137, 856 S.W.2d 309 (1993). Where, as here, the Commission has denied a claim because of a failure to show entitlement by a preponderance of the evidence, the substantial evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Williams* v. *Arkansas Oak Flooring Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979).

With regard to the appellant's request for approval of his proposed stomach stapling procedure, the Commission noted in its opinion that the appellant had not asked for approval of more conservative measures in the alternative, but had instead limited his request to the stomach stapling surgery which he had scheduled. In denying the request, the Commission found that stomach stapling surgery was not reasonably necessary. In so finding, the Commission stated that the stomach stapling surgery was an invasive procedure, that the appellant had lost significant weight while following more conservative weight loss programs based on dietary modifications, and that there was no evidence to indicate that stomach stapling surgery was indicated prior to attempting more conservative weight loss programs. Our review of the record indicates that, although the appellant did

not maintain his weight losses, he did in fact lose a considerable amount of weight while following more conservative dietary weight-loss programs. In light of this evidence, we think that reasonable minds could conclude it would be preferable to continue dietary weight loss measures rather than implement a surgical procedure with its concomitant risks. *See e.g., Perry* v. *Leisure Lodges, Inc.*, 19 Ark. App. 143, 718 S.W.2d 114 (1986). We cannot say, on this record, that the Commission's opinion fails to display a substantial basis for the denial of the stomach stapling surgery requested by the appellant and we find no error on this point.

[redacted] Next, the appellant contends that the Commission erred in finding that the appellant's healing period ended by March 24, 1992. As the appellant notes, the "healing period" is defined as the period necessary for the healing of an injury resulting from an accident, which continues until the employee is as far restored as the permanent character of his injury will permit. *Arkansas Highway & Transportation Dept.* v. *McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

[redacted] In the case at bar, the record shows that treatment of, and even accurate diagnosis of, the appellant's back injury was not possible unless and until the appellant lost approximately 75 to 100 pounds. Furthermore, there was evidence that the appellant was capable of losing weight through various programs based on calorie reduction, but had failed over a period of approximately one and one-half years to reduce his weight sufficiently to permit diagnosis and treatment of his underlying back injury. The appellant argues that there was evidence that the appellant's lack of success was due to a psychological eating disorder. However, the question on appeal is not whether there is evidence to support findings other than those made by the Commission, but is instead whether the findings made by the Commission are supported by substantial evidence. *Tyson Foods, Inc.* v. *Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988). In the case at bar, the appellant testified that he regained weight because he simply began eating more after being taken off diet pills. The Commission noted that the appellant had demonstrated an ability to lose weight without diet pills, and found that the appellant's failure to lose weight was volitional. We think that the matter resolves itself to a question of credibility, and we cannot say that the

Commission erred in finding that the appellant's healing period had ended in light of his failure to lose the amount of weight necessary to allow treatment of his underlying injury.[1]

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the majority opinion in this case.

First: I assume that the opinion's statement that the appellant "had not asked for approval of more conservative measures in the alternative" means that he could — or probably could — have had such measures if he had asked for them. If this is what that language means, then I would remand to allow such a request to be made rather than simply affirming the Commission's denial of benefits.

Moreover, even if the appellant has had the stomach-stapling procedure that the Commission's opinion said appellant had made arrangements to be paid for by the Arkansas Department of Health, he would be entitled to temporary total disability benefits for some period during the recovery from that procedure.

And if, as the majority opinion states, "reasonable minds could conclude it would be preferable to continue dietary weight loss measures rather than implement a surgical procedure with its concomitant risks," would not the appellant be entitled to the "surgical intervention" for his herniated disk if he has lost the weight — by dietary measures — that the neurosurgeon thought necessary? But we simply affirm the Commission and make no provision for any additional hearing or determination.

Finally, why should the appellee not pay for any disability which the appellant has as a result of his injury? As the opinion of the dissenting Commissioner points out, the law is settled that an employer takes a claimant as he finds him — and the appellant in this case weighed 300 pounds at the time of his pre-

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[1]We are not faced with the question of whether the appellant would begin a new healing period were he to request more conservative weight loss treatment, and we express no opinion on that issue.

employment physical. Or is the employer relieved from paying for the disability an employee receives while working if the employee is simply unable to lose weight because — as the majority opinion puts it — the failure to do this is "due to a psychological eating disorder"? We did not think so when we indicated in *Weller* v. *Darling Store Fixtures*, 38 Ark. App. 95, 828 S.W.2d 858 (1992), that Professor Larson was right when he summarized the law in this area as follows:

> When the treatment prescribed takes the form of exercise or wearing a brace, or undergoing an alcohol detoxification program, obviously there is no element of risk, and unreasonable refusal to follow medical instructions will lead to a loss of benefits for any disability attributable to this refusal. But when the prescribed treatment involves weight reduction, although in principal the cases should be assimilated to the exercise cases, courts have been less stern, perhaps because almost everyone has some personal experience of good-faith but ineffective weight-reduction efforts — and are reluctant to stigmatize these all-too-human failures as "willful refusal."

1 A. Larson, *The Law of Workmen's Compensation* § 13.22(d).

I dissent.

James D. McCARTHER *v.* Kenneth D. GREEN

CA 94-372 895 S.W.2d 562

Court of Appeals of Arkansas
Division II
Opinion delivered March 29, 1995

[redacted]

James Allen Brown, for appellant.

O. Jerome Green, for appellee.

JOHN B. ROBBINS, Judge. This is an appeal from a judgment of the Pulaski County Chancery Court which ordered the appellant James McCarther to specifically perform an agreement to indemnify the appellee Kenneth Green. Because an identical action between these same parties was pending in circuit court when this action was filed, the order of the chancery court must be reversed.

On August 14, 1992, appellee filed a complaint in the Pulaski County Chancery Court, requesting that appellant be compelled to specifically perform a settlement agreement in which appellant agreed to indemnify appellee for certain tax liability and to collateralize his agreement of indemnity. The case was later transferred to the circuit court on appellee's request, who claimed that his action was actually only at law and did not invoke the need for equity jurisdiction. The case was tried before a jury in circuit court on May 12, 1993.

In chambers prior to the beginning of the May 12 trial, a special judge, sitting in place of the circuit judge, questioned whether the remedy appellee was seeking was specific performance or money damages. Appellee's counsel replied that "[w]e're trying the case for money damages." The case then proceeded to trial before a jury. After the appellee, plaintiff below, rested his case, appellant moved for a directed verdict, claiming that appellee had not shown that he had incurred any damages for which he could be indemnified. The court then asked appellee if he wished to proceed with the trial and have the trial court decide the directed verdict, and appellee answered affirmatively. The court then granted appellant's motion, stating:

> The Court is going to grant the motion for directed verdict. It is my opinion that there has been no proof of actual damage sustained by the [appellee], which would support a claim by the [appellee] for indemnity. The claim that's being advanced, as I read the pleadings and based upon the representations of counsel and the evidence adduced, basically, started out as a specific performance claim, came to this Court on a motion to transfer, and while there has been some testimony about tax liability, it essentially is still a specific performance claim.

In response to appellee's question regarding whether the court's ruling was "without prejudice," the court responded:

> No. That would be with prejudice. I mean, I'm not sure what you mean by that, but the entry of the directed verdict will conclude the case. . . .
>
> The court is going to enter the directed verdict on the basis that the action is brought prematurely by the [appellee]

> because the [appellee] does not have a cause of action at this time for indemnity because no sums have been paid. That will leave a legal issue as to whether the case could be refiled.
>
> But it is specifically my ruling that the claim of the [appellee] is premature and cannot be advanced on the evidence that's been adduced in this court as an indemnity claim at this time in that there's no proof of actual damages.

Other than announcing this ruling in chambers, no orders were ever entered by the circuit court.[1]

Nevertheless, on the same day that the circuit court trial was held and the circuit judge orally granted appellant a directed verdict, the appellee filed virtually the identical lawsuit against appellant in chancery court, again contending that he was entitled to specific performance of the indemnity agreement. The following day, appellee moved to have this suit transferred to First Division Chancery Court. In his motion, appellee stated:

> On May 12, 1993, the Circuit Court ruled that this case belongs in Chancery Court based upon the pleadings and dismissed the case as premature for an action seeking a judgment of damages because the Plaintiff has not yet actually paid any money to state or federal taxing authorities out of his own pocket.
>
> Because this case was originally assigned to First Division Chancery, it should be returned to that Court for litigation.

Despite appellee's statement in this motion, there is no order from the circuit court which transferred appellee's first lawsuit back to chancery court. Nor is there anything in the transcript of the circuit court trial indicating that the circuit court considered transferring the case back to chancery court. Moreover, there is no certificate of service on this motion showing that appellee served it on appellant or his attorney. In his brief, appellant states

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[1]We need not address an apparent conflict between Ark. Code Ann. § 16-65-121 (Supp. 1993) and Ark. R. Civ. P. 58 because while the trial court's ruling was on the record it was not rendered in open court.

that he had no knowledge of this motion or the order transferring it to the First Division until he received the record for purposes of this appeal.

On June 1, 1993, appellant filed his answer to appellee's May 12, 1993, complaint. In his answer, he affirmatively alleged that the identical lawsuit had been filed by appellee on August 14, 1992; that it was later moved to circuit court; and that, on May 12, 1993, a jury trial was held and the matter was concluded by a directed verdict. Appellant then claimed appellee's second complaint is barred by *res judicata* and should be dismissed and sought sanctions under Rule 11 of the Arkansas Rules of Civil Procedure. Attached to appellant's answer was a file-marked copy of the first complaint filed by appellee on August 14, 1992.

A hearing was held on appellee's second complaint on June 6, 1993. At that time, Chancery Judge Gray asked whether an order had been entered in the circuit court proceeding. Appellant's counsel explained that he had drafted a precedent and presented it to the court; appellee's attorney stated that he had objected to the form. The chancellor then stated:

> The Court has considered the issue of whether res judicata applies to the issues before this Court at this time and I have reviewed the transcript and also I have reviewed in detail the decision of the special judge — . . . . And this Court specifically finds that Circuit Court addressed whether there was an indemnification contract and found that the contract was an indemnification contract and also whether the lawsuit was ripe, the issues were ripe, and addressed those two issues but didn't address any other issues in its decision. So, the other issues that the [appellee] has before this Court are not barred by res judicata.

A second hearing was held on October 6, 1993, at which time the chancellor heard witnesses in regards to the merits of appellee's second case. Afterwards, in chambers, appellee argued that appellant's defense of *res judicata* was not applicable because no final judgment had ever been entered by the circuit court. Appellant again attempted to reassert his argument that the circuit court retained jurisdiction of appellee's cause of action until it entered a final order. The chancellor then asked whether an order had been entered by the circuit court to transfer the case

to chancery court, and appellant responded "no," that a new complaint was filed.

On November 10, 1993, the chancellor entered an order, finding that appellant had breached the contract for indemnification, that appellant be required to deposit $255,000.00 to collateralize the indemnity agreement, and that appellee be awarded his costs and attorney's fees in an amount to be set by the court. On December 9, appellant filed his notice of appeal.

Appellant raises three points on appeal: (1) the trial court erred in failing to find that the doctrine of *res judicata* estopped the plaintiff from bringing this action; (2) the trial court erred in failing to find that the First Division Chancery Court of Pulaski County, Arkansas, did not have jurisdiction in this matter; and (3) the trial court erred in finding that there had been a breach of contract.

Where there is concurrent jurisdiction, the court which first acquires jurisdiction may, as a rule, retain it. *Titan Oil & Gas, Inc.* v. *Shipley*, 257 Ark. 278, 291, 517 S.W.2d 210 (1974). In *Moore* v. *Price*, 189 Ark. 117, 70 S.W.2d 563 (1934), the supreme court stated:

> The rule is stated in Corpus Juris as follows: "Where two actions between the same parties on the same subject and to test the same rights are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court of co-ordinate power is at liberty to interfere with its action. This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by independent courts, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results." 15 C.J. 1134.
>
> Bailey on Jurisdiction, page 61, states: "In the distribution of powers among courts it frequently happens that jurisdiction of the same subject-matter is given to different courts. Conflict and confusion would inevitably result unless some rule was adopted to prevent or avoid it. There-

> fore it has been wisely and uniformly determined that whichever court, of those having such jurisdiction, first obtains jurisdiction, or, as is sometimes said, possession of the cause, will retain it throughout to the exclusion of another." The same rule is announced in "Courts and Their Jurisdiction" by Works, pages 68 and 69.

Id. at 121-22. In *Askew* v. *Murdock Acceptance Corp.*, 225 Ark. 68, 279 S.W.2d 557 (1955), the supreme court discussed in detail the necessity of comity between the courts and of avoiding conflict in the execution of judgments between independent courts.

When a case is brought in a court of competent jurisdiction, the authority and control of that court over the case continues until the matter is disposed of in the appellate court. *Vaughan* v. *Hill*, 154 Ark. 528, 532, 242 S.W. 826 (1922). *See also Jones* v. *Garratt*, 199 Ark. 735, 739-40, 135 S.W.2d 859 (1940); *Wright* v. *LeCroy*, 184 Ark. 837, 841, 44 S.W.2d 355 (1931); *Cotton* v. *Cotton*, 3 Ark. App. 158, 161-62, 623 S.W.2d 540 (1981). See also *Doss* v. *Taylor*, 244 Ark. 252, 424 S.W.2d 541 (1968), where the supreme court held that, where the probate court had first assumed jurisdiction for the sale of real estate and distribution of the proceeds, it was error for the chancery court to assume jurisdiction and reversed and remanded the decision of the chancery court with directions to remit the parties to their remedies in probate court. *Id.* at 259.

In the case at bar, an order disposing of the case had never been entered by the circuit court. Therefore, appellee's cause of action was still pending in circuit court, and may yet be as far as we know, and it was error for the chancery court not to have dismissed appellee's second complaint.

Because the case must be reversed on this issue, we do not address the other two points appellant has raised on appeal.

Reversed and dismissed.

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

Barbara MELLON *v.*
DIRECTOR, Arkansas Employment Security Department

E 94-46 895 S.W.2d 948

Court of Appeals of Arkansas
Division I
Opinion delivered March 29, 1995
[Supplemental Opinion on Denial of Rehearing
June 28, 1995.]

Barbara Mellon, pro se.

Allan Franklin Pruitt, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from the Arkansas Board of Review. The record filed by the Board reveals the following sequence of events.

On October 7, 1993, the appellant filed a notice of appeal to the Arkansas Appeal Tribunal from a denial of unemployment benefits by the Arkansas Employment Security Department.

On October 21, 1993, the Appeal Tribunal mailed a notice to the appellant and her employer advising them that a hearing would be conducted by telephone on November 3, 1993, at "01:15 p.m. CDT." The notice also advised that the parties should call the Tribunal "at least one (1) workday prior to hearing time" and provide a telephone number "where you will be available at the time and date of the scheduled hearing."

On November 4, 1993, an appeals referee mailed the parties a decision of the Tribunal stating that "the appellant failed to appear" at the hearing scheduled for November 3, 1993, and finding that "[a]fter a study of the record . . . all interested parties have been afforded a reasonable opportunity for a fair hearing" and the determination of the agency denying benefits was "supported by the record."

On December 20, 1993, the Appeal Tribunal received a letter from the appellant stating:

> I would like to set up a new hearing date. I never received my notice in the mail.
>
> The unemployment office told me the date it was supposed to be.

The above letter was sent to the Board of Review and is stamped as received there on December 22, 1993. By letter dated January 3, 1994, the Board informed appellant that it had received appellant's "untimely appeal to the Board" and appellant would be afforded a hearing, pursuant to *Paulino* v. *Daniels*, 269 Ark. 676, 599 S.W.2d 760 (Ark. App. 1980), to establish whether the late filing was due to "circumstances beyond your control." The letter also stated that the date of the hearing would be "Tuesday, January 18, 1994 at 10:00 a.m."

Pursuant to that letter, the Board mailed appellant a typed form upon which appellant was to write a telephone number at which she could be reached on the date and at the time set for the hearing. This form was mailed back to the Board, with a telephone number listed, and the form was signed by appellant.

There is another form in the record, signed by an appeals referee and dated 1-18-94, which contains a handwritten note stating that the referee called the number provided by the appel-

lant and a lady said the appellant was not there and she did not know if the appellant would be able "to make it to her house today."

The record also contains a decision from the Board of Review bearing a mailing date of January 27, 1994, and it states:

> The above-styled appeal was scheduled to be heard before the Board of Review on January 18, 1994 by telephone.
>
> Although duly notified of the date and time of the hearing, the claimant/appellant failed to respond as directed in the Notice of Telephone Hearing and has not shown good cause for failure to respond.
>
> The Board of Review considers it appropriate to dismiss the appeal, and the Appeal Tribunal decision (Appeal No. 93-AT-10392) remains in effect.

In a supplement to its response to "Appellant's Petition for Review" the appellee has filed a letter it received from the appellant on February 16, 1994. This letter states:

> Due to the weather on January 18, 1994, I was unable to reply to the scheduled hearing. I left message with the number.
>
> I think the weather was good cause for not being able to reply to the hearing.
>
> You may reach me at 501-423-5317.

Also, in the supplement, there is a letter to the appellant from the Board's administrative assistant which states that the appellant's letter received on February 16, 1994, was being sent to the Arkansas Court of Appeals "for its consideration as an appeal from the Board of Review decision [of January 27, 1994]."

The letter from the Board and the enclosed letter from the appellant were both received by the clerk of the court of appeals on February 18, 1994, and that is within the period of time provided for such an appeal. Therefore, we consider the matter properly before us.

In *Paulino* v. *Daniels, supra*, this court considered certain sections of the Arkansas Employment Security Act con-

taining provisions for the Board to review decisions made by an Appeal Tribunal. The sections provided that if the notice of appeal to the Board was not filed within the period of time stated by the statute, the Board could hold the appeal timely if it found that the late filing was the "result of circumstances beyond the appellant's control." Our opinion also stated that "due process requires" that an appellant be afforded a hearing on any alleged reasons for the failure to timely file and that the Board has the "duty and responsibility" to pass upon the issue of fact presented. We remanded that case for the Board to pass upon the contentions made by the appellant that the late filing was the result of circumstances beyond appellant's control. Those statutory provisions have been modified to some extent since the *Paulino* decision was handed down; however, Ark. Code Ann. § 11-10-524 and -525 (1987 and Repl. 1993), still contain some of the same provisions.

[redacted] In the case at bar, it can be seen from the history outlined above that the Board's decision of January 27, 1994, stated that the appellant had failed to respond to the notice of telephone hearing and had not shown good cause for such failure. Assuming, without deciding, that this would be sufficient to satisfy the holding in the *Paulino* v. *Daniels* case — and the Board's decision is somewhat unclear in that regard — we think it is not sufficient under subdivision (c) of Ark. Code Ann. § 11-10-524 (Repl. 1993), which was added by a 1991 amendment.

This amendment, which was in effect during the events of 1993 and 1994 in this case, provides that the decision of the Board shall become final within twenty days of mailing to the parties' last known address unless an appeal is filed within that period —

> or, in the case of a party-appellant failing to appear at a hearing a written request for reopening shall be made. Reopening shall be granted upon a showing of good cause for not appearing at the scheduled hearing.

[redacted] In this case, the Board's decision was mailed on January 27, 1994. The appellant wrote a letter, stamped as received by the Board on February 16, 1994, which can be construed as saying that appellant was not at the telephone on the hearing date for the reason that she was unable to get to the place where the tele-

[redacted]

phone was located because of the weather. This also appears to be corroborated by the referee's note of 1-18-94 which says that the lady who answered the phone said the appellant was not there and she did not know if the appellant would be able "to make it to her house today." Appellant's letter was received by the Board within twenty days of the mailing of the Board's decision — *see* Ark. R. Civ. P. 6(a) for method of computation — and she obviously wanted another hearing date. The Board's administrative assistant inadvertently sent the letter to this court as an appeal instead of presenting it to the Board for consideration under Ark. Code Ann. § 11-10-524 (Repl. 1993).

We remand to the Board for its consideration of appellant's letter received on February 16, 1994.

ROBBINS and ROGERS, JJ., agree.

[redacted]

Barbara MELLON *v.* DIRECTOR, Arkansas Employment Security Division

E 94-46 901 S.W.2d 27

Court of Appeals of Arkansas
En Banc
Supplemental Opinion on Denial of Rehearing
delivered June 28, 1995

[redacted]

[redacted]

Barbara Mellon, pro se.

Allan Pruitt, for appellee.

MELVIN MAYFIELD, Judge. The appellee has filed a petition for rehearing of our opinion of March 29, 1995, in which we remanded this matter to the Board of Review for its considera-

tion of appellant's letter received by the Board on February 16, 1994. Taken in the context of the circumstances involving the attempt of the appellant to have a hearing on the merits of her claim for unemployment compensation, the letter received by the Board on February 16, 1994, was a request for a new date on which appellant could participate in a telephone hearing on the claim.

In the petition for rehearing, the appellee tells us that the Board had decided on January 27, 1994, which was prior to receiving the letter of February 16, 1994, that the appellant's failure to respond to a telephone hearing scheduled on January 18, 1994, was sufficient to support the Board's order of January 27, 1994, dismissing appellant's appeal. Specifically, the petition for rehearing contends that Ark. Code Ann. § 11-10-524(c) (Supp. 1993) only applies to reopening decisions of the Appeal Tribunal and not to decisions of the Board of Review. Then the petition for rehearing tells us that appellant's request for hearing received by the Appeal Tribunal on December 20, 1993, was forwarded to the Board of Review and that this "effectively removed the untimely filing issue to the Board's jurisdiction, pursuant to Ark. Code Ann. § 11-10-524(b) (Supp. 1993). Then, following *Paulino* v. *Daniels*, 269 Ark. 676, 599 S.W.2d 760 (Ark. App. 1980), the Board scheduled a telephone hearing on the timeliness issue for January 18, 1994."

Then the petition for rehearing explains its method of operation in situations like the one involved in the instant case.

> The Board has found such removal of untimely filing issues related to requests for reopening before the Tribunal administratively convenient because, under § 11-10-524(c), the same statutory time period runs with regard to both the alternative procedures of either appeal to the Board of Review or request for reopening before the Appeal Tribunal. Thus, disposition of the timeliness issue in a hearing before the Board tends to relieve cumbersome multiplicity of Tribunal and Board docketings and hearings. In regard to the Board's usual procedure after a removal in a case such as this, a conclusion by the Board of untimeliness within the control of an appellant results in dismissal of the appeal, including any request for reopening. In the

> alternative, if an appellant appears in [a] hearing before the Board and proves that the untimely response to an Appeal Tribunal decision was a result of circumstances beyond the appellant's control, the Board would issue an order remanding the case to the Appeal Tribunal for hearing at least on the reopening issue and further Tribunal decision.

[redacted] Because of the operational procedure described in the appellee's petition for rehearing, it is somewhat difficult to understand why the petition was filed. We understand the appellee's contention that Ark. Code Ann. § 11-10-524(c) (Supp. 1993) applies to reopening decisions of the Appeal Tribunal and not to reopening decisions of the Board of Review. However, our opinion assumed that the request for a new hearing which was received by the Board on February 16, 1994, would have been sent by the Board to the Appeal Tribunal for the taking of evidence in a telephone hearing, and this evidence would have then been sent to the Board for its determination of whether there was good cause for not appearing at the scheduled hearing. Indeed, this is the only way that additional evidence may be taken by the Board. *See Jones* v. *Director of Labor*, 8 Ark. App. 234, 650 S.W.2d 601 (1983), and Ark. Code Ann. § 11-10-525(a)(2) (1987). Moreover, the appellee's petition for rehearing is in agreement with that case and cites it as authority. Thus, while our opinion may not have been clear in its application of Ark. Code Ann. § 11-10-524(c) (Supp. 1993), we do not think it makes any practical difference in the decision of the issue in this case.

[redacted] The real issue here is brought into focus by the case of *Paulino* v. *Daniels*, 269 Ark. 676, 599 S.W.2d 760 (Ark. App. 1980), cited in our opinion of March 29, 1995, and in appellee's petition for rehearing. That case involved an attempt to appeal to the Board of Review. The opinion states that the appeal was "admittedly filed late" and said "the real question raised is why it was late." Then the opinion stated "in view of the fact that there is no substantial evidence in this record to support the finding of the board that the failure to file a timely appeal was *not* a result of circumstances beyond the appellant's control, due process requires that claimant-appellant be afforded a hearing on her contentions." 269 Ark. at 679, 599 S.W.2d at 762 (emphasis in the opinion). The opinion cited sections 6(d)(2) and 6(d)(3) of the

Arkansas Employment Security Act, which at that time were found in Ark. Stat. Ann. § 81-1107 (Repl. 1976). Now 6(d)(2) is found in Ark. Code Ann. § 11-10-524(a) (1987), and 6(d)(3) is found in Ark. Code Ann. § 11-10-525(a) (1987). The opinion makes it clear that the failure to appeal in time to either the Appeal Tribunal or the Board of Review may be excused if the failure was due to circumstances beyond the appellant's control.

A few days later, the court of appeals in *McBride* v. *Daniels*, 269 Ark. 705, 600 S.W.2d 425 (Ark. App. 1980), relied upon its *Paulino* v. *Daniels* decision to hold that the Board of Review's reliance, solely upon the fact that the petition for review by the Board was not timely filed, did not meet the requirements of due process. Again, this court made the same holding in *Lawson* v. *Brooks*, 29 Ark. App. 14, 779 S.W.2d 185 (1989), where we remanded for the appellant to be afforded a hearing to determine if the late filing was due to circumstances beyond the appellant's control. And in *Springdale Memorial Hospital* v. *Director*, 34 Ark. App. 266, 809 S.W.2d 828 (1991), we affirmed *Paulino's* requirement for a hearing to determine whether the "untimeliness of the appeal" to the Board of Review was due to circumstances beyond the claimant's control. However, we held in that case that the Board of Review erred in finding that the untimely appeal to the Board was due to circumstances beyond the claimant's control.

Thus, we think it is clear that before an appeal to the Appeal Tribunal or to the Board of Review may be dismissed as untimely, the appellant must be afforded an opportunity to have a hearing on the question of whether the untimely appeal was due to circumstances beyond the appellant's control.

Moreover, the case of *Helena-West Helena School District* v. *Stiles*, 15 Ark. App. 30, 688 S.W.2d 326 (1985), relied upon *Paulino* v. *Daniels* in a case where the appellant school district was not present when an appeals referee conducted a telephone hearing for the Board of Review. We held that due process required that the school district be given a hearing on its contention that its absence from the hearing resulted from its not receiving notice that the hearing would be held.

Thus, the due-process holding in *Paulino* v. *Daniels* has resulted in a two-prong requirement. In the instant case, we

are concerned with both prongs. When the Appeal Tribunal — as it explains in its petition for rehearing — "effectively removed the untimely filing issue to the Board's jurisdiction" this did not eliminate the need to consider the appellant's request for a new hearing date which the Tribunal forwarded to the Board at that time. Therefore, the Board sent a letter to the appellant which stated:

> As your appeal was untimely filed, you will be afforded a hearing to establish whether the late filing was due to circumstances beyond your control pursuant to *Paulino* v. *Daniels*, 269 Ark. 676, 599 S.W.2d 760 (Ark. App. 1980).

The hearing was scheduled to be held by telephone at 10:00 a.m. on January 18, 1994, but the appellant was not at the telephone number she had furnished when the appeals referee called it on the scheduled day and time. The Board then, on January 27, 1994, mailed appellant an order stating that she had failed to respond to the telephone call on January 18, 1994, and that the appeal was dismissed.

However, on February 16, 1994, the Board received a letter from appellant stating what could be considered a good cause for failing to be at the telephone number when the call was made and asking for a new hearing day. This letter was received within twenty (20) days of the January 27 mailing of the Board's order dismissing the appeal and, under Ark. Code Ann. §§ 11-10-525(b) and 529(a) (1987) the Board's dismissal of January 27, 1994, had not become final. Thus, forgetting about Ark. Code Ann. § 10-11-524(c) and whether it applied to the Board in this case, we think the request for new hearing, received by the Board before its January 27 decision became final, allowed the Board to grant the appellant a new hearing. Whether the new hearing should be granted is for the Board to determine on remand. However, the due-process considerations stated in *Paulino* v. *Daniels* and its progeny require more than a simple finding that the appellant failed to appear at a hearing and therefore has not shown good cause for failing to file a timely appeal to the Board. Moreover, in the instant case the two-prong requirement of opportunity to be heard and reasons for the untimely appeal are both present.

The petition for rehearing is denied.

Jane STEPHERSON *v.*
DIRECTOR, Employment Security Department

E 94-71 895 S.W.2d 950

Court of Appeals of Arkansas
Division I
Opinion delivered April 5, 1995

[redacted]

[redacted]

[redacted]

[redacted]

Hardin & Grace, P.A., for appellant.

Ronald A. Calkins, for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant Jane Stepherson appeals from an order of the Arkansas Board of Review holding that drivers of appellant's trucks, which were leased to a broker, were employees for whom contributions were required under the Arkansas Employment Security Act. The Board found that appellant failed in her burden of proving that the drivers, who without dispute were providing services for wages, were independent contractors within the meaning of Ark. Code Ann. § 11-10-210(e) (Supp. 1993). Appellant contends the Board erred in this ruling. We affirm.

Appellant contends that the drivers were exempt as independent contractors within the meaning of Ark. Code Ann. § 11-10-210(e) (Supp. 1993), which provides:

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

The Board found that appellant did not meet the criteria for the first and third prongs of the test and was liable for contributions. We affirm.

[redacted] In order to obtain the exemption contained in § 11-10-210(e), it is necessary that the employer prove *each* of subsections (e)(1) through (3). *American Transportation Corp.* v. *Director*, 39 Ark. App. 104, 840 S.W.2d 198 (1992). Therefore, if there is sufficient evidence to support a finding that any one of the three requirements is not met, the case must be affirmed. *Id.* In reviewing decisions of the Board of Review, this court views the evidence in the light most favorable to the Board's findings, giving them the benefit of every legitimate inference that can be drawn from the testimony and will affirm the Board's decision if its findings are supported by substantial evidence. *Id.*

Appellant testified that she leased three trucks to Fikes Truck Line, Inc. (hereinafter "Fikes"), that Fikes hired drivers to drive her trucks in transporting loads, and that Fikes paid her a percentage for each load. She stated that she was not involved in the "trucking business," but rather the "equipment leasing business." Contrary to appellant's assertion that she was only in the equipment leasing business, the Board found that appellant was more than a lessor of trucks because she interacted with the drivers. Appellant testified that her contact with the drivers concerned maintenance and repair of the trucks and issuing the drivers a paycheck upon completion of a load based on an individual pay rate she had negotiated with them. Appellant also said that she advertised for drivers, and referred drivers to Fikes for approval and hiring. Appellant testified that under her lease agreement with Fikes, her income depended on how much the drivers used her trucks. Appellant stated that she was usually unaware of when her trucks were not being used. She mentioned two occasions on which she was aware that a truck was not being used and on one of these occasions, she made the decision about whether to leave the truck where it was or to have it picked up.

[redacted] Appellant argues that she has satisfied the third prong of the test because the drivers are in the trucking business, an "independent business" from her business of equipment leasing. Appellant's argument misconstrues the third prong of the

three-part test. In order for an employer to satisfy the third prong of the test, the employer must show that the individual is "customarily engaged in an independently established trade, occupation, profession, or business *of the same nature as that involved in the service performed.*" Ark. Code Ann. § 11-10-210(e)(3) (emphasis added). *See Morris* v. *Everett, Director*, 7 Ark. App. 243, 647 S.W.2d 476 (1983). Appellant testified that a majority of the drivers worked 40 hours a week driving one of her trucks for Fikes. One of the drivers, Craig Weasenforth, testified that he never drove another truck for any other company during the time that he drove one of appellant's trucks. He also testified that a majority of his jobs were obtained through Fikes although he obtained a job through a broker other than Fikes (known as "trip leasing") and that he used appellant's truck to perform the job and was paid by appellant. The Board found that "trip leasing" occurred infrequently. Another driver, William Cooper, said that he drove one of appellant's trucks for five to six years and did not drive for anyone else during that time. The Board noted that each driver who testified said that he did not drive for anyone else while driving one of appellant's trucks and that appellant testified that she was unaware of the drivers working for other companies during the time they drove for her. The Board found that none of the drivers was customarily and independently engaged in a business of the same nature as that of appellant.

[redacted] As we cannot conclude that the Board's finding that appellant failed to satisfy the third prong of the test of § 11-10-210(e) is not supported by substantial evidence, we need not discuss the Board's findings as to the first prong of the test.

Affirmed.

COOPER and ROBBINS, JJ., agree.

Laurie BECKNER *v.* STATE of Arkansas

CA CR 94-765 896 S.W.2d 445

Court of Appeals of Arkansas
Division I
Opinion delivered April 5, 1995

[redacted]

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

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with driving while intoxicated. After a de novo bench trial in circuit court, she was convicted of that offense, fined $500, sentenced to one day in jail, and ordered to complete an alcohol treatment program. In addition, her driver's license was suspended for 90 days. From that conviction, comes this appeal.

Arkansas Code Annotated § 5-65-103 (Repl. 1993) makes it unlawful for any person who is intoxicated to be in actual physical control of a motor vehicle. The only issue before us on appeal is whether the evidence was sufficient to establish that the appellant was in actual physical control of a motor vehicle.

At trial, Officer Adkins testified that he noticed a car with its engine running in front of a house where he had made sev-

eral narcotic arrests. A passenger got out of the car, but the appellant remained inside it. After observing the appellant inside the car for about five minutes, Officer Adkins started to approach her. The appellant then got out of the car, turned it off, and started walking toward the house, whereupon she was approached by her husband. When asked how she got to the house, the appellant replied that her husband directed her down there so he could get some narcotics.

The appellant argues that the case at bar is distinguishable from *Wiyott* v. *State*, 284 Ark. 399, 683 S.W.2d 220 (1985), and *Roberts* v. *State*, 287 Ark. 451, 701 S.W.2d 112 (1985). In *Wiyott, supra*, the Supreme Court held that there was sufficient evidence of actual physical control where the defendant was found asleep behind the wheel of a parked vehicle which was not running, but where the keys were in the ignition. In *Roberts, supra*, the defendant was found to be in actual physical control of a vehicle lodged against a building in a parking lot where the defendant was asleep behind the wheel, the car and building were damaged, the ignition key was turned on, the gearshift lever was in the "drive" position, but the engine was not running.

[redacted] The appellant contends that both *Wiyott* and *Roberts* are to be distinguished because no one testified that the appellant had driven the car in the case at bar. We do not agree because we think that the evidence was sufficient to permit the fact-finder to infer that the appellant had driven the car shortly before her arrest.[1] We hold that the appellant's DWI conviction is supported by substantial evidence, and we affirm.

Affirmed.

PITTMAN and ROBBINS, JJ., agree.

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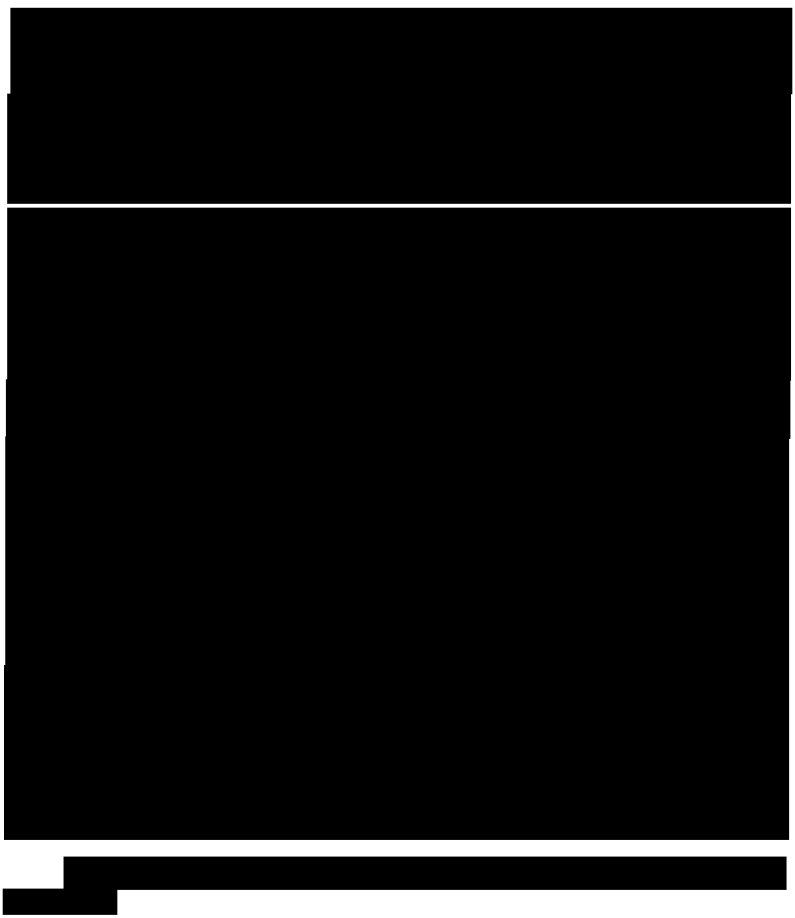
[1]Although we do not reach the issue, we note that the appellant's act of turning off the car might in itself be sufficient to support a finding of actual physical control under *Wiyott*, where the Court quoted with approval from an Oklahoma case stating that "the control contemplated meant more than the 'ability to stop an automobile,' but meant the 'ability to keep from starting,' 'to hold in subjection,' 'to exercise directing influence over,' and 'the authority to manage.'" *Wiyott*, 284 Ark. at 402. The Court's decision in *Wiyott* was based squarely on its conclusion that there was sufficient evidence to support a finding that the defendant in that case had exercised directing influence over his vehicle and had the authority to manage it. *Id.*

Isiah ROBINSON *v.* STATE of Arkansas

CA CR 94-283 896 S.W.2d 442

Court of Appeals of Arkansas
Division I
Opinion delivered April 5, 1995



Ronald C. Nichols, for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted in a jury trial of criminal use of a prohibited weapon and aggravated assault. He was fined $1,500.00 and sentenced to three years and six years, respectively, in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in permitting the victim to remain in the courtroom wearing a police uniform and in denying his motion for a directed verdict. We find no error and affirm.

The appellant contends that he was prejudiced because the victim's presence in the courtroom during the trial inflamed the jury. The victim in this case was a police officer, and the appellant objected to his presence in the courtroom and to his wearing a badge and a jacket with a police emblem on it. The trial court overruled the appellant's objections.

Arkansas Rule of Evidence 616 provides in pertinent part:

> Notwithstanding any provision to the contrary, in any criminal prosecution, the victim of a crime . . . shall have the right to be present during any hearing, deposition, or trial of the offense.

Thus, the victim of a crime is entitled to remain in the courtroom during the trial.

The appellant relies on *Moore* v. *State*, 299 Ark. 532, 773 S.W.2d 834 (1989), in which our Supreme Court reversed a conviction where the trial court allowed three policemen who had testified against Moore to sit inside the railing of the courtroom, in a place normally reserved for parties, directly in front of the jury, during closing arguments. The Court found that this presented a manipulation of the seating arrangement to emphasize the testimony of certain witnesses over others and was tantamount to the trial court expressing an opinion on the credibility of the witnesses. However, unlike the case at bar, the officers in *Moore* were not victims of the crime and the case was not decided on the basis of Rule 616. In the case at bar, the officer was not allowed to sit at the counsel table but sat in the spectator area of the courtroom. *See Mask* v. *State*, 314 Ark. 25, 869 S.W.2d 1 (1993).

We also point out that the charges against the appel-

lant arose out of an incident involving a police officer and this was made known to the jury during opening statements. We fail to see how the victim's wearing a jacket indicating his profession could have prejudiced the appellant. Prejudice will not be presumed and we do not reverse absent a showing of prejudice. *Wallace* v. *State*, 314 Ark. 247, 862 S.W.2d 235 (1993).

In arguing that the trial court erred in denying his motion for a directed verdict, the appellant contends that the State did not meet its burden of proving beyond a reasonable doubt that he was guilty of the offenses with which he was charged. The appellant's abstract supporting this argument consists only of his counsel's opening statement and the colloquy between counsel and the trial court regarding his motion. Statements and arguments of counsel are not evidence. *Davis* v. *State*, 33 Ark. App. 198, 804 S.W.2d 373 (1991). The appellant failed to abstract any of the testimony presented to the jury. This Court has stated numerous times that the record on appeal is confined to that which is abstracted, and failure to abstract those portions of the record relevant to the points on appeal precludes this Court from considering those issues. *Midgett* v. *State*, 316 Ark. 553, 873 S.W.2d 165 (1994). However, we may go to the record to affirm, *Haynes* v. *State*, 314 Ark. 354, 862 S.W.2d 275 (1993), and having done so, hold that the evidence is sufficient to support the appellant's conviction.

Affirmed.

ROBBINS, J., agrees.

PITTMAN, J., concurs.

JOHN MAUZY PITTMAN, Judge, concurring. I concur in the result reached and join in all but the last sentence of the majority opinion. However, unlike the majority, I have not gone to the transcript, and I express no opinion on the merits of appellant's sufficiency argument.

Deborah BARNETTE *v.* ALLEN CANNING COMPANY

CA 94-649 896 S.W.2d 444

Court of Appeals of Arkansas
Division I
Opinion delivered April 5, 1995

Walters, Hamby & Verkamp, by: *Michael Hamby*, for appellant.

Davis, Cox & Wright, by: *Laura J. Andress*, for appellee.

JOHN B. ROBBINS, Judge. The appellant, Deborah Barnette, appeals the Workers' Compensation Commission's decision that she is not entitled to any temporary disability benefits beyond January 25, 1993. Ms. Barnette argues that there is no substantial evidence to support the Commission's finding that, after this date, she unjustifiably refused employment suitable to her capacity. We agree and reverse.

[redacted]

When reviewing decisions from 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 supported by substantial evidence. *Welch's Laundry & Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Phillips* v. *State*, 271 Ark. 96, 607 S.W.2d 664 (1980). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

In the case at bar Ms. Barnette suffered a compensable shoulder injury while employed as a capper at Allen Canning Company on May 27, 1992. She continued to work light duty until June 30, 1992, at which time she terminated her employment. Ms. Barnette underwent surgery in December of 1992, and her doctor released her to any duty involving one hand on January 25, 1993.

Allen Canning Company paid and continues to pay medical bills incurred as a result of Ms. Barnette's injury and it paid temporary total disability benefits through February 11, 1993. However, it controverted Ms. Barnette's claim for additional temporary disability benefits until a date yet to be determined. In denying this claim, the Commission relied on Ark. Code Ann. § 11-9-526 (1987), which provides:

> If any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the commission, the refusal is justifiable.

Specifically, the Commission found that Ms. Barnette was capable of performing light, one-handed duty after January 25, 1993, and that subsequent to this date she unjustifiably refused employment offered by Allen Canning Company which was within her physical restrictions.

Sharon Moore, a supervisor at Allen Canning Company, tes-

tified that Ms. Barnette was absent from her employment in June of 1992 due to personal problems. When Ms. Barnette came back to work and inquired about her job, she was told that she was no longer employed but that she could reapply. From that point forward, there was apparently no contact between Ms. Barnette and her former employer regarding possible employment. Ms. Moore stated, "I have always been willing to put Debbie back to work on the pick line if she would come in and inquire about it." She also stated, "I could still use her today if she wanted to do that type of work."

[redacted] Although Ms. Moore suggested that Ms. Barnette might be rehired if she reapplied for a light-duty job, this does not constitute an offer of employment as contemplated by Ark. Code Ann. § 11-9-526 (1987). There is no evidence that, after Ms. Barnette was released to one-handed duty on January 25, 1993, she was ever contacted by Allen Canning Company and offered a job. Because Ms. Barnette was never offered a job, we find that there is not substantial evidence to support the Commission's finding that Ms. Barnette unjustifiably refused employment suitable to her capacity. Therefore, we reverse and remand for the Commission to make an appropriate award of benefits.

PITTMAN and COOPER, JJ., agree.

Sharon BELCHER *v.* HOLIDAY INN

CA 94-469 896 S.W.2d 440

Court of Appeals of Arkansas
Division I
Opinion delivered April 5, 1995

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

Jones, Gilbreath, Jackson & Moll, by: *Charles R. Garner*, for appellee.

MELVIN MAYFIELD, Judge. This is the second appeal in this workers' compensation case. Appellant, Sharon Belcher, sustained a work-related back injury on September 11, 1987, which was accepted by the employer as compensable, and appellant received medical benefits plus a rating of five percent for a permanent partial impairment. Appellant was released and returned

to work for Holiday Inn in March 1988. She was terminated in July 1989 for reasons unrelated to her injury, and she subsequently obtained employment with Brownwood Life Care Center where she worked approximately eight months.

Appellant then required additional treatment for her back injury and filed a claim for additional medical benefits, for physical impairment equal to eight percent to the body as a whole, and benefits for loss of wage earning capacity. The Workers' Compensation Commission found appellant was entitled to the additional medical benefits and to the physical impairment of eight percent; however, it denied wage loss disability, in any amount, holding that Ark. Code Ann. § 11-9-522(b) (1987) barred her from receiving benefits for loss of wage earning capacity. That section provides in part that a person who has returned to work at wages equal to or greater than the person's average weekly wage at the time of the accident, is not entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by the medical evidence.

On appeal the Arkansas Court of Appeals reversed and held that Ark. Code Ann. § 11-9-522(b) (1987) "precludes a claim for wage loss benefits as a matter of law only during such time as the claimant has returned to work, obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than her average weekly wage at the time of the accident." Therefore, we remanded for the Commission to reconsider appellant's entitlement to wage loss disability benefits. *See Belcher* v. *Holiday Inn*, 43 Ark. App. 157, 868 S.W.2d 87 (1993).

On remand the Commission again held that appellant was not entitled to any wage loss disability benefits. This time it based its decision on Ark. Code Ann. § 11-9-522(c)(2) (1987), which provides:

> (2) Included in the stated intent of this section is to enable an employer to reduce or diminish payments of benefits for a functional disability, disability in excess of permanent physical impairment, which, in fact, no longer exists, or exists because of discharge for misconduct in connection with the work, or because the employee left his work voluntarily and without good cause connected with the work.

In its opinion the Commission stated that appellant was "terminated on July 20, 1989, for misconduct. Claimant then obtained employment at the Brownwood Life Care Center. Claimant worked at Brownwood for approximately eight months before voluntarily terminating her employment."

[redacted] In making this determination, the Commission stated it was based "upon a subsequent de novo review of the record," but it made no reference to any evidence upon which it was based. The findings are in conclusory language and in no way constitute sufficient findings of fact. In *Cagle Fabricating & Steel, Inc.*, 309 Ark. 365, 369, 830 S.W.2d 857, 859 (1992), the court said the Commission "was required to find as facts the basic component elements on which its conclusion was based," and that case was remanded to the Commission for "a new decision based upon a specific finding." Moreover, in its first decision in the present case, the Commission said "[b]ut for the claimant's conduct, she would still be working for the respondent," but made no finding of fact in that opinion to support its conclusion. Obviously we cannot say as a matter of law that all "conduct" is "misconduct in connection with the work" as that term is used in Ark. Code Ann. § 11-9-522(c)(2) (1987).

[redacted] Because we must remand this matter to the Commission for a new determination based upon specific findings of fact, we briefly give some guidance in the law that may be involved. On the issue of misconduct in connection with work, see *Nibco, Inc.* v. *Metcalf & Daniels*, 1 Ark. App. 114, 613 S.W.2d 612 (1981), and concerning leaving work voluntarily, see *JB Drilling Co.* v. *Lawrence*, 45 Ark. App. 157, 873 S.W.2d 817 (1994).

Reversed and remanded for proceedings consistent with this opinion.

ROBBINS and ROGERS, JJ., agree.

Sharon PENDLETON a/k/a Sharon McCullar
v. STATE of Arkansas

CA CR 94-601 896 S.W.2d 600

Court of Appeals of Arkansas
Division II
Opinion delivered April 5, 1995

[redacted]

[redacted]

Norman M. Smith, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant Sharon Pendleton appeals from an order revoking her probation and sentencing her to serve ten years in the Arkansas Department of Correction. Her only argument on appeal is that she was denied her constitutional right to assistance of counsel.

On March 2, 1993, appellant pleaded guilty to the charge of "Hot Checks, a violation of 5-37-302, a Class 'C' Felony (three counts)" and was placed on supervised probation for a period of three years subject to certain conditions. On November 3, 1993, the State filed a petition to revoke alleging appellant violated the conditions of her probation.

On December 13, 1993, appellant was served with a copy of an order setting a hearing on the petition to revoke for December 20, 1993. On January 10, 1994, a letter dated January 7, 1994, was filed in which the court reset the revocation hearing for Jan-

uary 24, 1994, because "there is a conflict with another court setting."

On January 24, 1994, appellant appeared without an attorney and the following exchange took place:

THE COURT: Ms. Pendleton, do you have an attorney?

MS. PENDLETON: No, sir.

THE COURT: Why not?

MS. PENDLETON: Because I couldn't afford one.

THE COURT: Are you employed?

MS. PENDLETON: Yes, sir.

THE COURT: How long have you been employed?

MS. PENDLETON: Since, uh, July. Well, since I was fourteen. I've been working in Little Rock since then.

THE COURT: Have you talked to any attorneys?

MS. PENDLETON: Sir?

THE COURT: Have you talked to any attorneys?

MS. PENDLETON: Uh, I tried to contact Reggie McCollum [SIC], but, uh, he wasn't in his office.

THE COURT: That's because he doesn't have a license to practice law right now.

MS. PENDLETON: Oh, that's . . . okay.

THE COURT: Is he the only lawyer you talked to?

MS. PENDLETON: Yes, sir, tried to talk to, yes, sir.

THE COURT: You didn't talk to anybody around here?

THE DEFENDANT: Uh, no.

THE COURT: Any other lawyer in Little Rock, Pine Bluff, anywhere?

THE DEFENDANT: No, sir.

THE COURT: Let's see, you've known about this since

December the 10th, when it was set before.

MS. KNOLL (appellant's probation officer): You continued it for her to get an attorney.

THE COURT: Let's see. Actually, you've known about it since November. And it was re-set from December the 20th, to today so you could get an attorney. I'm going to assume that you have waived an attorney. So, just have a seat.

The court proceeded to hear the evidence and appellant appeared pro se. At the conclusion of the hearing, the trial court revoked appellant's probation and sentenced her to serve ten years in the Arkansas Department of Correction.

[redacted] Appellant argues on appeal that she was denied her constitutional right to assistance of counsel. This argument is based on *Brooks* v. *State*, 36 Ark. App. 40, 819 S.W.2d 288 (1991). In *Brooks*, we said:

> The Constitutions of both the United States and the State of Arkansas guarantee an accused the right to have the assistance of counsel for his defense, and it is generally recognized that no sentence involving loss of liberty can be imposed where there has been a denial of counsel. This right extends to revocation hearings if sentencing is to follow revocation. Although the right to counsel is a personal right and an accused may knowingly and intelligently waive counsel at various stages of the proceedings, every reasonable presumption must be indulged against the waiver of this fundamental right.
>
> . . . The accused must have full knowledge and adequate warning concerning his rights and a clear intent to relinquish them before waiver can be found. Waiver of the right to counsel presupposes that the court has discharged its duty of advising appellant of his right to counsel, questioning him as to his ability to hire independent counsel, and explaining the desirability of having assistance of counsel during the trial and the problems attending one representing himself. This last requirement has been held especially important since a party appearing *pro se* is responsible for any mistakes he makes in the conduct of his trial and he receives no special consideration on appeal. The burden

> is on the State to show that an accused voluntarily and intelligently waived his right to counsel. Presuming waiver from a silent record is impermissible.

36 Ark. App. at 43-44, 819 S.W.2d at 290 (citations omitted).

Here, the record does not show that appellant was informed of her right to counsel, the consequences of failure to obtain counsel, or the alternatives to pro se representation if she was unable to retain independent counsel. Although the trial court stated appellant's case was reset from December 20 so she could get an attorney, there is no evidence regarding any proceeding held December 20, 1993. We cannot tell from the record whether a hearing was actually held on that date. Moreover, the letter informing appellant that the hearing had been reset states it was reset due to "a conflict with another court setting." Further, when appellant was asked whether she had an attorney she stated she did not have an attorney because she could not afford one and there is no evidence that appellant was informed that the court would appoint counsel without expense to her.

On the record before us, we do not think the appellant waived her right to counsel.

The State argues that although appellant did not waive her right to counsel, she forfeited that right by appearing on January 24 without an attorney; without having spoken to one about representing her despite being given adequate time to obtain an attorney; and without reasonable excuse for not having obtained one. The State cites *Burns* v. *State*, 300 Ark. 469, 780 S.W.2d 23 (1989) and *Tyler* v. *State*, 265 Ark. 822, 581 S.W.2d 328 (1979), in support of this argument. However, we think these cases are distinguishable.

In *Burns*, a public defender was appointed to represent the appellant. Subsequently, the appellant asked for a new attorney because he did not feel he was being properly represented. The trial court denied appellant's request and appellant moved for a continuance in order to prepare his case. The trial court denied the continuance and asked appellant if he intended to represent himself. Appellant said he would if he could not get another attorney. Our supreme court held the trial court was correct in denying appellant's motion for a continuance. The court noted

appellant's appointed counsel was acting diligently and competently in his behalf; that the trial court made appellant well aware of the dangers and disadvantages of self-representation; that the trial court continually encouraged the appellant to use his appointed counsel, pointing out that the attorney was trained to go to court, while appellant was not; and that the trial court required appellant's appointed counsel to stand by and to assist when the circumstances dictated.

In *Tyler* the appellant engaged an attorney who filed a motion for discovery. The State was granted a continuance in order to comply with the motion and to better prepare for trial. On the morning of trial, appellant's attorney stated the defense was not ready and the appellant had discharged him because "defendant wants a continuance." Appellant did not deny the statement. The trial judge refused to reset the case remarking it seemed a ploy by people in the county to show up in court on the day of trial without counsel in order to get a continuance. The judge offered to try another case set for that day first so appellant could get an attorney and his witnesses while that trial was in progress. Appellant stated there was no way he could get his witnesses that day. When the judge stated it might be the next day before appellant's case was started and asked appellant if he desired the additional time, appellant responded there was not enough time to prepare a lawyer. The trial then proceeded. Our supreme court held it was not error to deny the continuance. It stated appellant's counsel was required to remain in the courtroom throughout the trial to assist appellant and during an in camera hearing on another matter the judge reminded appellant his attorney was present, sitting beside him in the courtroom, and ready to assist him in any way.

In the instant case, contrary to *Burns* and *Tyler*, appellant never had counsel, there is no evidence that the trial court made appellant aware of the dangers and disadvantages of self-representation, and there was no one sitting by to assist appellant if necessary. On the facts of this case, we cannot agree appellant forfeited her right to counsel.

Reversed and remanded.

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

Allen SMITH *v.* STATE of Arkansas

CA CR 94-687 896 S.W.2d 450

Court of Appeals of Arkansas
Division I
Opinion delivered April 12, 1995
[Rehearing denied May 17, 1995.*]

Etoch Law Firm, by: *Louis A. Etoch*, for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted in a jury trial of two counts of aggravated assault for which he was sentenced to six years in the Arkansas Department of Correction on each count to run concurrently. Judgment was entered on January 4, 1994. The appellant's abstract shows that he filed a motion for a new trial on January 24, 1994. The notice of appeal abstracted by the appellant was filed on February 22, 1994. An order denying the appellant's motion for a new trial was entered on April 13, 1994.[1] We do not address the arguments raised by the appellant on appeal because we conclude that he failed to file a timely notice of appeal.

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*Mayfield, J., would grant.

[1]Although the order denying the appellant's motion was entered on April 13, 1994, nunc pro tunc February 21, 1994, a judgment or order is entered within the meaning of Rule 4 when it is filed with the clerk of the court in which the claim was tried. Ark. R. App. P. 4(e).

Rule 4(a) of the Arkansas Rules of Appellate Procedure provides that "a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from." Rule 4(b) extends the time for filing a notice of appeal upon a timely filing in the trial court of a motion for judgment notwithstanding the verdict under Ark. R. Civ. P. 50(b), a motion to amend the court's findings of fact or to make additional findings under Ark. R. Civ. P. 52(b), or a motion for a new trial under Ark. R. Civ. P. 59(b). Under Rule 4(c), if a timely motion listed in section (b) is filed in the trial court by any party, the time for appeal for all parties shall run from the entry of the order granting or denying a new trial or granting or denying any motion.

Rule 4(c) also provides that if the trial court neither grants or denies the motion within thirty days of its filing, the motion will be deemed denied as of the thirtieth day. A notice of appeal filed before the disposition of any such motion or prior to the expiration of the thirty-day period shall have no effect. Rule 4(c) applies to criminal matters where the motion made following the judgment of conviction is analogous to a civil motion made under Rule 50(b), Rule 52(b) or Rule 59(b). *Fuller* v. *State*, 316 Ark. 341, 872 S.W.2d 54 (1994); *Enos* v. *State*, 313 Ark. 683, 858 S.W.2d 72 (1993).[2]

We hold that the appellant failed to file a timely notice of appeal and as a result, this Court lacks jurisdiction to entertain the matter. We, therefore, dismiss the appeal.

Appeal dismissed.

PITTMAN and ROBBINS, JJ., agree.

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[2]We note the Supreme Court's per curiam *In re Amendment to Rule 36.9 of the Arkansas Rules of Criminal Procedure*, 315 Ark. Appx. 770 (1994) effective January 31, 1994, amended Rule 36.9 to specifically incorporate Rule 4(c) into the Arkansas Rules of Criminal Procedure. Our holding that the appellant's notice of appeal was not timely filed makes it unnecessary to decide whether the timeliness of the appellant's motion for a new trial is to be determined by reference to the 10-day period set out in Rule 59(b) (*see Fuller, supra*), or by reference to the 30-day period prescribed by Ark. R. Crim. P. 36.22 since in either event the notice of appeal was untimely.

Danny SNOWDEN *v.* Joe T. BENTON, III,
Russell A. Benton and Mountain Pine Timber, Inc.

CA 94-513 896 S.W.2d 451

Court of Appeals of Arkansas
Division I
Opinion delivered April 12, 1995

M. Edward Morgan, for appellant.

Graddy & Adkisson, P.A., by: *Larry E. Graddy*, for appellees.

JAMES R. COOPER, Judge. The appellant in this civil case sought an appeal from an order of the Faulkner County Circuit Court entered December 20, 1993. The appellant filed a motion for a new trial on December 22, 1993. No ruling was ever made on the new trial motion. The appellant filed a notice of appeal on January 20, 1994, from the circuit court's order of December 20, 1993. We are constrained to dismiss this appeal because the notice of appeal was untimely.

A notice of appeal filed prior to the disposition of a motion for a new trial is without effect under Ark. R. App. P. 4(c). The Rule provides that, when such a post-trial motion has been filed, a new notice of appeal must be filed within the prescribed time from the entry of the order dealing with the post-

trial motion or from the expiration of the thirty days allowed in the absence of a ruling. *Lawrence Brothers, Inc.* v. *R.J. "Bob" Jones Excavating Contractor, Inc.*, 318 Ark. 328, 884 S.W.2d 620 (1994). Because the appellant's notice of appeal was filed before the expiration of the thirty-day period, it was without effect under Rule 4(c) and we must dismiss the appeal.

Appeal dismissed.

PITTMAN and ROBBINS, JJ., agree.

TRANS UNION CORPORATION *v.* Harold CRISP

CA 93-1167 896 S.W.2d 446

Court of Appeals of Arkansas
Division II
Opinion delivered April 12, 1995

[redacted]

[redacted]

Richard T. Donovan, for appellant.

Daggett, Van Dover & Donovan, by: *Joe R. Perry*, for appellee.

JOHN B. ROBBINS, Judge. Appellee, Harold Crisp, filed suit against appellant, Trans Union Corporation, a credit reporting agency, under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681—1681t (1988), contending that appellant reported incorrect information and failed to correct the information after being advised of the mistake. The incorrect information consisted of a bankruptcy and a state and federal tax lien, which appellant failed to show had been satisfied. In his complaint, appellee alleged that appellant negligently and willfully failed to follow reasonable procedures to assure the accuracy of the report, to disclose the source of the information in appellee's credit file, and to promptly delete information found upon investigation to be inaccurate. After a jury trial on the merits, appellee was awarded $15,000.00 in compensatory damages, $25,000.00 in punitive damages, and attorney's fees. We affirm.

On appeal, appellant raises four points: (1) that its inclusion of two tax liens on appellee's credit report did not violate the Fair Credit Reporting Act because the information was accurate, any inaccuracy was not the result of failure to follow reasonable procedures, and the inclusion of the tax liens did not proximately cause appellee any damages; (2) that appellant is not liable for the inclusion of the erroneous bankruptcy entry because it was not a result of appellant's failure to follow reasonable procedures and did not cause appellee to be denied credit;

(3) that appellant did not violate the Fair Credit Reporting Act's requirements of re-investigation and disclosure; and (4) that appellant did not willfully violate the Fair Credit Reporting Act and, therefore, appellee is not entitled to punitive damages.[1]

Appellant's first point concerns, in part, the trial court's denial of a summary judgment and directed verdict on issues concerning appellant's inclusion of two tax liens on appellee's credit report. Although a tax lien by the Internal Revenue Service and one by the State of Arkansas had been filed against appellee, these liens had been satisfied at the time appellant issued appellee's credit report. Notwithstanding this fact, the credit report reflected these liens without showing they had been satisfied. In his complaint and at trial, appellee contended that the inclusion of this information on his credit report without also showing the satisfaction of the liens violated the Fair Credit Reporting Act because this inaccuracy resulted from appellant's failure to follow reasonable procedures designed to assure maximum accuracy of its reports.

Appellant maintained that its reporting of the tax liens was accurate and moved for summary judgment, seeking dismissal of appellee's claims insofar as they related to the tax liens. However, it does not appear from appellant's abstract or the record that this motion was ever ruled on by the trial court. A summary judgment movant is precluded from raising on appeal the issue of whether the trial court erred in its denial of his motion for summary judgment where the movant failed to secure a ruling on his motion. *Kulbeth* v. *Purdom*, 305 Ark. 19, 21, 805 S.W.2d 622 (1991). Therefore, we need not address the appellant's argument on this point.

Appellant also contends that the trial court erred in refusing to enter a directed verdict on this issue. At the conclusion of appellee's case, appellant moved for a directed verdict, contending that the federal and state liens were accurate. The trial court, however, denied appellant's motion, and appellant

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[1]We certified this appeal to the Arkansas Supreme Court pursuant to Ark. Sup. Ct. R 1-2(d) on our belief that this case presented a question about the law of torts and, therefore, was excepted from our jurisdiction. Ark. Sup. Ct. R. 1-2(a)(16). The supreme court declined to accept the case and remanded it for our decision.

then presented its case. By going forward with proof after its motion for directed verdict was denied, the appellant waived its right to allege any error regarding the trial court's failure to direct a verdict. *See Higgins* v. *Hines*, 289 Ark. 281, 283, 711 S.W.2d 783 (1986). Because the motion for a directed verdict on this issue was not renewed at the close of the appellant's case, it was not preserved for our review. *Id.*

The remainder of appellant's arguments on his first, second, and third points concern sufficiency of the evidence. Appellant contends that appellee failed to prove that appellant failed to follow reasonable procedures designed to assure maximum possible accuracy; that appellee failed to prove that the inclusion of the tax liens on appellee's credit report resulted in a denial of credit; that appellee introduced no evidence to show that the erroneous bankruptcy entry resulted from appellant's failure to follow reasonable procedures; that appellee failed to show the erroneous bankruptcy entry caused him to be denied credit; and that appellee failed to show that appellant violated the Fair Credit Reporting Act's reinvestigation requirement. These points are all challenges to the sufficiency of the evidence, and because appellant failed to renew its motion for directed verdict at the conclusion of trial, it has waived these points on appeal. It has consistently been held that a motion for directed verdict must be made or renewed at the conclusion of all the evidence; otherwise, questions about the sufficiency of the evidence are waived. *Willson Safety Prods.* v. *Eschenbrenner*, 302 Ark. 228, 232, 788 S.W.2d 729 (1990).

In its reply brief, appellant admits that it failed to renew its directed verdict motion but argues that its discussion regarding jury instructions was tantamount to a renewal of this motion. Appellant has cited no authority for this argument. An assignment of error unsupported by convincing argument or authority will not be considered on appeal unless it is apparent, without further research, that the assignment of error is well taken. *Smith* v. *Smith*, 41 Ark. App. 29, 32, 848 S.W.2d 428 (1993). Moreover, the discussion on which appellant relies does not appear in its abstract nor the record, and counsel for appellee denies any specific recollection of such discussion. Rule 6(d) of the Arkansas Rules of Appellate Procedure provides a procedure which a party may use when no report of a proceeding has been

made. Appellant, however, has not invoked this procedure. The burden is on the appellant to bring up a record sufficient to demonstrate that the trial court was in error. *See Bratton* v. *Gunn*, 300 Ark. 140, 777 S.W.2d 219 (1989). The record before us does not demonstrate that the appellant took any action at the end of the trial to preserve these sufficiency arguments, thus we need not address them.

[redacted] Appellant's fourth and final point is that there was insufficient evidence to support the jury's award of punitive damages. By agreement of the parties, the trial was bifurcated and, after the jury returned a verdict of $15,000.00 for compensatory damages, the case was reopened and submitted to the jury on the issue of punitive damages. The jury then returned a verdict of $25,000.00 for punitive damages. Although appellant did not specifically move for a directed verdict on this issue, its counsel stated to the court that there was insufficient proof to submit this issue to the jury. Therefore, this issue was preserved for appeal.

Section 1681n of the Fair Credit Reporting Act provides:

> Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of —
>
> (1) any actual damages sustained by the consumer as a result of the failure;
>
> (2) such amount of punitive damages as the court may allow; and
>
> (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Appellant contends there was no evidence to support a finding of willfulness on its behalf.

[redacted] Punitive damage awards are permitted even without malice or evil motive, but the violation must have been willful under 15 U.S.C.A. § 1681n. *Pinner* v. *Schmidt*, 805 F.2d 1258,

1263 (5th Cir. 1986), *cert. denied* 483 U.S. 1022 (1987). In each case where punitive damages have been allowed, the defendant's conduct involved willful misrepresentations or concealments. *Id.* To be found in willful noncompliance, a defendant must have "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Stevenson* v. *TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993).

In the case at bar, appellee alleged that appellant willfully violated § 1681e(b), § 1681g, and § 1681h of this act. Because we find substantial evidence to support the conclusion that the appellant willfully violated § 1681g and § 1681h of the act we do not address the matter of § 1681e(b). We find that the issue of punitive damages was properly before the jury.

Sections 1681g and 1681h require a credit reporting agency to disclose the nature and substance of all information and the sources of such information, and read as follows:

> § 1681g. Disclosures to consumers
>
> (a) Information on file; sources; report recipients
>
> Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:
>
> (1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.
>
> (2) The sources of the information;. . .
>
> * * *
>
> § 1681h. Conditions of disclosure to consumers
>
> (a) Times and notice
>
> A consumer reporting agency shall make the disclosures required under section 1681g of this title during normal business hours and on reasonable notice.
>
> (b) Identification of consumer
>
> The disclosures required under section 1681g of this title shall be made to the consumer —

> (1) in person if he appears in person and furnishes proper identification; . . .
>
> * * *

[redacted] Appellee testified that, after he was refused credit by Ford Motor Credit Company and Helena Bank, he obtained a copy of his credit report and learned of the erroneous bankruptcy entry and the failure to show that the tax liens had been satisfied. He stated that he then called appellant about the erroneous report but its representative refused to talk to him over the telephone and told him that he would have to come to the Memphis office. He stated that he went to the Memphis office the following day but was told there that he would have to deal with appellant's Ohio office. Although two witnesses for appellant testified that they work in the Memphis office, did not remember seeing appellee, and disputed that he would have been turned away from the Memphis office, the credibility of these witnesses' testimony was a question for the jury to determine. *See Kempner* v. *Schulte*, 318 Ark. 433, 885 S.W.2d 892 (1994).

Appellee also notes that, when he attempted to obtain disclosure of the information from appellant by interrogatories after suit had been filed, appellant responded:

> TUC is a credit reporting agency and utilizes a myriad of different methods to obtain credit information on Mr. Crisp and all other consumers. There is not enough time or room in this document to acquaint Plaintiff with a method of business that has taken years and substantial money, time and effort to perfect. Suffice it to say, TUC obtains information on Plaintiff, as well as other consumers from creditors and public records, as well as other sources.

Assuming the jury believed the testimony of appellee, it could have inferred that appellant's failure to help appellee when he visited the Memphis office was willful. Therefore, we affirm the award of punitive damages.

Affirmed.

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

FARM BUREAU MUTUAL INSURANCE COMPANY of ARKANSAS, INC. *v.* Willa May SUDRICK

CA 94-141 896 S.W.2d 452

Court of Appeals of Arkansas
En Banc
Opinion delivered April 19, 1995

[redacted]

Kincade Law Office, by: *Ronald P. Kincade* and *Osmon, Chism & Ethredge, P.A.*, by: *Kerry D. Chism*, for appellant.

J. Scott Davidson and *David E. Miller*, for appellee.

JOHN MAUZY PITTMAN, Judge. Farm Bureau Mutual Insurance Company of Arkansas, Inc., brings this appeal contending that the trial court erred in granting appellee's motion for judgment notwithstanding the verdict. We conclude that the trial court's order granting the motion was entered at a time when the trial court had no jurisdiction or authority to so act, and we reverse and dismiss.

Appellee filed this action against appellant, her insurer, seeking to recover insurance proceeds on account of a fire loss. After a trial, the jury returned a verdict in which it found "for" appellee but awarded her no damages. On August 5, 1993, the court entered its judgment in accordance with the jury verdict. On August 9, appellee filed a motion for judgment notwithstanding the verdict

or a new trial. On September 23, forty-five days after appellee's motion was filed, the trial court entered an order granting appellee's motion for judgment n.o.v. and awarding her a judgment against appellant for $24,487.62. On September 27, appellant filed its notice of appeal.[1]

Appellee's August 9 motion for judgment n.o.v. or a new trial was timely filed within ten days of the August 5 judgment. Ark. R. Civ. P. 50(b), 59(b). However, because the trial court neither granted nor denied the motion within thirty days of its filing, the motion was deemed denied as of the thirtieth day, September 8, 1993. Ark. R. App. P. 4(b) and (c). The trial court's failure to act on appellee's motion within thirty days of its filing resulted, by operation of law, in that court's loss of jurisdiction to decide the motion. Therefore, the September 23 order purporting to grant appellee's motion for judgment n.o.v. was void and of no effect. *See Reis* v. *Yates*, 313 Ark. 300, 854 S.W.2d 335 (1993); *Arkansas State Highway Commission* v. *Ayres*, 311 Ark. 212, 842 S.W.2d 853 (1992); *Wal-Mart Stores, Inc.* v. *Isely*, 308 Ark. 342, 823 S.W.2d 902 (1992); *Phillips* v. *Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991); *Deason* v. *Farmers and Merchants Bank*, 299 Ark. 167, 771 S.W.2d 749 (1989).

Reversed and dismissed.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the opinion of the majority in this case. The opinion refuses to consider the merits of the case because it holds that the trial court did not have jurisdiction to grant appellee's motion for judgment notwithstanding the verdict. The reasoning is that the motion was granted forty-five days after it was filed, but it had been denied by operation of law at the end of thirty days after it was filed.

The problem I have is that appellant's notice of appeal, as

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[1]The notice of appeal states that appellant appeals from a judgment "entered on August 4, 1993." Actually, no judgment was entered on that date. The only judgment by which appellant was aggrieved was the September 23 judgment, and every argument appellant makes on appeal is directed at the September 23 judgment. Under these circumstances, we do not think that appellant's failure to designate the September 23 judgment in its notice of appeal is fatal to its appeal of that judgment. *See Jasper* v. *Johnny's Pizza*, 305 Ark. 318, 807 S.W.2d 644 (1991).

abstracted by the appellant, states that appellant is appealing from a judgment entered August 4, 1993, and the abstract states that the notice of appeal was filed on September 27, 1993. Obviously, the notice of appeal was filed more than thirty days after August 4, 1993, and our Appellate Rule 4(a) requires a notice of appeal to be filed within thirty days from the entry of the judgment from which the appeal is taken.

According to the majority opinion, the trial court granted the appellee's JNOV motion by entering judgment for her against the appellant on September 23, 1993. However, appellant's abstract does not show that a notice of appeal was ever filed from that judgment. It is well settled that the "record on appeal is confined to the abstract," *Wynn* v. *State*, 316 Ark. 414, 417, 871 S.W.2d 593, 594 (1994); and our review is upon the record as abstracted, *Zini* v. *Perciful*, 289 Ark. 343, 711 S.W.2d 477 (1986). Moreover, it is not our practice to go to the record to reverse the trial court.

It may be that the date stated in the notice of appeal is incorrect and that my view is highly technical; however, I think the majority opinion is based on a point that is also highly technical. Actually, I would like to decide the case on its merits — and that surely would be more satisfactory to the parties.

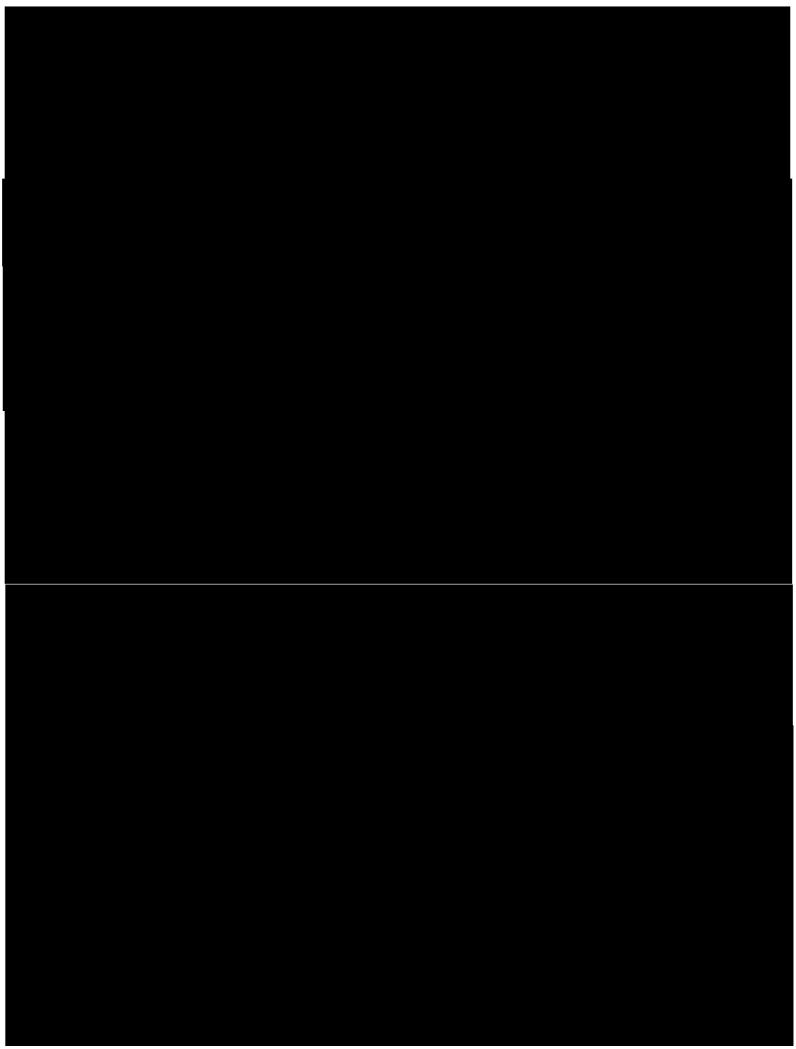
But the only notice of appeal abstracted was filed more than thirty days after August 4, 1993, and the abstract does not show any notice of appeal from the judgment entered September 23, 1993. Therefore, I think the appellant's appeal must be dismissed.

COOPER, J., joins in this dissent.

David SCHWEDE *v.* STATE of Arkansas

CA CR 94-587 896 S.W.2d 454

Court of Appeals of Arkansas
En Banc
Opinion delivered April 19, 1995



[redacted]

Malcolm R. Smith, P.A., for appellant.

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

JUDITH ROGERS, Judge. Appellant was found guilty during a bench trial of aggravated assault and sentenced to two years in the Arkansas Department of Correction. On appeal, appellant challenges the sufficiency of the evidence to support his conviction and argues that the trial judge erred in not recusing. We affirm.

[redacted] Appellant first argues that the evidence is not sufficient to sustain his conviction for aggravated assault. The test for determining sufficient proof is whether there is substantial evidence to support the verdict; on appeal, the court reviews the evidence in the light most favorable to the appellee and sustains the conviction if there is any substantial evidence to support it. Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Tigue* v. *State*, 319 Ark. 147, 889 S.W.2d 760 (1994).

Arkansas Code Annotated § 5-13-204 (Repl. 1993) provides that:

> (a) A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person.

The record, when viewed in the light most favorable to the state, reveals that on January 16, 1993, Paul West asked appellant to leave the Prairie's Club in Dewitt after appellant had caused a disturbance. After kicking at the door of the club from the outside, appellant proceeded to sit in his truck and "rev" the engine. Mr. West and John Lauderdale went outside to again ask

appellant to leave the premises. According to Mr. West and Mr. Lauderdale, while they were standing approximately five feet from appellant's truck, appellant said "I will show you mother f*****s what a gun is." Appellant then reached for a gun under his seat, pointed it at Mr. West and Mr. Lauderdale, while cocking the hammer. Both Mr. West and Mr. Lauderdale testified that when they heard the hammer cock they immediately ran away.

Appellant argues that the evidence is insufficient to support a conviction for aggravated assault. He argues that if the gun could not be used as a bludgeon or create a danger of a violent response, then there was a necessity, under *Holloway* v. *State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986)(overruled in part by *Doby* v. *State*, 290 Ark. 408, 720 S.W.2d 694 (1986)), for direct proof that the gun was loaded for there to be the creation of a substantial danger. Appellant contends that there is no evidence that the gun was loaded, thus his conviction should be overturned. We find no merit in appellant's argument.

First, we point out that appellant's reliance on *Holloway* v. *State* is misplaced. We found in *Holloway* that the jury could infer from the evidence in that case that the gun was loaded. We did not hold that direct proof of a gun being loaded was required in establishing the creation of a substantial danger.

[redacted] In *Wooten* v. *State*, 32 Ark. App. 198, 799 S.W.2d 560 (1990), we recognized that our aggravated assault statute is not based upon the use of a deadly weapon or the creation of fear, but requires the creation of "substantial danger of death or serious physical injury to another person." We found in *Wooten* that, based on the evidence that appellant did not point the gun at the officer or expressly threaten the officer, the appellant was not guilty of aggravated assault. In *Wooten*, we referred to the case of *Johnson* v. *State*, 132 Ark. 128, 200 S.W 982 (1918), where it was said that "the act of drawing a pistol, if accompanied by threats evidencing an intention to use it on the person threatened, constitutes an assault."

[redacted] In this case, the record reveals that appellant made a threatening statement, pointed a pistol at Mr. West and Mr. Lauderdale, and then cocked the hammer. Based on this evidence, like that considered in *Holloway*, the trier of fact could infer from the circumstances that the gun was loaded. We cannot say that

there is no substantial evidence upon which the trial court could find appellant guilty of aggravated assault. *Wooten* v. *State, supra.*

Appellant also argues that the trial judge demonstrated the appearance of bias against him during trial, and thus should have recused. We disagree.

At the close of the State's case, appellant moved for a directed verdict. Appellant argued that the evidence was insufficient under the cases of *Holloway, supra* and *Wooten, supra*, and appellant suggested that the court take a recess to review those cases. The trial judge was amenable to appellant's suggestion and called a recess. When the trial resumed, appellant restated his motion for a directed verdict, and the State responded. In denying the motion, the court discussed at length the aggravated assault statute and the *Holloway* decision, and concluded by saying:

> . . . that it can reasonably be inferred, based upon the evidence before this Court, that the gun was loaded. For why would the Defendant have cocked the gun in preparation of firing the gun if it had been empty. The evidence is found to be amply sufficient to sustain a conviction of aggravated assault, and the court so finds that the defendant is guilty as charged.
>
> I — I'm — Mr. Smith (appellant's counsel), I'm sorry. Did you wish to put on any proof?"

Appellant's counsel responded that he did wish to put on evidence, but, in view of the court's remark, he really didn't know how to proceed. The court then stated "[a]ll right, let me just put it this way. I was addressing your motion, and giving my reasons for that. Now, if you wish to move forward, I will allow you to so do." Appellant requested a brief recess, and afterwards he moved for a mistrial and for the trial judge's recusal, based on the argument that the trial court had already determined appellant's guilt. The motions were denied, and appellant proceeded to put on proof in his defense.

A judge's recusal is discretionary, and his decision will not be reversed absent a showing of an abuse of discretion. Further, judges are presumed to be impartial and the party seeking disqualification bears a substantial burden in proving otherwise. *Duty* v. *State*, 45 Ark. App. 1, 871 S.W.2d 400 (1994).

In *Ross* v. *State*, 267 Ark. 1027, 593 S.W.2d 475 (1994), the supreme court found that where the trial judge expressed impatience and irritation in response to statements made by a witness and conducted his own cross-examination of the witness, it gave the appearance of bias against appellant and it was error for the trial judge to refuse to step down from the case. Also, in *Burrows* v. *City of Forrest City*, 260 Ark. 712, 543 S.W.2d 488 (1976), the supreme court held that the trial judge should have recused from a revocation hearing after he told appellant's counsel that appellant should "bring his toothbrush with him," together with other statements which had been made. The supreme court found that these statements could be interpreted to mean that the trial judge's impartiality in the exercise of his judicial discretion was impaired. We find the facts in those two cases quite distinguishable from the evidence in the case at bar.

[redacted] In this case, the record reflects that the trial judge was specifically responding to appellant's lengthy motion for a directed verdict. The trial judge was considering the cases of *Holloway* and *Wooten* in comparison to the facts of this case and also considering the evidence of guilt in light of appellant's motion. We consider the court's remark that appellant was "guilty" as nothing more than a misstatement. The judge immediately corrected himself, apologized to appellant's counsel, and allowed appellant to present his case. Furthermore, the record does not indicate any other instances where the trial court intimated bias or prejudice toward appellant. From this record, we cannot conclude that the one misstatement by the trial judge, when viewed in context, reveals the level of bias or prejudice toward appellant such that the judge's impartiality was seriously in doubt. Therefore, we cannot say that the trial court abused its discretion in not recusing from the proceedings.

Affirmed.

COOPER, ROBBINS and MAYFIELD, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from the majority's finding that the trial judge did not abuse his discretion in refusing to recuse from the proceedings. The trial judge's statements that he found the evidence sufficient to sustain the conviction and the defendant guilty as charged conflict with the presumption of innocence to which the appellant was enti-

tled. In making those comments, I believe that the trial judge gave the appearance of having a mind-set which could not be reconciled with the proposition that the trial court was committed to hear all relevant, credible evidence, weighing it and arriving at a judicious result. *See Ross* v. *State*, 267 Ark. 1027, 593 S.W.2d 475 (1980).[1]

Where the trial judge sits as a finder of fact, the appearance of fairness in trial proceedings becomes even more important. *Id.*; *Burrows* v. *Forrest City*, 260 Ark. 712, 543 S.W.2d 488 (1976). The proper administration of the law requires not only that judges refrain from actual bias, but also that they avoid all appearances of unfairness. *Bolden* v. *State*, 262 Ark. 718, 561 S.W.2d 281 (1978). In *Farley* v. *Jester*, 257 Ark. 686, 520 S.W.2d 200 (1975), our Supreme Court stated:

> [C]ourt proceedings must not only be fair and impartial—they must appear to be fair and impartial. This factor is mentioned in a Comment found in 71 Michigan Law Review 538, entitled, "Disqualification of Interest of Lower Federal Court Judges: 28 U.S.C. § 455", as follows:
>
> > Another factor to be considered in a judge's decision to disqualify is the contention that the appearance of impartiality is as important, if not more so, than actual impartiality. In 1952, Justice Frankfurter explained his disqualification in a case by stating that 'justice should reasonably appear to be disinterested as well as be so in fact.' The Supreme Court gave support to this view in the due process context when in *Murchison* Justice Black wrote for the Court:
> >
> > > (T)o perform its high function in the best way 'justice must satisfy the appearance of justice.'
> >
> > More recently the Court set aside an arbitration award and stated that '(a)ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.'

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[1]I wish to make it clear that I do not intend, by anything said in this dissent, to impugn the integrity or fairness of the trial judge. I really do not question whether the appellant got a fair trial — only that he did not have a trial which *appeared* fair.

257 Ark. at 692, 520 S.W.2d at 203-204.

The Supreme Court stated in *Patterson* v. *R.T.*, 301 Ark. 400, 784 S.W.2d 777 (1990):

> Of course, a judge trying a case without a jury may develop "bias" as the trial progresses, and that "bias" ultimately may result in the court's judgment. It is, however, the communication of that bias at inappropriate times and in inappropriate ways that will cause us to reverse. That is what has happened in this case. While we suggest no knowing violation or intentional misconduct on the part of the chancellor, we reverse this decision because it was so tainted by the appearance of prejudgment.

301 Ark. at 407, 784 S.W.2d at 781.

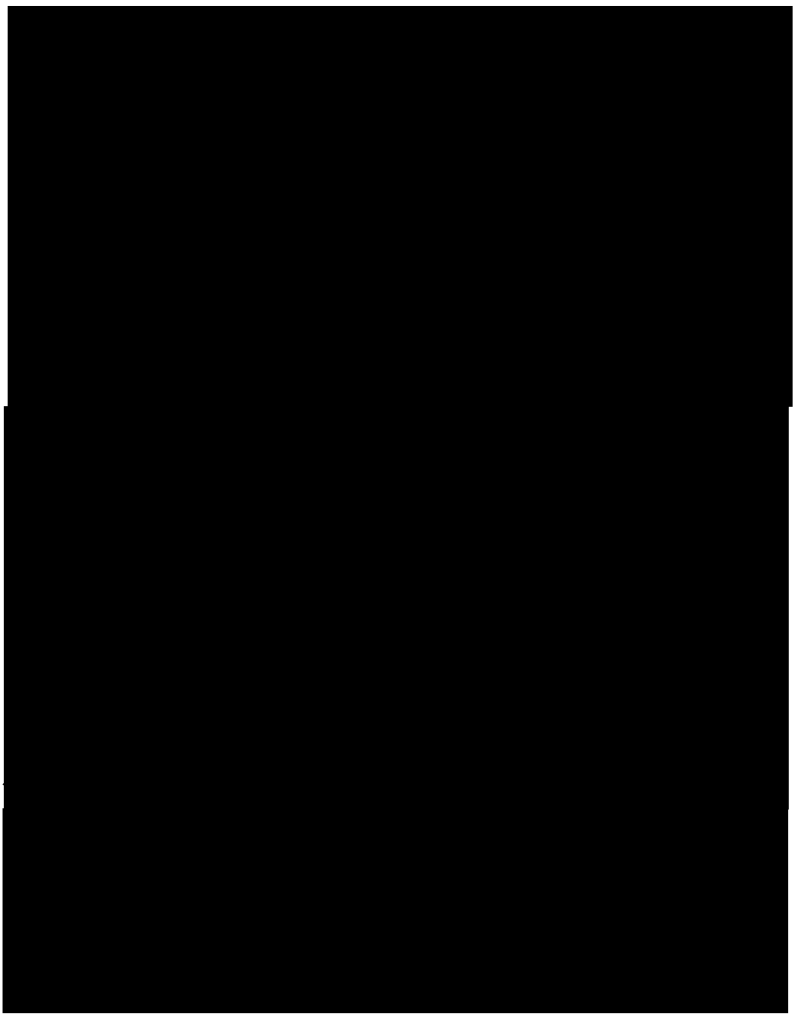
Here, the trial judge's comments gave the appearance that the appellant's guilt had been predetermined. Moreover, the appearance of fairness in the case at bar was even more important because the trial judge was sitting as a finder of fact. *See Ross* v. *State, supra.* I believe that to "satisfy the appearance of justice," the trial judge should have resolved the issue in favor of the appearance of fairness and disqualified himself.

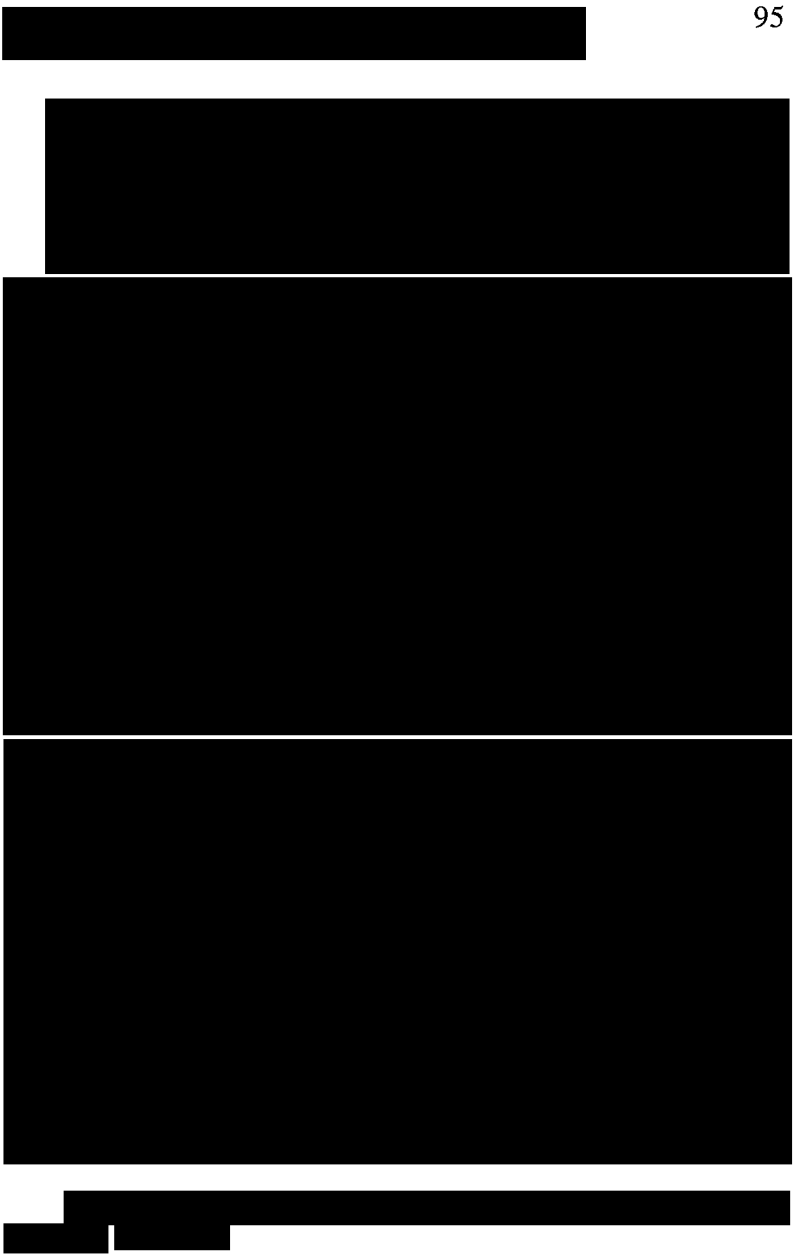
ROBBINS and MAYFIELD, JJ., join in this dissent.

Edgar JACKSON *v.*
CIRCLE T EXPRESS and Second Injury Fund

CA 94-557 896 S.W.2d 602

Court of Appeals of Arkansas
Division I
Opinion delivered May 3, 1995





Walker Law Firm, by: *Eddie H. Walker*, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *E. Diane Graham*, for appellee Circle T Express.

Terry Pence, for appellee Second Injury Fund.

JAMES R. COOPER, Judge. The appellant appeals from a decision of the Workers' Compensation Commission finding that Circle T Express and the Second Injury Fund were not precluded from raising the issue of compensability and that the appellant failed to prove that he sustained an injury arising out of and in the course of his employment. On appeal, the appellant argues that the Commission erred in allowing the appellees to raise the issue of compensability after the issue had been stipulated to in a prehearing order and benefits had been paid and that there is no substantial evidence to support the Commission's denial of compensation. We affirm.

The appellant contends that he sustained a compensable injury on May 11, 1990. Circle T initially accepted the claim and paid compensation. A prehearing conference was held on December 16, 1991, in which Circle T stipulated that the appellant sustained a compensable injury on May 11, 1990, and a prehearing order was entered which recited this stipulation. Circle T controverted the appellant's entitlement to permanent disability in excess of a 20% anatomical rating. The parties agreed that the issues at the hearing would be wage loss disability, related medical expenses, and attorney's fees. Circle T subsequently joined the Second Injury Fund and the Fund denied the occurrence of an injury arising out of and in the course of the appellant's employment. Circle T then withdrew its stipulation and suspended payment of compensation on June 3, 1992.

After a hearing on August 24, 1992, the administrative law judge determined that Circle T was precluded from raising the issue of compensability but that the Second Injury Fund was not precluded from raising the issue. The ALJ further determined that the appellant failed to prove by a preponderance of the evidence that he sustained a compensable injury. After conducting a de novo review, the Commission determined that neither the Circle T Fund nor the Second Injury Fund was precluded from defending against the claim and that the appellant failed to prove that he sustained a compensable injury.

The appellant first argues that the Commission erred in allowing the appellees to raise the issue of compensability after the compensability of his claim had been stipulated to by the

parties. He further contends that since his claim was accepted as compensable and benefits had been paid he was prejudiced in having to prove compensability more than two years after the incident. We agree with the Commission's finding that Circle T was not precluded from denying further liability.

[redacted] The Commission found that Circle T was not precluded from challenging the appellant's claim as a result of the stipulation or payment of compensation based upon the appellant's failure to prove that he sustained a compensable injury. The Commission refused to enforce the stipulation because it found that such enforcement would be contrary to the basic notions of justice and fair play. It concluded that "[t]o find on one hand that the facts fail to establish a cause of action and on the other to impose liability on one of the parties is not logically consistent or compatible with the interests of justice and fair play." Arkansas Code Annotated § 11-9-705(a)(1) (Supp. 1993) provides:

> In making an investigation or inquiry or conducting a hearing, the commission shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct the hearing, in a manner as will best ascertain the rights of the parties.

We cannot say, in keeping with the Commission's statutory duty to act in the manner provided by law, that the Commission erred in finding that Circle T was not precluded from further challenging the compensability of the appellant's claim.

[redacted] Even if Circle T had been precluded from defending against the claim, we would agree with the Commission's finding that the Second Injury Fund was not precluded from defending against the claim. Arkansas Code Annotated § 11-9-525(c)(1) (1987) provides the following:

> In all cases in which a recovery against the Second Injury Trust Fund is sought for permanent partial disability or for permanent total disability, the State Treasurer as custodian shall be named as a party and shall be entitled to defend against the claim.

The Commission noted that the statute did not provide any limitation on the Second Injury Fund's right to defend against a

claim and that its right to defend was not affected by the stipulation since it became a party after the stipulation between Circle T and the appellant. As a matter of due process, the Second Injury Fund is entitled to the opportunity to appear and defend against a claim. *Second Injury Fund* v. *Mid-State Const.*, 16 Ark. App. 169, 698 S.W.2d 804 (1985). One who becomes a party to an action after the making of a stipulation is not bound by that stipulation. 73 Am. Jur. 2d *Stipulations* § 9 (1974).

The appellant contends that he was prejudiced in that he was deprived of an opportunity to identify witnesses and obtain medical opinions at a time closely related to the date of his injury due to having to defend his claim two years after its occurrence. However, the record reveals, as discussed later, that the appellant obtained several medical opinions soon after May 11, 1990. We also note that the appellant has not shown that he was deprived of obtaining any additional evidence before the hearing that would have supported the compensability of his claim.

The appellant finally argues that the Commission's finding that he failed to prove that he sustained a compensable injury is not supported by substantial evidence. In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Grimes* v. *North American Foundry*, 42 Ark. App. 137, 856 S.W.2d 309 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Fort Smith* v. *Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). In making our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Grimes* v. *North American Foundry, supra.* The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *McClain* v. *Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989).

The appellant was employed by Circle T Express as a long

haul truck driver. He contends that he sustained a work-related injury while making a run. He stated that he slept in the sleeper compartment of his truck and awoke the next morning with shoulder pain. He continued on his run, but testified that his condition continued to worsen and his right arm became numb and weak with tingling in his fingers. He subsequently reported the problems to his supervisor.

The appellant testified that he related the history of the onset of his problems to each of his physicians. After completing his run on May 20, 1990, the appellant sought medical attention from Dr. Terrall Smith, a general practitioner. Dr. Smith's records indicate that the appellant related his problems to a bad seat in his truck. On May 22, 1990, the appellant was treated by Dr. Barry Southerland, a chiropractor. Dr. Southerland's records indicate that the appellant related his problems to a fall which occurred when a hand-hold bracket broke as he was climbing onto his truck. Dr. Southerland referred the appellant to Dr. Doug Parker, an orthopedic specialist. Dr. Parker's records do not indicate that the appellant related the onset of his problems to any specific incident. The appellant was next examined by Dr. Michael Standefer, a neurosurgeon, and his records indicate that "[t]he patient noted the onset of right upper extremity pain approximately one month ago with no previous inciting event being appreciated." In a response to a letter written by the appellant's attorney, Dr. Standefer, however, rendered the following opinion: "I am certainly inclined to agree with you that Mr. Jackson's development of neck, shoulder and upper extremity pain was secondary to cervical disc protrusion which developed subsequent to a job-related activity."

A report from a functional capacity evaluation the appellant performed on May 8, 1991, indicates he related that he sustained a work-related injury on May 11, 1990, after slipping on ice and falling on his back. At the hearing, the appellant testified that he had slipped on ice in December 1989 and that he fell when a bracket broke on his truck in January 1990, although neither of these incidents were reported. The appellant maintained that he had never experienced any problems with his neck, shoulder, arm or fingers prior to May 11, 1990.

[redacted] The Commission found that the appellant attributed

his problems to various incidents and causes suggesting that he had been uncertain about the cause of his problems. The Commission pointed out that Dr. Standefer's opinion that the appellant's problems were job-related was inconsistent with his initial report. It further pointed out that this opinion did not indicate what job-related activity Dr. Standefer was referencing and did not indicate how the activity contributed to the appellant's condition. The Commission concluded that the evidence was insufficient to support a conclusion that any work-related activity caused the appellant's problems. We find that there is substantial evidence to support the Commission's decision.

Affirmed.

PITTMAN and ROBBINS, JJ., agree.

[redacted]

K.M., A JUVENILE *v.* STATE of Arkansas

CA 94-644 896 S.W.2d 906

Court of Appeals of Arkansas
Division II
Opinion delivered May 3, 1995

[redacted]

[redacted]

Deloss McKnight, for appellant.

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

JAMES R. COOPER, Judge. This is an appeal from a judgment of the Cross County Chancery Court, Juvenile Division, finding the appellant to be a delinquent juvenile for committing the offense of criminal mischief. The appellant was ordered to pay $50 in restitution and $35 in court costs, and sentenced to three months unsupervised probation. On appeal, she argues that the evidence is not sufficient to support the trial court's determination. However, we do not address the appellant's argument because we find that she failed to file a timely notice of appeal.[1]

The judgment order was filed on February 22, 1994. The appellant filed a motion for new trial on March 4, 1994, and filed her notice of appeal on March 8, 1994. The order denying the appellant's motion for a new trial was filed on May 6, 1994. No subsequent notice of appeal was filed.

Rule 4(a) of the Arkansas Rules of Appellate Procedure provides that "a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from." Rule 4(b) extends the time for filing a notice of appeal upon a timely filing in the trial court of certain motions including a motion for a new trial. Under Rule 4(c), if a timely motion listed in section (b) is filed in the trial court by any party, the time for appeal for all parties shall run from the entry of the order granting or denying a new trial or granting or denying any motion. Rule 4(c) also provides that if the trial court neither grants nor denies the motion within thirty days of its filing, the motion will be deemed denied as of the thirtieth day.

[redacted] A notice of appeal filed prior to the disposition of a post-trial motion has no effect, and a new notice of appeal must be filed within the prescribed time dated from the entry of the

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[1]We note that even if we addressed the appellant's argument, we would find the evidence sufficient to support the verdict.

order dealing with the post-trial motion or from the expiration of thirty days allowed in the absence of a ruling. *Lawrence Brothers* v. *R.J. Jones Excavating Contractor*, 318 Ark. 328, 884 S.W.2d 620 (1994). The timely filing of a notice of appeal is jurisdictional. *Giacona* v. *State*, 39 Ark. App. 101, 839 S.W.2d 228 (1992). We find that the appellant failed to file a timely notice of appeal and as a result, this Court lacks jurisdiction to entertain the matter. We, therefore, dismiss the appeal.

Appeal dismissed.

PITTMAN and MAYFIELD, JJ., agree.

Alfred James COUCH *v.* FIRST STATE BANK of Newport

CA 94-711 898 S.W.2d 57

Court of Appeals of Arkansas
Division I
Opinion delivered May 10, 1995
[Rehearing denied June 14, 1995.]

[redacted]

Dover & Dixon, P.A., by: *David A. Couch*, for appellant.

Anderson & Kilpatrick, by: *Randy Murphy*, for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant Alfred James Couch, Jr. appeals the Arkansas Workers' Compensation Commission's calculation of his temporary total disability benefits, the failure to impose a penalty for untimely payment of interest on permanent partial disability benefits, and the failure to award attorney's fees. We affirm in part and reverse and remand in part.

When reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission. We must uphold those findings unless there is no substantial evidence to support them. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Wright* v. *ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

[redacted] The parties agreed that appellant was entitled to 110 days of temporary total disability benefits and that for 60 of those days that he did not work, he received sick pay that he had accu-

mulated as an employment benefit. Appellant's first argument concerns calculation of the 60 days of temporary total disability benefits for which he received sick pay from appellee. The Commission affirmed appellee's payment of $1,620.00 for the 60 days of temporary disability benefits. Appellee calculated the benefits by dividing a weekly wage rate of $189.00 by seven days to arrive at a daily rate of $27.00 and multiplying $27.00 by 60 days. Appellant argues that the correct amount is $2,268.00 calculated by multiplying the weekly wage of $189.00 by twelve weeks, i.e., 60 days based on his five-day work week. In other words, appellant argues that the weekly wage rate should be divided by five rather than seven to arrive at a daily rate. From our review of the abstract, there is no evidence that appellant worked a five-day work week. It is appellant's burden to abstract the record to demonstrate error, and we will not go to the record to determine whether reversible error occurred. *Death & Permanent Total Disability Trust Fund* v. *Whirlpool Corp.*, 39 Ark. App. 62, 837 S.W.2d 293 (1992). Accordingly, we cannot conclude that the calculation of the 60 days of temporary disability benefits is not supported by substantial evidence.

Appellant's second argument concerns appellee's untimely payment of interest accrued on the award of permanent partial disability benefits. Appellant contends that he is entitled to a 20 percent penalty on the owed interest pursuant to Ark. Code Ann. § 11-9-802(c) (1987). That section provides:

> If any installment, payable under the terms of an award, is not paid within fifteen (15) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, the installment unless review of the compensation order making the award is had as provided in §§ 11-9-710 -11-9-712.

Appellee argues that "installment" can mean only compensation and does not include accrued interest on compensation. We agree that "installment" for purposes of § 11-9-802(c) includes compensation. *See Model Laundry & Dry Cleaning* v. *Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ark. App. 1980). In subsections (a) and (b) of § 11-9-802 "installment" is referred to as an "installment of compensation."

We conclude that an "installment" for purposes of § 11-9-802(c) includes interest awarded on compensation benefits. "Compensation" as defined by Ark. Code Ann. § 11-9-102(9) (1987) is "the money allowance payable to the employee or his dependents. . . ." Arkansas Code Annotated § 11-9-809 (1987) provides that accrued and unpaid compensation shall bear interest. When a claimant is entitled to compensation, he may also receive an award of interest from the date the benefits should have been paid. Ark. Code Ann. § 11-9-809 (1987); *see Clemons* v. *Bearden Lumber Company*, 240 Ark. 571, 401 S.W.2d 161 (1966). In *Eureka Log Homes* v. *Mantonya*, 28 Ark. App. 180, 772 S.W.2d 365 (1989), we held that an award of compensation benefits implied an award of interest even though interest was not specifically mentioned in the award. Further, Section 11-9-802(c) speaks of an "installment, payable under the terms of an award." *See Model Laundry, supra*, dissenting opinion (emphasis should be on "award," not on "installment," to determine the amounts to which a penalty applies).[1]

Similarly, several jurisdictions impose a penalty for late payments of interest accrued on compensation awards based on statutory language analogous to our § 11-9-802(c). *Gellie* v. *W.C.A.B.*, 217 Cal. Rptr. 630 (Cal. App. 1985); *Laucirica* v. *W.C.A.B.*, 95 Cal. Rptr. 219 (Cal. App. 1971); *Brazil* v. *School Board of Alachua County*, 408 So. 2d 842 (Fla. App. 1982); *Torres* v. *Eden Roc Hotel*, 238 So.2d 639 (Fla. 1970). We reverse and remand for the Commission to impose a penalty in accordance with § 11-9-802(c) on the untimely payment of interest accrued on appellant's permanent disability benefits.

[redacted] Appellant also argues that he is entitled to interest on the penalty from the date that the penalty was due until paid. However, appellant failed to raise this argument below, so we

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[1]In *Model Laundry, supra*, the court held that no penalty could be imposed for untimely payments of medical benefits and attorneys' fees, reasoning that "compensation" as defined in § 11-9-102 includes only amounts payable to the employee. There is no statutory provision that medical benefits and attorneys' fees be paid directly to the employee, and there is no statutory provision for these benefits to be paid in installments. The court stated that "the General Assembly would not have made the penalty applicable only for installments had it intended it to apply to the other payments as well." *Id.*, 268 Ark. at 776.

[redacted]

decline to address it. *Hill* v. *White-Rodgers*, 10 Ark. App. 402, 665 S.W.2d 292 (1984).

[redacted] Appellant's final argument is that he is entitled to additional attorney's fees under Ark. Code Ann. § 11-9-714 (1987) for appellee's alleged unreasonable delay in resolving the claim. Section 11-9-714 provides only for costs to be awarded in such instances. There is substantial evidence to support the Commission's refusal to award attorney's fees.

Affirmed in part; reversed and remanded in part.

COOPER and ROBBINS, JJ., agree.

[redacted]

Mildred L. FONTENOT *v.* Stephen M. FONTENOT

CA 94-624 898 S.W.2d 55

Court of Appeals of Arkansas
Division II
Opinion delivered May 10, 1995

[redacted]

[redacted]

[redacted]

L.D. Gibson, for appellant.

[redacted]

Mixon & McCauley, P.A., by: *James R. McCauley*, for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant, Mildred Fontenot, and the appellee, Stephen Fontenot, were divorced, and appellant was awarded custody of the parties' children and child support. Appellant appeals from a February 1994 order which increased child support and awarded appellee the right to claim as dependents for income tax purposes the three minor children. For the reasons that follow, we reverse and remand for proceedings consistent with this opinion.

In a March 1993 order, the chancellor deviated from the family support chart and set monthly child support at $280.00 for each of the three children, for a total of $840.00. The court acknowledged that appellee had remarried and acquired two stepchildren since a 1989 support order and that appellant claimed the children as exemptions on her income tax returns. Appellant was then earning $266.00 weekly.

In June 1993, appellant petitioned the court for an increase in child support pursuant to a change in her circumstances. Because of illness, surgery, and subsequent complications, appellant testified that she had worked only four weeks between April 11, 1993, and November 23, 1993. She testified that she receives insurance sick pay of $90.44 weekly, that she has to work two weeks out of every fifteen weeks to retain the sick pay, that she receives full pay for the two weeks she works, and that she did not know when she would be able to return to work. She also stated that she had depleted her savings account and was behind on house and car payments. The parties' son who attends college also lives with appellant. Appellee, a captain in the United States Army, testified that he receives monthly net pay of $3,697.00 and that his monthly household living expenses total $2,640.00. He further stated that his wife had temporary work earning $1,000.00 monthly.

In a February 1994 order, the chancellor found that appellant had suffered a severe and traumatic illness that necessitated appellant's leaving her job, that her circumstances had deteriorated to the point of being "dire", and that she was attempting to support the children with a weekly income of $90.00 and appellee's monthly support of $840.00. The chancellor concluded

that there was a material change in circumstances. The chancellor also found that appellee's circumstances had not changed except for a modest increase in his salary. The chancellor's order increased child support "to the amount of $388.33 per child per month for a total of $1,165.00 per month in accordance with the Child Support Chart"; stated that "[a]s each child reaches the age of eighteen or graduates from high school, whichever is later, the child support amount shall be reduced accordingly"; and provided that appellee could claim the three children as dependents on his tax return for 1993 and subsequent years.

[redacted] Appellant first contends that the chancellor erred in addressing the issue of tax exemptions because the issue was not raised by either party and thus was not before the court. We do not agree. In *Jones* v. *Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993), the appellant similarly argued that the issue was not raised by either party in its pleadings or testimony. We stated that the right to claim the parties' children as tax exemptions is accurately characterized as a matter of child support. *Id.* Here, the issue of child support clearly was before the court, and therefore the issue of the right to claim the children as dependents for tax purposes could be addressed by the chancellor in the decree.

[redacted] Appellant next contends that because the chancellor awarded appellee the tax exemptions, the chancellor essentially deviated from the child support chart without providing the required written findings. We agree. Arkansas Code Annotated § 9-12-312(a)(2) (Repl. 1993) provides for the determination of child support as follows:

> In determining a reasonable amount of support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart, shall the presumption be rebutted.

In *Roland* v. *Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993), we stated:

> "Reference to the chart is mandatory, and the chart itself establishes a rebuttable presumption of the appropriate amount which can only be explained away by written findings stating why the chart amount is unjust or inappropriate." *Black* v. *Black*, 306 Ark. 209, 214, 812 S.W.2d 480, 482 (1991). The chancellor, in his discretion, is not entirely precluded from adjusting the amount as deemed warranted under the facts of a particular case. *Waldon* v. *Waldon*, 34 Ark. App. 118, 806 S.W.2d 387 (1991). The presumption may be overcome if the chancellor determines, upon consideration of all the relevant factors, that the chart amount is unjust or inappropriate. *Id.*

43 Ark. App. at 65.

[redacted] In *Freeman* v. *Freeman*, 29 Ark. App. 137, 778 S.W.2d 222 (1989), we stated:

> In *Niederkorn* v. *Niederkorn*, 616 S.W.2d 529, 533 (Mo. Ct. App. 1981), the court said, "[a]n award of the tax exemption to one party is nearly identical in nature to an order that the other party pay as child support a sum equal to the value of the exemption." *See also Calia* v. *Calia*, 624 S.W.2d 870, 874 (Mo. Ct. App. 1981).

29 Ark. App. at 141. Appellee has received a benefit by the chancellor's order permitting appellee to claim the dependents on his tax return, but we are unable to determine from the record the extent of the benefit. The chancellor's award concerning the dependents essentially caused his child support award to appellant to be a deviation from the support chart without the requisite findings to support a deviation.

[redacted] This court has the power to decide chancery cases *de novo* on the record before it, but in appropriate cases, the court also has the authority to remand such cases for further action. *Jones* v. *Jones*, 43 Ark. App. 7, 18, 858 S.W.2d 130 (1993). This case requires a remand for the chancellor to reconsider the tax exemption issue. We leave it to the discretion of the chancellor to decide whether a more detailed and explanatory opinion will suffice to meet the requirement of the supreme court's per curiam

order on child support guidelines and Arkansas Code Annotated § 9-12-312(a)(2) or whether further proof from the parties is necessary on the applicable factors and other relevant matters.

[redacted] Appellant also contends that although the chancellor intended to apply the child support chart in setting support for the three children, he mistakenly set the amount at $1,165.00 monthly instead of the $1,180.00 monthly chart amount based on a monthly salary of $3,650.00 and three dependents. This is a matter the chancellor can address on remand of this case. In addition, there are some indications in the record that the established monthly net pay of $3,697.00 may be appellee's net pay *after* the deduction of the previously set $840.00 monthly child support payment. If so, this issue may also be addressed on remand.

[redacted] Appellant's final argument concerns the chancellor's order for reduction in child support as each child reaches age eighteen or graduates from high school. The chancellor set child support at $388.33 per child per month for a total of $1,165.00 per month "in accordance with the Child Support Chart." The order further provided that as each child reaches the age of eighteen or graduates from high school, support shall be reduced accordingly. Even though the chancellor spoke of the child support being $388.33 per child, we do not believe the chancellor's intent was to reduce the child support by $388.33 as each child reached majority. Rather, we believe he intended that child support be reduced in accordance with the child support chart. This issue can also be clarified on remand.

Reversed and remanded.

COOPER and MAYFIELD, JJ., agree.

Peggy WELCH *v.* TRI-COUNTY SHIRT CO.

CA 94-475 897 S.W.2d 575

Court of Appeals of Arkansas
Division I
Opinion delivered May 10, 1995

J. T. Skinner, for appellant.

Bill H. Walmsley, for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant Peggy Welch appeals a decision of the Arkansas Workers' Compensation Commission finding unauthorized treatment was rendered by Drs. Louis Campos and David Sward. The Commission erred as a matter of law. We reverse and remand.

Appellant testified that in June 1992 she began experiencing numbness and tingling in the fingertips of her left hand, which worsened after a nonwork-related car accident on August 31, 1992. Attributing her left arm pain to the car accident, appellant went to her family physician, Dr. Louis Campos, on September 2, 1992. Appellant testified that she consulted Dr. Campos again on September 9, 1992, at which time she was diagnosed with carpal tunnel syndrome. Thereafter she reported her injury as work-related to appellee's personnel manager, Ms. Karen McFarren.

Ms. McFarren testified that appellant did not consider her

injury as work-related when appellant consulted Dr. Campos on September 2. Ms. McFarren further stated that when appellant first told her on September 9 that appellant attributed her injury to work, Ms. McFarren advised her that if she wanted to claim compensation benefits, appellant was required by company policy to consult Dr. Thomas Benton, a company doctor. Ms. McFarren testified that she obtained appellant's signature on the Workers' Compensation Form A-11 and A-29 and scheduled an appointment with Dr. Benton for appellant. Appellant saw Dr. Benton on September 11, 1992.

Dr. Benton referred appellant to Dr. Doug Foster, an orthopedist, who saw appellant one time on September 14, 1992. On September 16, 1992, appellant returned to Dr. Benton for the second and last time. Thereafter she refused to see either Dr. Foster or Dr. Benton. Appellant stated that she disagreed with the treatment plan proposed by Dr. Foster. Appellant said that she returned to Dr. Campos, on September 21, 1992, and continued to receive treatment from him. On November 9, 1992, Dr. Campos referred appellant to Dr. David Sward, who performed carpal tunnel release surgery.

The Commission found that appellee provided appellant with the proper notice of the change of physician requirements as outlined in Ark. Code Ann. § 11-9-514 (1987); that appellee had the right to make the choice of initial physician and when first notified of the injury, advised appellant to see Dr. Thomas Benton; and that since appellant failed to petition the Commission for a change of physician in accordance with Ark. Code Ann. § 11-9-514(a)(1) (1987), treatment rendered by Drs. Campos and Sward was unauthorized.

Appellant contends that she was free to choose Dr. Campos as her initial treating physician and that the change of physician rules in § 11-9-514 do not apply because she received treatment from Dr. Campos prior to and at the time she reported her work-related injury to appellee. She continued treatment with Dr. Campos. The Commission held that the employer has the right of first choice of physician because of the employer's duty to provide prompt medical services under Ark. Code Ann. § 11-9-508 (1987).

[redacted] Arkansas Code Annotated § 11-9-514 (1987) is silent as to whether the employer or employee has the right to make the

choice of an initial treating physician.[1] Further, our review of related provisions of the Arkansas Workers' Compensation Act fails to persuade us with any sufficient certainty of the legislative intent. The Commission held and appellee argues that Ark. Code Ann. § 11-9-508 (1987) implies that the employer has the right of first choice because the employer has a duty to provide medical services to an injured employee. However, the statute speaks only to the employer's duty to provide medical services or bear the expense of medical services, not to the method of providing medical treatment. Moreover, provisions of our Workers' Compensation Act are to be construed liberally in favor of the claimant. *City of Fort Smith* v. *Tate*, 311 Ark. 405, 844 S.W.2d 356 (1993); *Belcher* v. *Holiday Inn*, 43 Ark. App. 157, 868 S.W.2d 87 (1993). This is in keeping with the remedial purposes of the Act. *Belcher, supra.* For the reasons stated, we reverse and remand for the Commission to make specific findings as to whether the parties made any agreement as to a choice of initial physician or whether either party acquiesced to the other's choice. *See Magic Mart, Inc.* v. *Little*, 12 Ark. App. 325, 676 S.W.2d 756 (1984); *Moro, Inc.* v. *Davis*, 6 Ark. App. 92, 638 S.W.2d 694 (1982).

Reversed and remanded.

COOPER and ROBBINS, JJ., agree.

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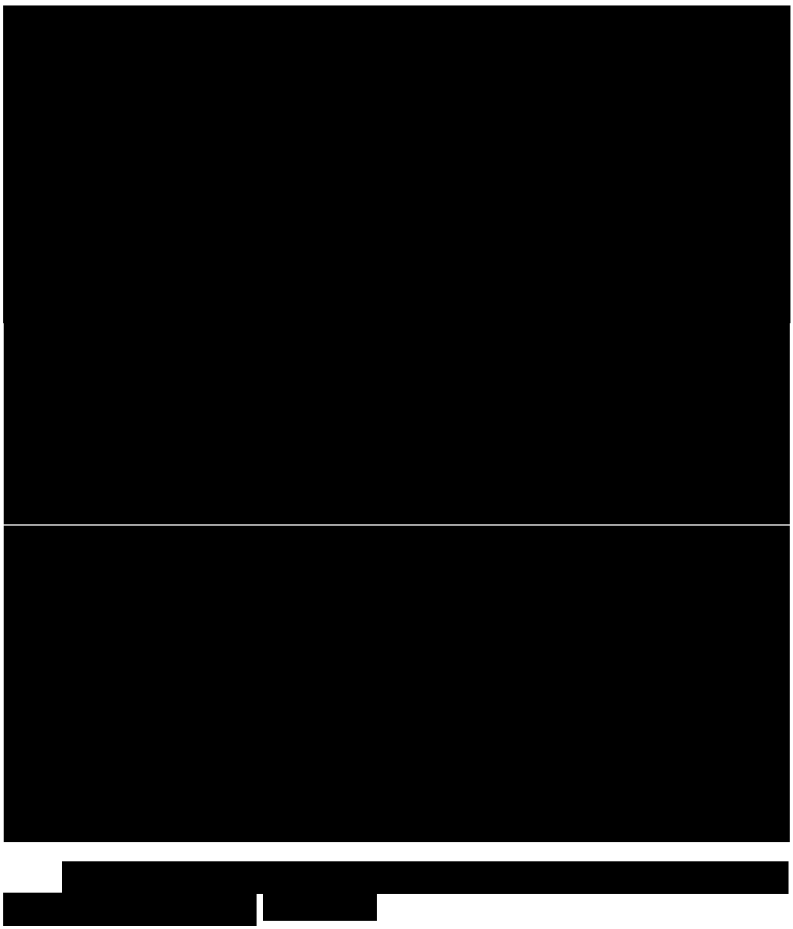
[1]We note in Ark. Code Ann. § 11-9-514(a)(3)(A) (Supp. 1993), applicable to injuries occurring after July 1, 1993, that upon establishment of an Arkansas managed care system, the employer shall have the right to select the initial primary care physician from among those associated with the medical care entities certified by the commission.

FIRST FINANCIAL INSURANCE COMPANY
v. NATIONAL INDEMNITY COMPANY

CA 94-562 898 S.W.2d 63

Court of Appeals of Arkansas
Division II
Opinion delivered May 17, 1995



Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jim Tilley,* for appellant.

Wright, Lindsey & Jennings, by: *Jay Moody*, for appellee.

JOHN MAUZY PITTMAN, Judge. First Financial Insurance Company has appealed from a declaratory judgment for appellee, National Indemnity Company. Appellee brought this action to determine coverage of injuries received in an accident by Kathy Kesterson, a passenger in a logging truck that was owned by Julius DeLaughter. We hold that the special circuit judge erred in imposing coverage on appellant and reverse.

At the time of the accident, Mr. DeLaughter had a comprehensive general liability policy issued by appellant and an automobile policy issued by appellee. Before the accident, the truck was loaded with logs by use of a hydraulic boom loader that was separate from the truck. The accident occurred as Mr. DeLaughter's employee delivered timber from the woods to a mill. After the accident, Ms. Kesterson sued Mr. DeLaughter and alleged that the accident had been caused by his or his agents' negligence in loading the truck, which had caused the load to shift, or by Mr. DeLaughter's failure to maintain functioning brakes on the truck. At first, appellant assumed defense of the action but later tendered the defense to appellee based on an auto exclusion in appellant's contract with Mr. DeLaughter. Appellee accepted the defense at that time.

In February 1993, appellee filed a complaint for declaratory judgment against appellant, alleging that it had mistakenly accepted the defense of Mr. DeLaughter. Appellee alleged that appellant should accept his defense because the primary cause of Ms. Kesterson's damages was the improper loading of the vehicle, which was purportedly covered under appellant's policy. In defense, appellant relied on the following exclusion set forth in its policy:

> This insurance does not apply:
>
> . . . .
>
> (b) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of
>
> (1) any automobile or aircraft owned or operated by or rented or loaned to any insured, or

> (2) any other automobile or aircraft operated by any person in the course of his employment by any insured....

This policy also had an amendatory endorsement that included the following definition:

> "[L]oading or unloading", with respect to an automobile, means the handling of property after it is moved from the place where it is accepted for movement into or onto an automobile or while it is in or on an automobile or while it is being moved from an automobile to the place where it is finally delivered, but "loading or unloading" does not include the movement of property by means of a mechanical device (other than a hand truck) not attached to the automobile.

Appellee argued that the definition of "loading or unloading" in the amendatory endorsement rendered the exclusion not applicable, and the special circuit judge agreed.

Appellant argues that whether Ms. Kesterson's injuries occurred from faulty loading of the truck, faulty brakes, or their combination, its exclusion of coverage for injuries arising out of the ownership, maintenance, operation, or use of a vehicle applies. We agree.

[redacted] In order to be ambiguous, a term in an insurance policy must be susceptible to more than one reasonable construction. *Insurance Co. of N. Am.* v. *Forrest City Country Club*, 36 Ark. App. 124, 127, 819 S.W.2d 296 (1991). The language in an insurance policy is to be construed in its plain, ordinary, and popular sense. *Tri-State Ins. Co.* v. *Sing*, 41 Ark. App. 142, 145, 850 S.W.2d 6 (1993); *Insurance Co. of N. Am.* v. *Forrest City Country Club*, 36 Ark. App. at 127; *Columbia Mut. Casualty Ins. Co.* v. *Coger*, 35 Ark. App. 85, 88, 811 S.W.2d 345 (1991). Contracts of insurance should receive a practical, reasonable, and fair interpretation consonant with the apparent object and intent of the parties in the light of their general object and purpose. *Tri-State Ins. Co.* v. *Sing*, 41 Ark. App. at 145. Resort to rules of construction is unnecessary if the terms of an insurance contract are not ambiguous, and in such cases, the policy will not be interpreted to bind the insurer to a risk which it plainly excluded

and for which it was not paid. *Id.*; *Columbia Mut. Casualty Ins. Co.* v. *Coger*, 35 Ark. App. at 88. Usually, a general liability policy provides protection only for the specific hazard for which premiums have been paid; all others are excluded, and unless the automobile hazard is included in a general liability policy, coverage for use of automobiles is excluded, or only covered within narrow limits such as on premises. *Tri-State Ins. Co.* v. *Sing*, 41 Ark. App. at 145.

Here, the policy plainly excluded coverage for injuries arising out of the ownership, maintenance, operation, and use of any automobile owned by the insured. We believe this exclusion reflects the intent to exclude damages such as those Ms. Kesterson suffered arising from the use of a truck. As in *Tri-State Ins. Co.* v. *Sing*, cogent evidence of such a construction is the fact that the insured held a separate policy with appellee providing coverage for his automobiles. Whether the logs were improperly loaded by use of a mechanical device, Ms. Kesterson's injuries clearly arose out of the ownership, maintenance, operation, or use of the truck and were therefore not covered by appellant's policy.

Reversed.

COOPER and MAYFIELD, JJ., agree.

Jeff BEALER *v.* STATE of Arkansas

CA CR 93-365 897 S.W.2d 577

Court of Appeals of Arkansas
Division II
Opinion delivered May 17, 1995

[redacted]

J. Sky Tapp, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was convicted of delivery of cocaine and sentenced to thirty years in the Arkansas Department of Correction.

Pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, the appellant's counsel has filed a motion to withdraw on the grounds that the appeal is without merit. This motion was accompanied by a brief referring to everything in the record that might arguably support an appeal. The Clerk of this Court furnished the appellant with a copy of his counsel's brief and notified him of his right to file a *pro se* brief within thirty days. The appellant did not file a brief. The State concurs that

the appellant's counsel has complied with Rule 4-3(j) and that the appeal is without merit.

[redacted] There were no objections or rulings at trial decided adversely to the appellant. Therefore, from our review of the record and the briefs presented to this Court, we find compliance with Rule 4-3(j) of the Rules of the Arkansas Supreme Court and the Court of Appeals, and that the appeal is without merit. Accordingly, counsel's motion to be relieved is granted and the judgment of conviction is affirmed.

PITTMAN and MAYFIELD, JJ., concur.

JOHN MAUZY PITTMAN, Judge, concurring. I fully join in Judge Cooper's opinion by which we affirm appellant's conviction and grant counsel's motion to be relieved. I write separately only to respond to the position taken by Judge Mayfield in his concurring opinion. First, I cannot agree with the position that, despite the fact that "there were no objections or rulings during trial that were decided adversely to appellant," the sufficiency of evidence remains a "possible ground for reversal." Therefore, I disagree that we should address the question of the sufficiency of the evidence.

At a jury trial, a defendant's failure to move for a directed verdict at the conclusion of the State's case and again at the close of all of the evidence constitutes a waiver of any question pertaining to the sufficiency of the evidence. Ark. R. Crim. P. 36.21(b). Here, appellant did not move for a directed verdict at either time. Thus, the sufficiency issue was not preserved for appeal and is not a possible ground for reversal, and we cannot consider it. *See Cummings* v. *State*, 315 Ark. 541, 869 S.W.2d 17 (1994); *Henry* v. *State*, 309 Ark. 1, 828 S.W.2d 346 (1992); *Collins* v. *State*, 308 Ark. 536, 826 S.W.2d 231 (1992); *Porter* v. *State*, 43 Ark. App. 110, 861 S.W.2d 122 (1993).

Nor can I agree with Judge Mayfield's implication that we must nevertheless determine whether sufficient evidence was introduced to support a conviction before we can declare an appeal wholly frivolous. In fact, the Arkansas Supreme Court has ruled contrary to that position. *See Jones* v. *State*, 308 Ark. 555, 826 S.W.2d 233 (1992) (in affirming a criminal conviction where the appellant's counsel filed a no-merit brief, the supreme

court simply noted that the issue of sufficiency of the evidence had not been preserved and was therefore waived). The purpose behind the requirement in no-merit cases that we must determine whether an appeal would be wholly frivolous is to assure that an adversarial presentation is not required. How is that purpose served by considering the merits of an issue clearly not preserved for appeal? Were we to order rebriefing in an adversary form on such an issue, we would without question affirm the appeal without ever reaching the merits. What could be more frivolous than such an appeal?

Finally, I also disagree that the possibility that one may apply for federal habeas corpus relief should cause us to address the merits of an issue that clearly is not preserved for appeal. As Justice George Rose Smith wrote for the Arkansas Supreme Court in this state's leading case on the necessity of appropriate objections at trial, "[I]f the supposed error actually calls for postconviction relief, the defect [absence of an objection below] is not cured by the presentation of an argument that is certain to be rejected by this court for want of an objection at the trial." *Wicks* v. *State*, 270 Ark. 781, 787, 606 S.W.2d 366, 370 (1980).

MELVIN MAYFIELD, Judge, concurring. I concur in the result reached by the opinion written by Judge Cooper but that opinion does not come to grips with an issue that I think should be discussed and decided.

Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals sets out certain requirements to be followed in cases where the attorney wants to withdraw because the appeal is without merit. The rule concludes that after considering the attorney's motion to withdraw the appellate court may affirm or reverse the judgment of the trial court "without any supporting opinion."

However, our appellate court decisions have established some basic rules in these cases and have referred to the United States Supreme Court case of *Anders* v. *California*, 386 U.S. 738 (1967), and its requirements for insuring the guarantees of equal protection and due process provided by the United States Constitution. In that regard, *Jones* v. *State*, 306 Ark. 632, 819 S.W.2d 683 (1991), directed an attorney to rebrief a case where his brief did not comply with *Anders* and our appellate court rules. In

Jones v. *State*, 27 Ark. App. 24, 765 S.W.2d 15 (1989), we said "a no-merit appeal brief written almost entirely by the State does not comport with the constitutional requirements of equal protection and due process set out in *Anders*." In *Ofochebe* v. *State*, 40 Ark. App. 92, 844 S.W.2d 373 (1992), we said that under the requirements of *Anders* the appellate court is required "to make a determination 'after a full examination of all the proceedings,' whether the case is wholly frivolous." And we have denied counsel's motion to withdraw and have ordered rebriefing where we found that the appeal was not "wholly frivolous." *Tucker* v. *State*, 47 Ark. App. 96, 885 S.W.2d 904 (1994).

In the instant case the appellant was found guilty by a jury of delivery of a controlled substance, cocaine, and sentenced to thirty years in the Arkansas Department of Correction. Pursuant to *Anders* v. *California* and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, the appellant's counsel has filed a motion to withdraw on the grounds that the appeal is without merit.

Because there were no objections or rulings during trial that were decided adversely to appellant, the only possible ground for reversal is the sufficiency of the evidence. Counsel for appellant, however, did not move for a directed verdict at the conclusion of the State's case and again at the close of all the evidence, and this constitutes a waiver of any question as to the sufficiency of the evidence. *Reagan* v. *State*, 318 Ark. 380, 885 S.W.2d 849 (1994). But counsel has abstracted the evidence and we can determine whether it is sufficient. Moreover, it appears to be in keeping with *Anders* and our own cases of *Ofochebe* and *Tucker, supra*, for us to determine whether the appeal is "wholly frivolous." Indeed, our supreme court has said that a conviction would be void if there "is absolutely no evidence whatsoever to support the conviction." *Williams* v. *State*, 298 Ark. 317, 320, 766 S.W.2d 931, 933 (1989).

In addition, there is the possibility that a federal court may be asked to review this case on the grounds that the failure of appellant's attorney to make a proper motion for directed verdict deprived appellant of the effective assistance of counsel. In *Evitts* v. *Lucey*, 469 U.S. 387, 392 (1985), the Court said that the Fourteenth Amendment to the Constitution of the United

States guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make the appeal adequate and effective, and among those safeguards is the right to counsel. Also, the court said that the right to counsel created by the Sixth Amendment, which applies to the states through the Fourteenth Amendment, comprehends the right to *effective* assistance of counsel at the appellate level.

Although the United States Supreme Court grants certiorari for direct review in some cases, many federal questions from state courts reach the federal courts by a suit brought to obtain a writ of habeas corpus. In *Kimmelman* v. *Morrison*, 477 U.S. 365, 383 (1986), the Court said that when a State obtains a criminal conviction in a trial where the accused is deprived of the effective assistance of counsel the State unconstitutionally deprives the accused of his liberty and the federal courts may grant habeas relief. And while the federal courts will refuse to entertain an application for habeas corpus where the petitioner has failed to present his federal constitutional claim to the state court, this rule has undergone change. The opinion in *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), says the Court has "rejected the deliberate bypass standard in state procedural default cases and has applied instead a standard of cause and prejudice." 504 U.S. at 6; 112 S.Ct. at 1718; 118 L.Ed.2d at 327. The Court also said (504 U.S. at 7, 112 S.Ct. at 1718, 118 L.Ed.2d at 327-8) that *McCleskey* v. *Zant*, 499 U.S. 467 (1991), had held "that the same standard used to excuse state procedural defaults should be applied in habeas corpus cases where abuse of the writ is claimed by the government." In *McCleskey* the Court said:

> In procedural default cases, the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. . . . Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default . . . . Once the petitioner has established cause, he must show "'actual prejudice' resulting from the errors of which he complains."

499 U.S. at 493-94 (citations omitted). The Court in *Keeney* reversed and remanded to allow the appellee to show cause for

his failure to develop the facts in the state court proceedings and show prejudice from that failure.

In Arkansas, our supreme court has held that an appellant who has not made a motion for directed verdict in the trial court cannot question the sufficiency of the evidence on direct appeal and cannot circumvent this rule by asserting the ineffective assistance of counsel in a Rule 37 hearing. *Williams* v. *State*, 298 Ark. 317, 767 S.W.2d 299 (1989); *Guy* v. *State*, 282 Ark. 424, 668 S.W.2d 952 (1984). Since it has also been held that the effectiveness of counsel may not be raised for the first time on direct appeal, *Tisdale* v. *State*, 311 Ark. 220, 227, 843 S.W.2d 803, 806 (1992), it is fairly clear that the appellant in this case cannot question in state proceedings the sufficiency of the evidence upon which he was convicted or whether the failure of counsel to make a motion for directed verdict deprived appellant of the effective assistance of counsel on appeal. However, the federal courts can examine the effective-counsel issue under their cause and prejudice standard, and in *Jackson* v. *Lockhart*, 992 F.2d 167 (8th Cir. 1993), that is exactly what the court did. There, the court pointed out the Arkansas procedure and citing *Coleman* v. *Thompson*, 501 U.S. 722 (1991), said that if Jackson could not show cause and prejudice his habeas claim would be procedurally defaulted. 992 F.2d at 169. The court found that even if Jackson's trial counsel had renewed his motion for directed verdict at the conclusion of all the evidence, it was "highly unlikely" that the trial court would have granted it. *Id.* at 169-70. Thus, although the court specifically said that "ineffective assistance of counsel in itself may constitute cause to lift the procedural bar," *Id.* at 169, Jackson did not "demonstrate prejudice." And while the federal court in *Jackson* examined the evidence for itself, in *Coleman* v. *Thompson* the Court, discussing its determination of whether there was an independent and adequate state law reason to deny a petition for habeas corpus, said "we encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest . . . ." 501 U.S. at 739.

Therefore, I think the possibility of federal review indicates that it would be prudent to pass upon the sufficiency of the evidence in this case even though proper motions for directed verdict were not made. For that reason I would make it clear that under the procedural law of this state the appellant is not enti-

tled to a determination in this appeal of the sufficiency of the evidence to support his conviction; however, since the right to effective assistance of counsel presents a federal question which might be examined by the federal courts under the cause and prejudice standard, I would review the sufficiency of the evidence as an *alternative* basis for our decision in this appeal.

As an addendum to the above paragraph, and in an attempt to eliminate any confusion that might result from Judge Pittman's concurring opinion, I want to stress that I do not contend that we *must* determine whether sufficient evidence was introduced to support a conviction before we can declare an appeal wholly frivolous. But I have said that the Arkansas Supreme Court has said that a conviction would be void if there "is absolutely no evidence whatsoever to support the conviction." *See Williams* v. *State, supra*. The reason this is true, as explained in *Williams*, is that a conviction under those circumstances would violate due process. Another constitutional reason for being concerned about sufficiency of the evidence is revealed by the above cited cases of *Coleman* v. *Thompson, Keeney* v. *Tamayo-Reyes*, and *Jackson* v. *Lockhart*. These cases hold that a state prisoner's federal claim will not be granted habeas review in federal court if it was procedurally defaulted in state court unless (1) he can show cause for the default and actual prejudice resulting therefrom, or (2) that a fundamental miscarriage of justice would result from a failure to review the claim. Those cases also demonstrate that the failure to properly question the sufficiency of the evidence will not constitute ineffective assistance of counsel if the evidence is in fact sufficient, since no prejudice could result in that situation.

Therefore, because the evidence has been abstracted in the appellant's brief in this case, I would, as an *alternative* basis for affirmance, hold that the evidence is sufficient to support appellant's conviction. Not because that *must* be done, and not because the sufficiency of the evidence issue was properly raised during trial, but because the sufficiency issue can be raised in federal court in connection with a federal claim of ineffective assistance of counsel and because I have read appellant's brief and believe that his conviction is supported by the evidence.

Finally, I would point out as *Coleman* v. *Thompson*, points out:

[redacted]

> When a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction.

501 U.S. at 738-39.

[redacted]

Carl E. WARREN, Individually and as Executor of the Estate of E. Lucille Johnson, Deceased *v.* Sherry Grant TUMINELLO, et al.

CA 94-300 898 S.W.2d 60

Court of Appeals of Arkansas
Division I
Opinion delivered May 17, 1995

[redacted]

[redacted]

Friday, Eldredge & Clark, by: *William S. Sutton, Byron M. Eiseman, Jr., William A. Waddell, Jr.*, and *J. Lee Brown*, for appellant.

Malcolm R. Smith, P.A., for appellee.

MELVIN MAYFIELD, Judge. Appellant Carl E. Warren, individually and as executor of the estate of E. Lucille Johnson, appeals from the order of the probate court which reduced the fees requested by him as executor and accountant.

Mrs. Johnson died testate on February 21, 1991. The will left 63 percent of her estate to the United Methodist Foundation of Arkansas, 31 percent to the appellees, and the remainder to several other beneficiaries. Appellant, a CPA who had performed accounting services since 1951 for the decedent and her husband (until his death in 1989), was appointed as executor of her estate and subsequently hired Carl E. Warren & Associates, P.A. (Warren & Associates), to perform accounting services for the estate.

On December 23, 1991, the probate court approved appellant's petition to pay himself $70,592.50 as executor.

On March 31, 1992, appellant filed the first accounting as executor of the estate. The accounting showed payments to appellant as executor in the amount of $70,592.50 and to Warren &

Associates for accounting services in the amount of $70,710.43. On May 27, 1992, the appellees filed an objection to the accounting alleging, among other things, that appellant may be in violation of Ark. Code Ann. § 28-52-101(c)(5) (breach of duty regarding self dealing) with respect to fees paid to the accounting firm of Warren & Associates.

On March 23, 1993, appellant filed the second accounting as executor of the estate. This accounting showed additional payments in the amount of $13,376.91 to Warren & Associates, and on April 9, 1993, appellees filed amended objections to the accounting alleging that appellant had breached his fiduciary duties to the estate by acting as executor and accountant at the same.

On June 28, 1993, appellant filed a petition for approval of final accounting; for allowance and payment of final fees to the personal representative, accountant, and attorneys; and for authority to make final distribution of estate assets. Appellant requested an additional $28,220.00 fee as personal representative, making a total of 1162.50 hours of work at $85.00 per hour, and an additional $20,465.72 for the accounting firm of Warren & Associates. On the same day, the appellees filed an objection to this accounting and petition for fees.

A hearing was held July 13, 1993, on the reasonableness of the fees claimed, and on November 5, 1993, the probate court entered an order finding, among other things, that appellant had a serious conflict of interest in serving as executor and accountant for the estate and that appellant's charges as executor and accountant were excessive and unconscionable. The court held, among other things, that: (1) appellant was entitled to an executor's fee in the amount of $35,000 and should repay the estate $35,592.50 of the amount already received; (2) appellant should repay to the estate $42,776.74 paid him for hours included in three accounting bills paid December 27, 1991, plus 10 percent of the balance of those bills after deducting appellant's hours; and (3) appellant should repay $13,376.91 in accounting fees paid February 17, 1992. The court also denied the additional accounting and executor's fees requested and held appellant personally liable to the estate for the sums to be returned.

On appeal, the appellant first argues that the probate court erred in finding he had a conflict of interest. Appellant contends

he performed his tasks as accountant and executor in an admirable and thorough manner and that appellees' only complaint is that he charged too much. He says nothing prohibits a person from acting as both personal representative and accountant for an estate and that there was no evidence of self-dealing or of an actual conflict of interest.

An executor of an estate occupies a fiduciary position and must exercise the utmost good faith in all transactions affecting the estate and may not advance his own personal interest at the expense of the heirs. 31 Am. Jur. 2d *Executors and Administrators* § 527 (1989). However, we think the appellant is correct in arguing that an executor is not prohibited from acting as an accountant for the estate.

We have not been cited to any statute or case authority which prohibits one from serving both as a personal representative and accountant for an estate. The appellant cites us to the testimony of an accountant who testified as an expert for the appellees and who said he had contacted the Arkansas State Board of Public Accountancy and posed a hypothetical question to the Board which opined that the dual service was not unethical. Appellant also cites us to *In re Estate of William R. Tuttle*, 173 N.Y.S.2d 279, 149 N.E.2d 715 (1958); *In re Wexler's Estate*, 9 Misc.2d 735, 171 N.Y.S.2d 1016 (1951); *In re Estate of Jadwin*, 58 Misc.2d 809, 296 N.Y.S.2d 901 (1969); *Spector Industries, Inc.* v. *Mitchell*, 63 N.C. App. 391, 305 S.E.2d 738 (1983); and Annot., *Right of Executor or Administrator to Extra Compensation for Accounting Services Rendered by Him*, 65 A.L.R.2d 838 (1959). These authorities support the proposition that dual service as personal representative and accountant does not *per se* create a conflict of interest. Moreover, there is evidence that appellant in the instant case performed his tasks as executor and accountant thoroughly, and there is no contention that he accounted for or disposed of the assets of the estate in an improper manner.

Therefore, we think that the only issue in this case concerns the reasonableness of appellant's fees and whether the trial court erred in not awarding him a fee as accountant, in denying him 10 percent of the balance of the accounting bills after deducting appellant's hours included therein, and in reducing the fees awarded him as executor of the estate.

[redacted]

[redacted] Our problem is that the trial judge, after finding that appellant "has a serious conflict of interest" in serving as executor and accountant in this estate, also found appellant's charges "both as executor and accountant, are clearly excessive and unconscionable under any standards." Moreover, the judge allowed appellant a total fee of $35,000 for his services as executor but did not allow him a fee in any amount for hours the appellant spent working as an accountant, and did not allow appellant to retain the 10 percent portion of the fees allowed the accounting firm of Warren & Associates — which appellant contends he was due under an agreement with that firm made when appellant sold his interest in the firm. Probate cases are tried *de novo* on appeal, and this Court does not reverse the findings of the probate judge unless they are clearly erroneous, giving due deference to his superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Gilbert* v. *Gilbert*, 47 Ark. App. 37, 43, 883 S.W.2d 859, 862 (1994). The value of services rendered to an estate is primarily a factual determination to be made by the probate judge, and the appellate court will not reverse his decision where it is not clearly erroneous. *Adams* v. *West*, 293 Ark. 192, 195, 736 S.W.2d 4, 6 (1987). Further, a fee award for services rendered to an estate is primarily a matter within the discretion of the probate judge, and this Court will not reverse such an award without finding an abuse of discretion. *Morris* v. *Cullipher*, 306 Ark. 646, 652, 816 S.W.2d 878, 882 (1991).

[redacted] Thus, we cannot be sure what the trial judge allowed or disallowed as a result of the interplay of the factors of conflict of interest, excessiveness, and unconscionability. Our review of probate cases is *de novo*, just as it is in chancery cases. *In re Estate of Jones*, 317 Ark. 606, 607, 879 S.W.2d 433, 434 (1994). But the rule is well established that while we have the power to decide chancery cases *de novo* on the record before us, in appropriate cases we also have the authority to remand such cases for further action. *Black* v. *Black*, 306 Ark. 209, 215, 812 S.W.2d 480, 483 (1991); *Jones* v. *Jones*, 43 Ark. App. 7, 18, 858 S.W.2d 130, 137 (1993). *See also Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979), and *Moore* v. *City of Blytheville*, 1 Ark. App. 35, 612 S.W.2d 327 (1981). Here, we think it best to remand. We have given the matter careful consideration, but the evidence

presented concerns many bookkeeping details, the application of discretion under the evidence and the law, and perhaps the ability to hear additional evidence. In sum, we think it is best to remand for the trial judge to reconsider his decision in keeping with this opinion.

Reversed and remanded.

ROBBINS and ROGERS, JJ., agree.

LAWYERS SURETY COMPANY *v.* Juanita Phillips CAGLE

CA 94-450 898 S.W.2d 476

Court of Appeals of Arkansas
Division I
Opinion delivered May 24, 1995

[redacted]

W. Ray Nickle, for appellant.

Murrey L. Grider, for appellee.

JOHN B. ROBBINS, Judge. Lawyers Surety Company has appealed from an order of the Lawrence County Circuit Court dismissing its complaint against appellee, Juanita Phillips Cagle, on the ground that the issues involved should have been litigated by counterclaim or cross-claim in an earlier probate action. We reverse the circuit judge's order and remand this case for trial.

Ms. Cagle was a guardian for the estate of a minor. When appellee presented her final accounting, the probate court found a deficiency in the ward's funds in the amount of $27,312.73. The probate judge found that those funds had been misappropriated by appellee and directed that summons issue for appellant, Ms. Cagle's surety, to show cause why it should not be liable for the deficiency. On May 18, 1992, a judgment was entered against appellee and appellant, jointly and severally, for the amount of the deficiency. Appellant satisfied this judgment on June 24, 1992.

Appellant brought an action in circuit court against appellee in October 1992 for indemnification of the amount that it had paid to the ward. In response, appellee moved to dismiss on the ground that appellant should have brought a cross-claim in the earlier action and that the doctrine of res judicata barred any recovery in this case. After a hearing on the motion to dismiss,

the circuit judge entered an order in which he agreed, finding that the complaint stated facts that "should have been litigated by counterclaim or cross-claim" in the probate court action.

On appeal, appellant argues that its complaint against appellee is a simple indemnification suit to collect the money that it paid on behalf of a principal obligor, which is authorized by Ark. Code Ann. § 16-107-303 (1987). That statute provides in pertinent part:

> (a) When any bond, bill, or note for the payment of money or delivery of property shall not be paid by the principal debtor, according to the tenor thereof, and the bond, bill, or note, or any part thereof shall be paid by the security, the principal debtor shall refund to the security the amount or value, with interest thereon at the rate of ten percent (10%) per annum, from the time of payment.
>
> (b)(1) When the payment by a security shall be made in money, the security may recover the money with interest, in an action for so much money, paid to the use of the defendant.

Appellant argues that its cause of action against appellee arose *after* it paid the money to the ward. It also argues that, in the earlier action, its claim against appellee would have been in the form of a cross-claim, which is permissive and not compulsory. It additionally argues that, because appellant and appellee were not opposing parties in the probate case, it was not required to file a compulsory counterclaim against appellee. In response, appellee argues that it should not make any difference whether a claim is a counterclaim or a cross-claim. We disagree with appellee and are persuaded that appellant is correct.

Arkansas Rule of Civil Procedure 13 provides in pertinent part:

> (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which, at the time of filing the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

. . . .

(f) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence which is the subject matter either of the original action or of a counterclaim therein or relating to any property which is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

[redacted] Under the claim preclusion aspect of 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. *Magness* v. *Commerce Bank of St. Louis*, 42 Ark. App. 72, 78, 853 S.W.2d 890 (1993). Res judicata bars not only the re-litigation of claims which were actually litigated in the first suit but also those which could have been litigated. *Id.* Where a case is based on the same events as the subject matter of a previous lawsuit, res judicata will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Id.* The doctrine of res judicata applies only when the party against whom the earlier decision is being asserted had a fair and full opportunity to litigate the issue in question. *Id.* The cases dealing with the issue of res judicata do not draw a distinct line beyond which the principle of res judicata invariably applies and where it does not; the very nature of litigation makes that impossible. *Golden Host Westchase, Inc.* v. *First Serv. Corp.*, 29 Ark. App. 107, 119, 778 S.W.2d 633 (1989). In *Nickles Brothers Investments* v. *Rector-Phillips-Morse, Inc.*, 33 Ark. App. 47, 50, 801 S.W.2d 308 (1990), we held that res judicata applies to claims that might have been litigated as cross-claims, as well as to those that were actually litigated in an earlier action.

Appellant correctly points out that Arkansas case law permits a surety to bring an action to recover money it has paid on behalf of a principal in a subsequent and independent action against the principal. In such an action, the principal's obligation to pay arises upon the assessment of the damages from the breach of the condition of his bond and the payment of the money for

him by his security. In *Snider* v. *Greathouse*, 16 Ark. 72, 77 (1855), the court stated:

> But the liability of the security upon the bond is joint and several, and although he cannot have his recourse over against his principal, until he has paid the debt, still he is liable over to the creditor in the first instance; and, upon the payment of the debt, after it becomes due, if it is liquidated, or after its liquidation, if not so, according to the terms of the contract, whether by process of law or not, an obligation is raised to pay the same.

Id. at 78. *See also Washum* v. *Lester*, 183 Ark. 298, 36 S.W.2d 76 (1931).

In 41 Am. Jur. 2d *Indemnity* § 29 (1968), it is stated:

> [W]here a contract is strictly one of indemnity, that is, one against loss or damages, the indemnitee cannot recover until he has made payment or otherwise suffered an actual loss or damage against which the covenant runs. Applying this principle, it has been held that a surety cannot have a right of action on a general promise of indemnity until he has been compelled to pay the debt for which he is bound. . . .

In this case, appellant's cause of action against appellee arose upon its satisfaction of the probate judgment; its claim for indemnity, therefore, is not barred by the doctrine of res judicata. We reverse the circuit judge's order dismissing appellant's complaint and remand this case for trial.

Reversed and remanded.

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

Gregory Allen RODGERS *v.* STATE of Arkansas

CA CR 94-878 898 S.W.2d 475

Court of Appeals of Arkansas
Division I
Opinion delivered May 24, 1995

Gibson & Gibson, P.A., by: *Bynum Gibson*, for appellant.

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

JOHN B. ROBBINS, Judge. In December of 1986, appellant Gregory Allen Rodgers pled guilty to five counts of burglary and ten counts of theft of property. He was placed on probation for a period of five years subject to certain conditions. In February of 1989, a petition to revoke appellant's probation was filed which alleged that the appellant failed to report to his probation offi-

cer, had fled the State without permission, failed to pay restitution and failed to pay his probation fees. In February of 1991, the petition to revoke was nolle prossed because the appellant could not be located.

Appellant was arrested on November 9, 1993, in New York after apparently being stopped for a traffic violation. He was held in custody in New York due to the outstanding warrant from Arkansas. Appellant did not waive extradition until December 2, 1993, at which time he was returned to Arkansas and the present revocation proceeding was initiated.

On January 31, 1994, a revocation hearing was held at which the appellant argued that the petition to revoke should be dismissed because the appellant's hearing was not held within sixty days of his arrest pursuant to Ark. Code Ann. § 5-4-310(b)(2) (Repl. 1993). The trial court, citing *White* v. *State*, 310 Ark. 200, 833 S.W.2d 771 (1992), held that the appellant was "unavailable" for trial until he waived extradition on December 2, 1993. The trial court held that the period from appellant's arrest on November 9, until December 2, 1993, would not be counted in computing the sixty-day period. Appellant was eventually found to have violated the conditions of his probation and was sentenced to five years in the Arkansas Department of Correction.

Appellant contends on appeal that the trial court erred in failing to dismiss the petition to revoke because the sixty-day requirement imposed by Ark. Code Ann. § 5-4-310(b)(2) (Repl. 1993) was violated. Appellant attempts to distinguish *White* v. *State, id.*, contending that because *White* involved a defendant who was being held on a separate charge, other than for revocation purposes, the same rationale would not apply.

[redacted] Arkansas Code Annotated § 5-4-310(b)(2) (Repl. 1993), states:

> (2) The revocation hearing shall be conducted by the court that suspended imposition of sentence on the defendant or placed him on probation within a reasonable period of time, not to exceed sixty (60) days, after the defendant's arrest.

This court, as well as the supreme court, has stated that trial courts may look to the provisions of Ark. R. Crim. P. 28.3 per-

taining to speedy trials for guidance in computing excludable periods of time from the sixty-day limitation required for revocation hearings. *Lark* v. *State*, 276 Ark. 441, 637 S.W.2d 529 (1982); *Cheshire* v. *State*, 16 Ark. App. 34, 696 S.W.2d 322 (1985). Rule 28.3 provides in part:

> The following periods shall be excluded in computing the time for trial:
>
> (e) The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. A defendant shall also be considered unavailable whenever his whereabouts are known but his presence for the trial cannot be obtained or he resists being returned to the state for trial.

While the appellant is correct that in *White* v. *State*, *supra*, the defendant was being held on a separate charge, the relevant part of that decision for purposes of the present case was the calculation of time which was excluded under Rule 28.3. In *White*, the supreme court held that the appellant was "unavailable" for trial until "the appellant signed the waiver of extradition."

The trial court was correct in finding that the appellant was unavailable for trial while he was in the custody of the New York authorities. The record indicates that the appellant was returned to Arkansas upon signing the waiver of extradition on December 2, 1993. The record fails to show that any delay in signing the waiver was the result of any actions or neglect on the part of the State of Arkansas. *See Cheshire* v. *State, supra.* Appellant's hearing was held within sixty days of his signing the waiver of extradition and the trial court correctly denied his motion to dismiss.

Affirmed.

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

GEORGE W. JACKSON MENTAL HEALTH CENTER, et al
v. Elaine LAMBIE

CA 94-620 898 S.W.2d 479

Court of Appeals of Arkansas
Division II
Opinion delivered May 24, 1995
[Rehearing denied June 28, 1995.]

[redacted]

[redacted]

Richard S. Smith, for appellant Public Employee Claims Division.

Bill W. Bristow, for appellee.

MELVIN MAYFIELD, Judge. In this worker's compensation case the appellee's husband, an employee of appellant, committed suicide on January 11, 1992. The administrative law judge held that the death was not compensable because of Ark. Code Ann. § 11-9-401(a)(2) (1987), which provides:

> However, there shall be no liability for compensation

> under this chapter where the injury or death from injury was substantially occasioned by intoxication of the injured employee or by willful intention of the injured employee to bring about the injury or death of himself or another.

The Commission reversed the law judge and held that "work-related stress caused the decedent to commit suicide." Appellant, Public Employee Claims Division, argues that (1) the Commission erred in finding that the decedent's suicide arose out of, and in the course of, his employment and (2) the Commission erred in holding that the claim is not barred by Ark. Code Ann. § 11-9-401(a)(2) (1987).

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark* v. *Peabody Testing Service*, 265 Ark 489, 579 S.W.2d 360 (1979). The weight and credibility of the evidence is exclusively within the province of the Commission. *Morrow* v. *Mulberry Lumber*, 5 Ark. App. 260, 635 S.W.2d 283 (1982). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Company* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

There was evidence that Michael G. Lambie, age 44, had obtained what was called a Specialist degree, between a Master's and a Doctorate degree, from Arkansas State University, in rehabilitation counseling. He had worked at the Arkansas Services Center rehabilitating alcoholics until that facility closed. He then went to work for appellant, George W. Jackson Mental Health Center, in Jonesboro. Lambie was described by his wife and co-workers as compulsive and a perfectionist, as well as a self-taught computer programmer. His supervisor discovered his interest and expertise with computers and he was promoted to "Director of Monitoring and Evaluation."

The Center purchased a new computer system in July 1991 and Lambie was given the task of modifying the software to suit the Center's purposes. The software was designed to be used by

an inpatient hospital, and the Center was an inpatient and outpatient psychiatric facility. There was testimony that the nearer the time came for the new system to go on-line, the more frustrated Lambie became with it. He told several people that he simply did not think the software was capable of being adapted to the center's demands. From the testimony of various witnesses, it appears that Lambie took all fault for this upon himself rather than placing it where it belonged on the computer software company that had developed it and assured the State purchasers that it could be adapted to the Center's requirements.

Mrs. Lambie, a school teacher and counselor, testified that the family had taken a vacation to Disney World over the Christmas holidays, and she and Mr. Lambie had gone back to work on January 2, 1992. She said the next entire week Lambie worked day and night trying to get the computer software operating. He had a computer at home that was compatible with his computer at work and frequently stayed up until two or three a.m. working on it or would get up very early in the morning and start working on the computer. Then, no matter how late he had been up the night before, he left for the office at 7:30 a.m. On Thursday night Lambie stayed late at the office because "the Little Rock people" were still there.

On Friday and Saturday of that week Mr. Lambie was scheduled to be in meetings in Little Rock. Friday morning he got up at three or three-thirty a.m. (Mrs. Lambie was really not sure he ever went to bed) and was in Little Rock before eight. Mrs. Lambie and her daughter went to spend the weekend with her parents near Walnut Ridge. Mr. Lambie called his wife on Friday night and told her to have her mother get Mrs. Lambie's name off all her mother's bank accounts because he might get sued. Mr. Lambie called his supervisor, the Center's administrator, Bonnie White, twice that Friday and told her he just did not think this computer program would ever work for the Center.

Mr. Lambie checked out of the hotel in Little Rock at 2:56 a.m. on Saturday, January 11, 1992. As he drove home he made a tape recording for his wife, daughter, family and friends. It was clearly a suicide note. When he arrived home, he parked the car cross-ways in the driveway, and taped a note on the passenger side window which stated: "Elaine, I am in the back yard. Don't you

or Elizabeth come around. I Love you both," signed "Mike." The evidence is contradictory whether the tape recording and a note to "Rewind and Play" was in the house on the bar beside a gun case or on the windshield of the car. Lambie's body was discovered at 9:40 a.m. by a meter reader. Lambie had a fatal gunshot wound to the head. A .38 caliber revolver was near the body.

Bonnie White testified that Lambie was an ideal employee for any administrator. He was a perfectionist, with skills and a commitment to work that is not routinely found in people. She said when she thought Lambie had done an excellent job on something it wasn't good enough for Lambie. She said he would keep perfecting it and eventually bring to her work that was outstanding. Ms. White testified that as the time neared for the computer system to "go live," Lambie exhibited more and more signs of stress. She described an event that happened approximately six weeks prior to Lambie's death when he thought he had improperly certified some paraprofessionals and over-charged Medicaid. Ms. White said he was extremely agitated and kept saying it was "terrible" when she tried to assure him that, even if an error had been made, it could be corrected and it was not that serious. She said he was extremely relieved when he found out that he had not made an error.

On the Friday before his death, Ms. White said when she got to work just before eight, Lambie had already called her from Little Rock. He called again at five minutes until eight and was talking in a whisper. She said he expressed the opinion that the system would not work for the Center and she detected that he was blaming himself. He said, "I am to blame." She reiterated to him that he was not to blame; if anyone was to blame, it was the corporation who assured them the program would fit their needs. Ms. White said she then contacted Joy Mills in Little Rock and asked her to talk to Lambie and assure him he was not to blame for the problems with the software. Ms. White said she talked to Lambie again about one that afternoon and he was still blaming himself. Ms. Mills was to talk to him later in the afternoon. That was the last time Ms. White heard from Lambie. She said she was unaware of any other stressors in Lambie's life; he was known by his peers as one who had everything good in his life. Ms. White said after listening to the tape there was no doubt in her mind why Lambie took his life, "The stress of his work."

[redacted]

Dale Christian, the Director of Financial Management at George W. Jackson Mental Health Center, testified that he worked closely with Lambie for five years and was working with the same computer program in terms of the financial input and output of the system. He described Lambie as, "one of the most serious minded people that I ever met. He was very dedicated and [a] hard worker and one of the most intelligent people that I ever met." He also said of Lambie:

> He was very frustrated by the fact that the SMS system is designed for an acute care general hospital setting, and we were having to modify it to fit an inpatient psychiatric setting and an outpatient psychi-atric setting and those modifications were extremely difficult.

Christian testified that he was scheduled to be in Little Rock for the weekend meeting and arrived sometime around five on Friday afternoon. When he got to the meeting Saturday morning someone gave him a list that Lambie had prepared for him that detailed the problems with the computer system. Christian said the list was readable, understandable, rational and identified concrete problems in the system that had to be worked out.

Joyce Mills, Assistant Director of the Division of Mental Health, testified that she was in charge of all administrative services, including computer systems, finance, accounting, budget and personnel. Gene Brown, the project director for the whole division for the SMS computer system implementation, worked directly for her. She said she knew Mr. Lambie and had worked a good bit with him but until the day before his death, she had never been aware that he was under any particularly unusual degree of stress because of the project. On that day she, Brown and several other people, including a representative of the computer company that designed the SMS system, met with Lambie and discussed the concerns he had about the system. She said Lambie's concerns were practical and she thought they had come up with workable solutions to them. Ms. Mills said she saw no indication that Lambie was not in a rational frame of mind and thought when the meeting was over; he seemed to feel better about the project. She was surprised when she heard of Lambie's suicide.

[redacted] The Commission stated that it had previously "adopted

the test that compensation will be awarded if there is an unbroken chain of causation between the compensable physical injury and the suicide." "In other words," the Commission said, "the question is whether the act of suicide was an independent intervening cause breaking the chain of causation between the initial injury and the death or whether the suicide was in the direct line of causation." Many jurisdictions have adopted the "chain of causation" test, which, according to 1A Arthur Larson, *The Law of Workmen's Compensation* §36.30 (1990), holds that the intervening cause issue turns not on the employee's knowledge that he is killing himself, but rather on the existence of an unbroken chain of causation from the injury to the suicide.

In the instant case there was no physical compensable injury. Nevertheless, the Commission allowed benefits, holding that because the job stress was "a substantially contributory, if not, in fact, the sole, cause of decedent's suicide," and there would not have been a suicide without the job stress, there was "no independent intervening cause breaking the chain of causation between the stress experienced by the decedent as a result of his employment and his suicide."

Appellant, Public Employees Claims Division, argues that the Commission erred in finding that the decedent's suicide arose out of, and in the course of, his employment. Appellant emphasizes that to prove a compensable stress injury the employee is required to show that he was subjected to stress of a different quality than other, similarly-situated employees, and that such stress would have been likely to have produced a stress illness in anyone. *See Owens* v. *National Health Laboratories, Inc.*, 8 Ark. App. 92, 648 S.W.2d 829 (1983). It contends the job Lambie was doing was similar to that being done by other administrative personnel within the Arkansas Division of Mental Health Services and, although Lambie's reaction to his job stress was "obviously excessive," it had much more to do with his personality than his job.

[redacted] The appellant also argues that it makes no difference that job stress caused the suicide; since the decedent did not have a prior physical compensable injury, his widow cannot recover benefits for his suicide. 1A Arthur Larson, *The Law of Workmen's Compensation* § 36.40 (1990) states:

> Although it is sometimes said that the suicide must stem from a "compensable physical injury," this statement is unduly restrictive. The correct statement is that the suicide must be the result of some injury arising out of and in the course of employment. In other words, at the very outset there must be found an injury which itself arose out of and in the course of employment, and then the suicide must be traced directly to it. If there is no such employment connected injury setting in motion the causal sequence leading to the suicide, or when there are far stronger non-employment influences accounting for the suicide, the suicide is a complete defense.
>
> . . . .
>
> At this writing, there are relatively few such examples of suicide preceded by no definite physical injury. But the rapid development of the field of compensation for nervous and mental disorders suggests that as cases arise of suicide following upon mental or nervous injury, awards will not be refused merely for lack of evidence of a compensable physical injury at some point.

The record is replete with evidence that Lambie took his own life because of job-related stress and there is nothing in the record indicating any other possible reason for his suicide. The testimony revealed that just before his death, this superior employee was reduced to a state of hopelessness. The Commission found that the cause of Lambie's suicide was stress arising out of and in the course of his employment, and we cannot say its decision is not based on substantial evidence.

Appellant also argues that the Commission erred in holding that this claim is not barred by Ark. Code Ann. § 11-9-401(a)(2). Appellant acknowledges that section (a)(1) of this statute provides for the general obligation to pay compensation for work-related injury or death. However, according to appellant, the next section, (a)(2), "creates a clear exception in certain cases which would otherwise be compensable; i.e. the legislature obviously intended to deny compensability for intentionally self-inflicted deaths or injuries, even where they arose out of, and in the course, of employment."

Appellant maintains that Lambie was acting in a rational manner during the last hours of his life: He had attended meetings about the computer system where problems and possible solutions were discussed; he left a detailed and accurate list of problems which needed to be corrected for a colleague; he checked out of his hotel in Little Rock and returned to Jonesboro; he took care to protect his family from discovering his body; and he left instructions about returning the State property in his possession. It is appellant's position that since Lambie took steps to protect his family and the employer from the detrimental effects of his suicide, Lambie had the required knowledge and intention to come within the exclusion of Ark. Code Ann. § 11-9-401(a)(2).

[redacted] The Commission found this argument to be unpersuasive, and so do we. Quoting from 1A Arthur Larson, *The Law of Workmen's Compensation*, § 36.30 it stated:

> [T]he intervening cause issue turns not on the employee's knowledge that he is killing himself, but rather on the existence of an unbroken chain of causation from the injury to the suicide. . . . [I]f the first cause produces the second cause, the second cause is not an independent intervening cause. The question whether the actor appreciated the consequences of his act should not be decisive on the fundamental question whether that act was the natural and foreseeable result of the first injury.

The Commission held that because it was clear that if it had not been for the stress placed on Lambie of trying to adapt an unworkable computer software program to his employer's requirements, there would have been no suicide, there was no independent intervening cause breaking the chain of causation between the stress Lambie experienced as a result of his employment and his suicide. We think this decision is supported by substantial evidence.

Affirmed.

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

Douglas LAXTON *v.* STATE of Arkansas

CA CR 94-1014 899 S.W.2d 479

Court of Appeals of Arkansas
En Banc
Opinion delivered May 31, 1995

Ernie Witt, for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted of DWI and related offenses in Ashdown Municipal Court by a judgment entered on the municipal court's docket sheet on March 10, 1993. The appellant filed a document titled "Notice of Affidavit of Appeal" in the Circuit Court of Little River County on April 5, 1993. However, the appellant did not file the record of the municipal court proceedings with the circuit court until April 28, 1993,

more than 30 days after the entry of the municipal court judgment. The appellant was subsequently tried de novo in circuit court and found guilty of DWI. From that decision comes this appeal.

The appellee has moved to dismiss the appellant's appeal, arguing that the appellant's failure to file the municipal court record within the 30-day period prescribed by Inferior Court Rule 9 deprived the circuit court of jurisdiction and that, consequently, there is no basis for an appeal to this Court. We agree.

[redacted] Inferior Court Rule 9, which governs appeals from municipal court to circuit court, requires that such appeals be filed within 30 days of the entry of the judgment by filing the inferior court proceedings with the clerk of the circuit court. This procedure applies to criminal appeals as well as civil appeals. *Alfred* v. *State*, 310 Ark. 476, 837 S.W.2d 469 (1992).

[redacted] The appellant concedes that he failed to file the municipal court transcript within the 30-day period prescribed by Rule 9, but argues that he substantially complied with the Rule's requirement by filing his "Notice of Affidavit of Appeal" in the circuit court. We do not agree. The Arkansas Supreme Court has specifically rejected this argument in *Ottens* v. *State*, 316 Ark. 1, 871 S.W.2d 329 (1994), holding that a notice of appeal is not required in an appeal from municipal court to circuit court and that filing such a notice of appeal within 30 days of the municipal court conviction does not suffice to perfect an appeal.

[redacted] Because the appellant failed to timely file the municipal court record in circuit court, the municipal court judgment became final and the circuit court never gained jurisdiction of the appeal. Insomuch as the present appeal is from the circuit court proceedings, there is nothing before us to review. *See Smith* v. *State*, 316 Ark. 32, 870 S.W.2d 716 (1994).

Appeal dismissed.

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

MELVIN MAYFIELD, Judge, dissenting. This case involves a circuit court judgment which, after a trial on the merits, found appellant guilty of DWI. Today, the majority of this court has granted the State's motion to dismiss the appellant's appeal from the circuit court judgment. I dissent.

The majority opinion discusses Inferior Court Rule 9 which governs appeals from municipal court to circuit court. The rule requires that such appeals be taken within 30 days of the entry of the municipal court judgment by filing that court's proceedings with the clerk of the circuit court. The majority opinion concludes that because the appellant in this case failed to timely file the municipal court record in circuit court, the municipal court judgment became final, and the circuit court never gained jurisdiction of the appeal. Therefore, the majority holds because the present appeal is from the circuit court proceedings, there is nothing before us to review.

I recognize that both this court and the Arkansas Supreme Court have held that the timely filing of the municipal court record is essential to the circuit court's appellate jurisdiction. However, for the most part, those cases really do not involve the jurisdiction of the Arkansas Supreme Court or Court of Appeals. One of our recent cases has dealt with the question of our appellate jurisdiction in this situation.

In *Jones* v. *City of Flippin*, 47 Ark. App. 102, 886 S.W.2d 875 (1994), the appellant also failed to file the record of the proceeding in municipal court in the circuit court within 30 days of the municipal court's judgment of conviction, and the appellee filed a motion in the circuit court asking that the appeal be dismissed. We recognized that the cases hold that the 30-day period for filing the record is jurisdictional and that the issue may be raised for the first time on appeal. However, because the circuit court entered a judgment based on the evidence presented to it, we held we could not simply dismiss the appeal but that the judgment of the circuit court had to be reversed and set aside.

In *Davis* v. *Adams*, 231 Ark. 197, 328 S.W.2d 851 (1959), the Arkansas Supreme Court said:

> Save where the court is completely without jurisdiction of the subject matter, a party will be *estopped* to question the court's jurisdiction if he invokes it, * * * or accepts benefits resulting from the court's exercise of jurisdiction.

231 Ark. at 202, 328 S.W.2d 854 (emphasis in the original).

And in *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986), our supreme court said:

> Viewed together, these cases demonstrate that we have come to the position that unless the chancery court has no tenable nexus whatever to the claim in question we will consider the matter of whether the claim should have been heard there to be one of propriety rather than one of subject matter jurisdiction. We will not raise the issue ourselves, and we will not permit a party to raise it here unless it was raised in the trial court.

289 Ark. at 175-76, 711 S.W.2d at 456. *See also In Re Adoption of D.J.M.*, 39 Ark. App. 116, 839 S.W.2d 535 (1992).

Since it is without question that a circuit court in Arkansas has subject matter jurisdiction to hear and determine cases involving violations of criminal statutes, it cannot be said that the circuit court's jurisdiction in the instant case was totally lacking.

Therefore, in a situation like the instant case I would not dismiss the appeal from circuit court unless the issue was raised in that court. This is in keeping with the general rule that we do not consider issues that are not raised below. Moreover, to allow the State to go to trial in circuit court without raising an issue there about the validity of the municipal court appeal but allow the State to raise that issue on appeal to our supreme court or court of appeals, will let the State gamble on the result of the circuit court trial. In any event, failure to raise the issue in circuit court will promote judicial inefficiency.

I would not dismiss this appeal, but would decide it on the merits.

JENNINGS, C.J., joins in this dissent.