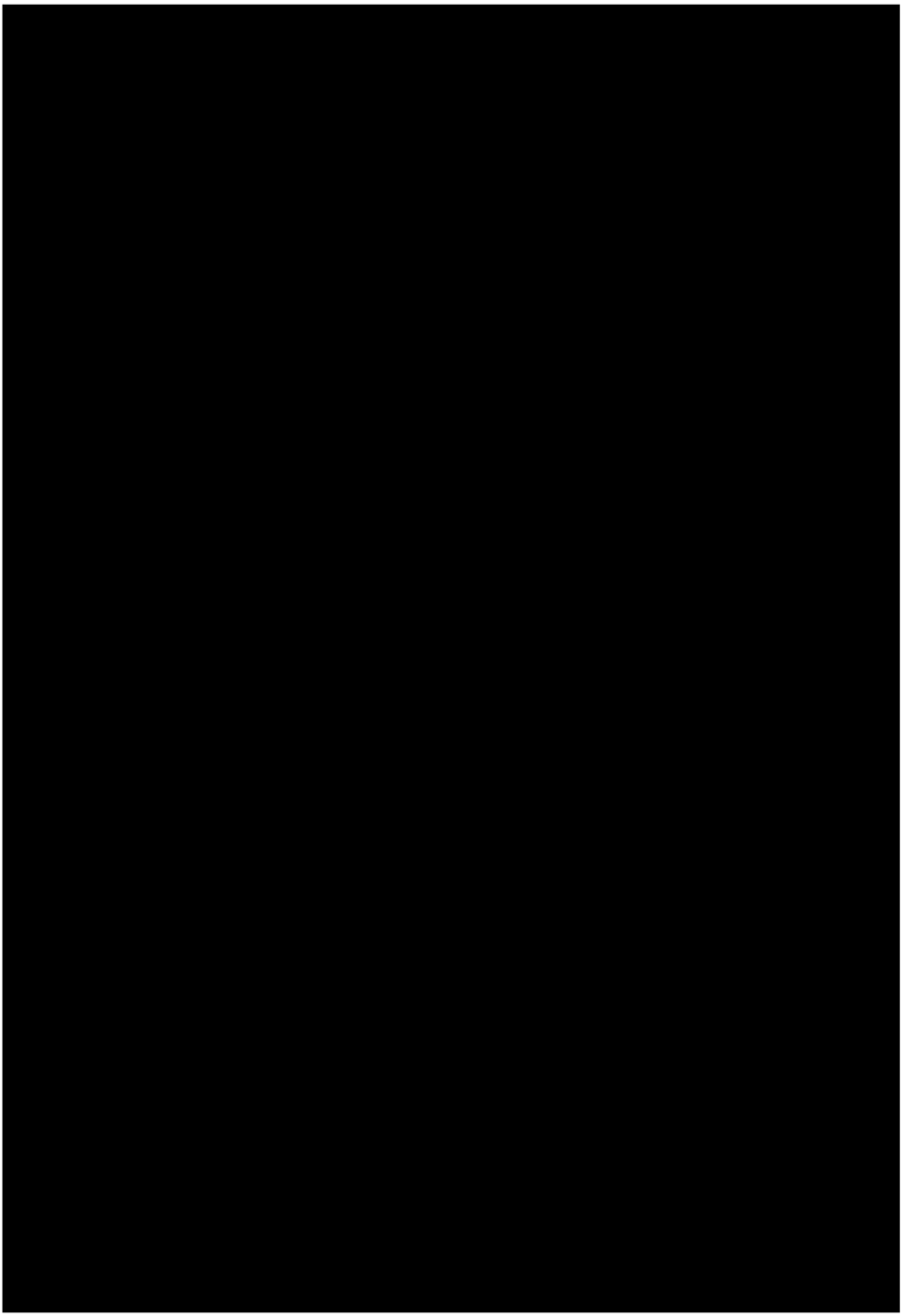
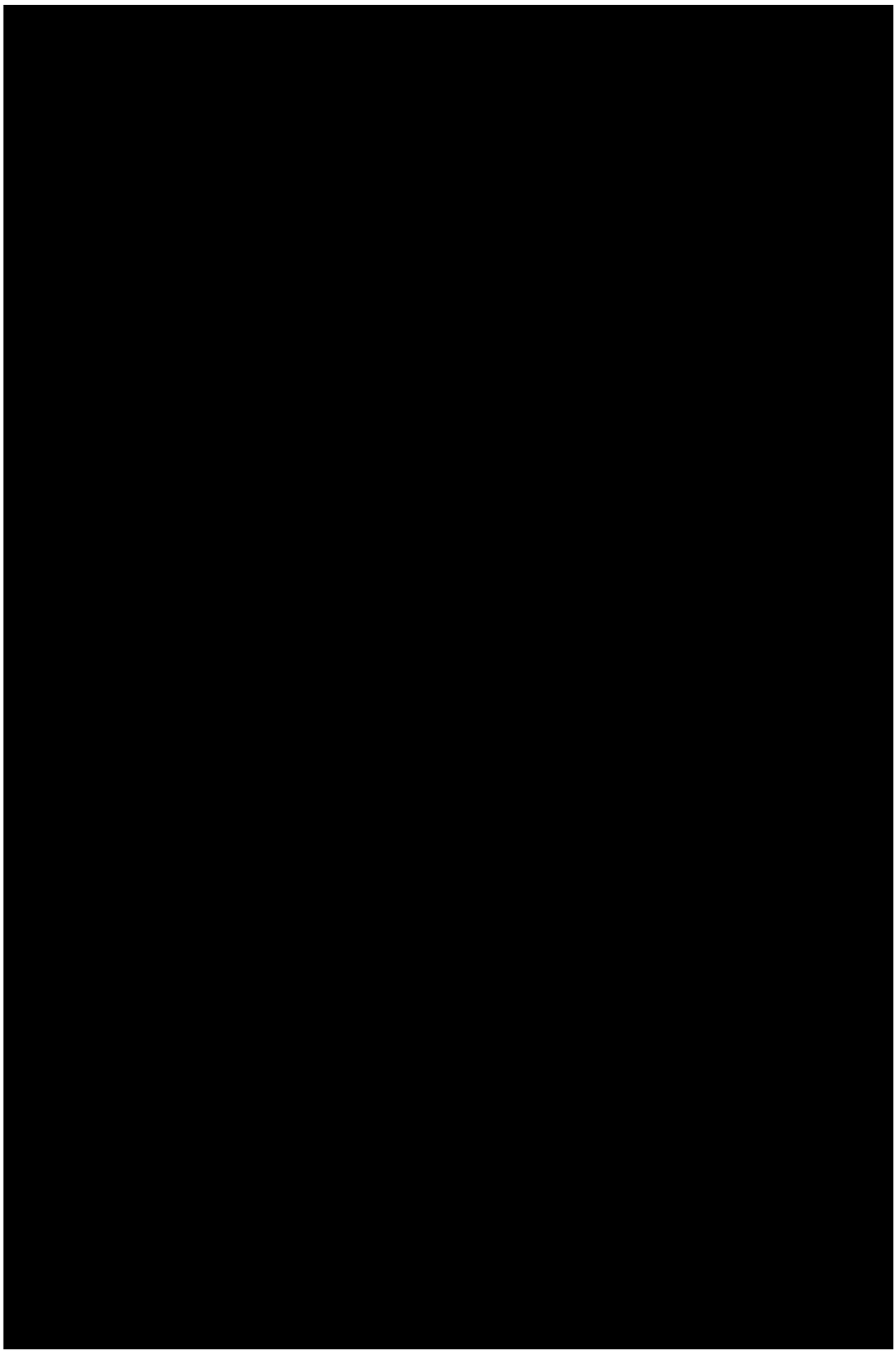
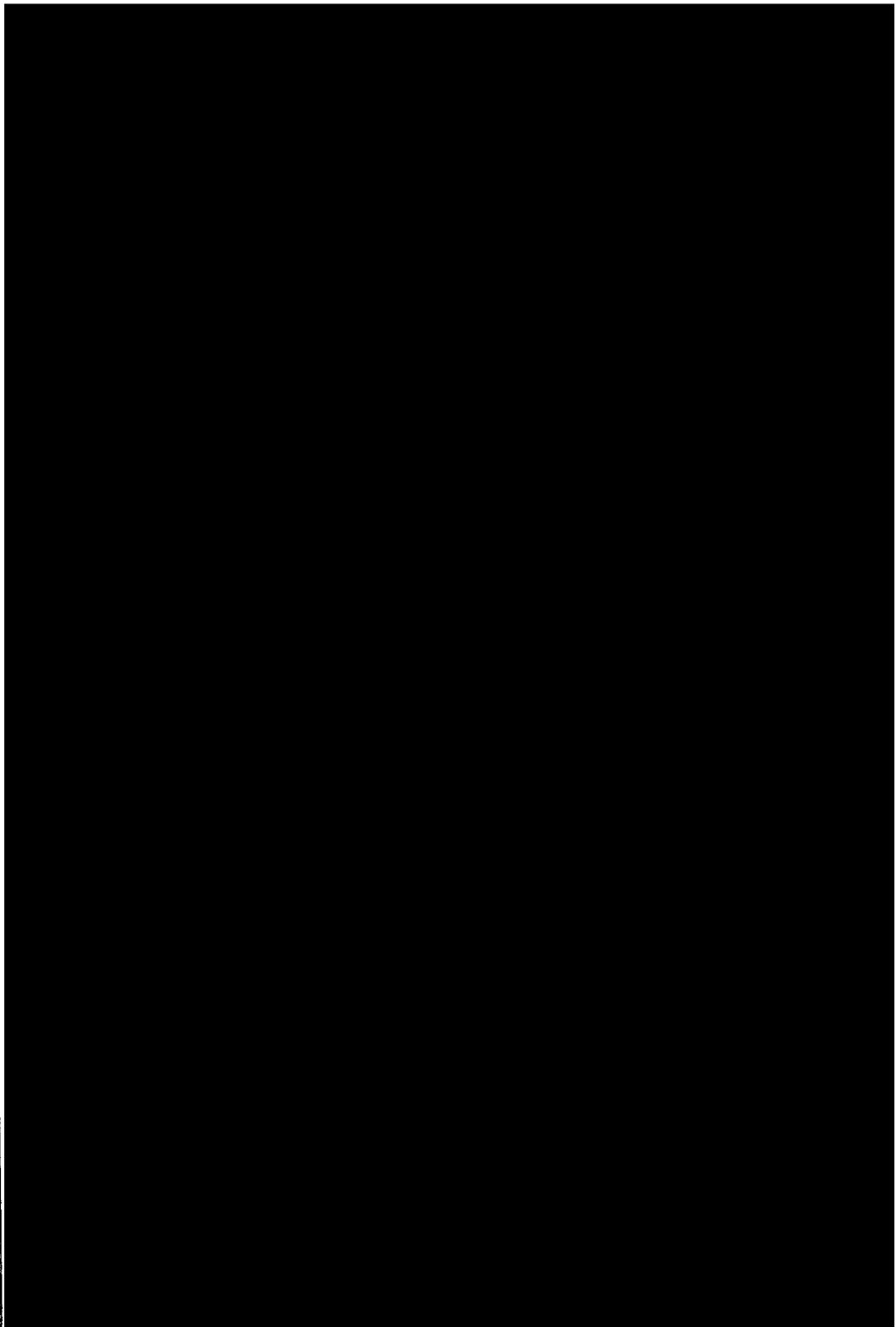
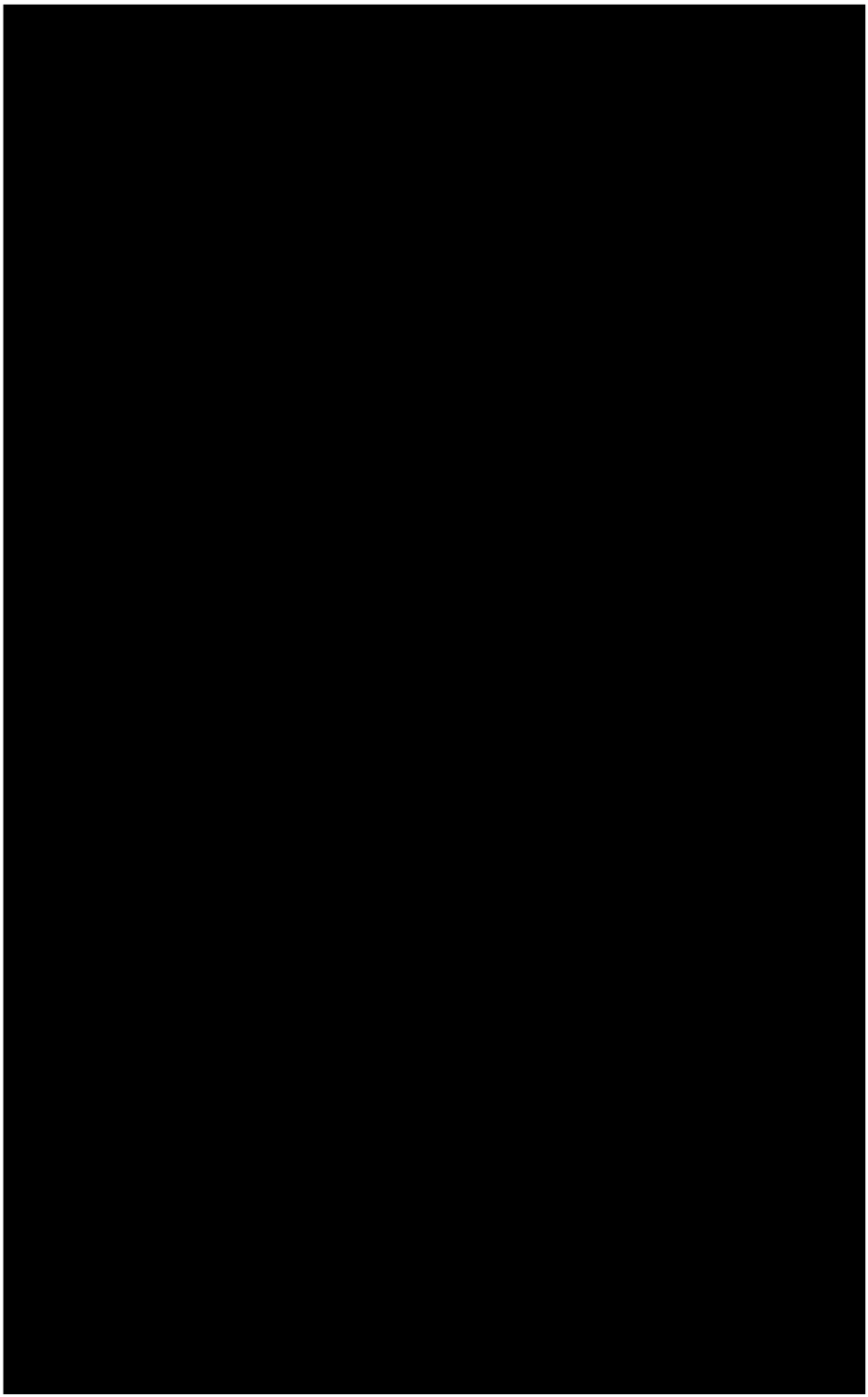
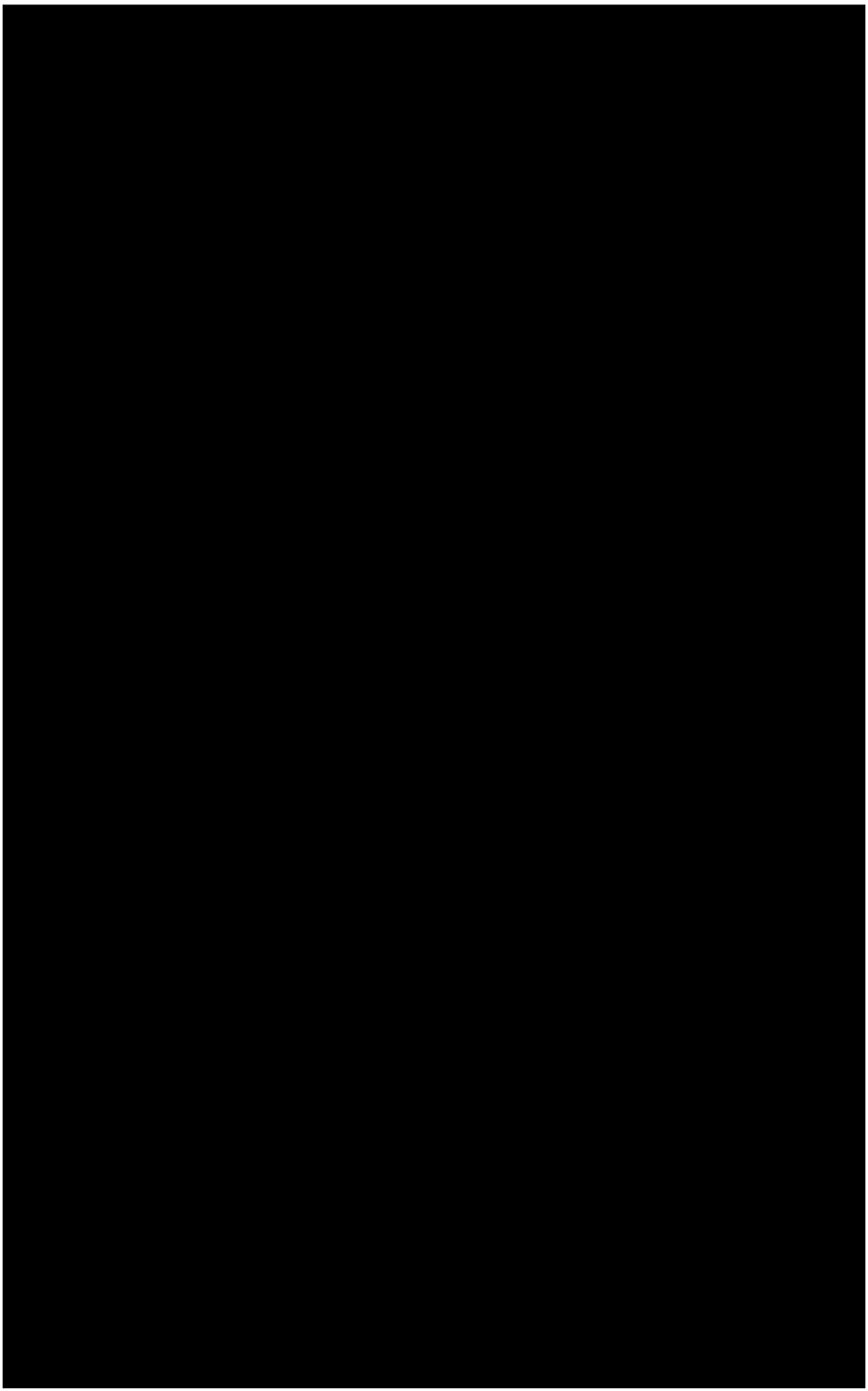
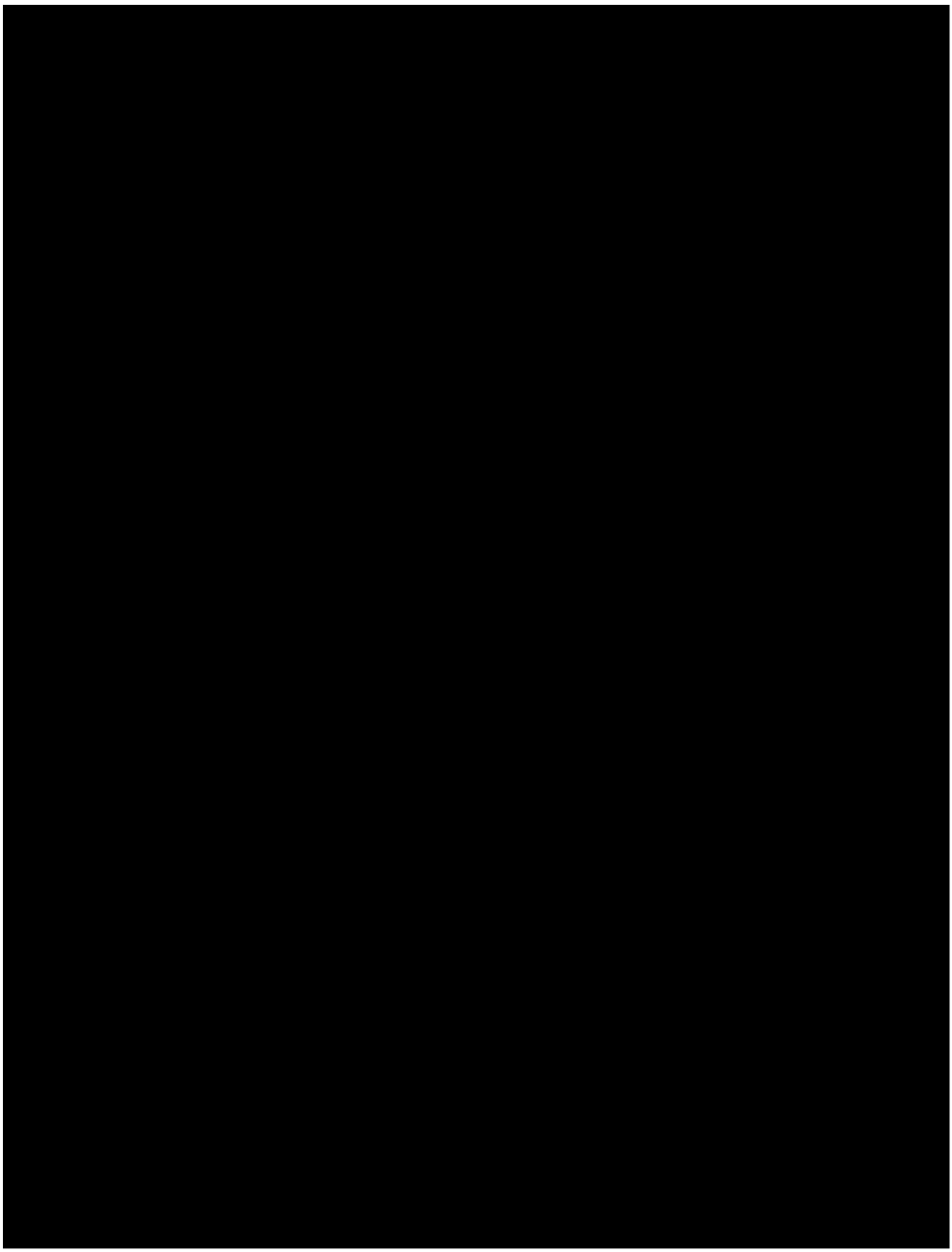


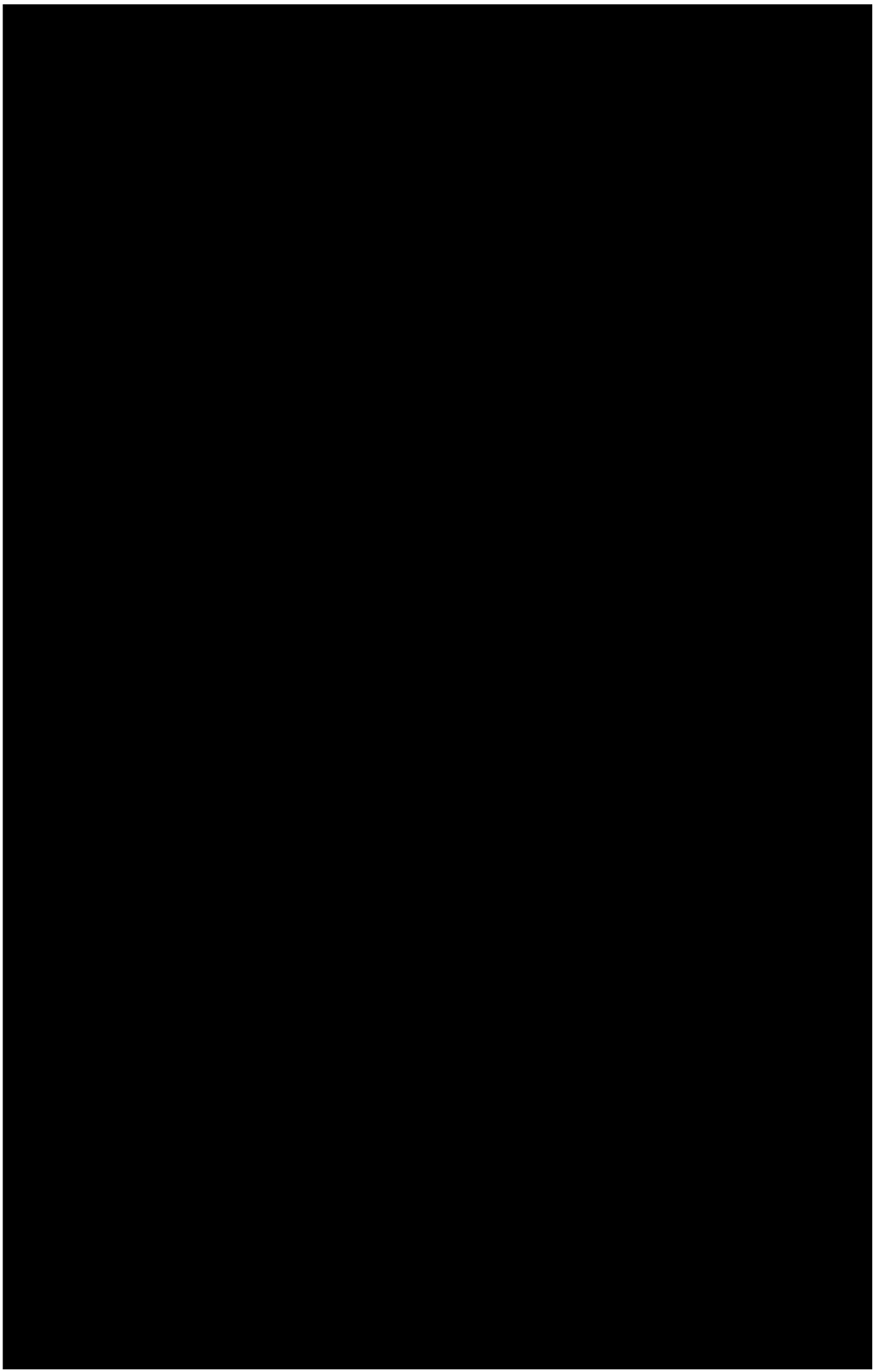


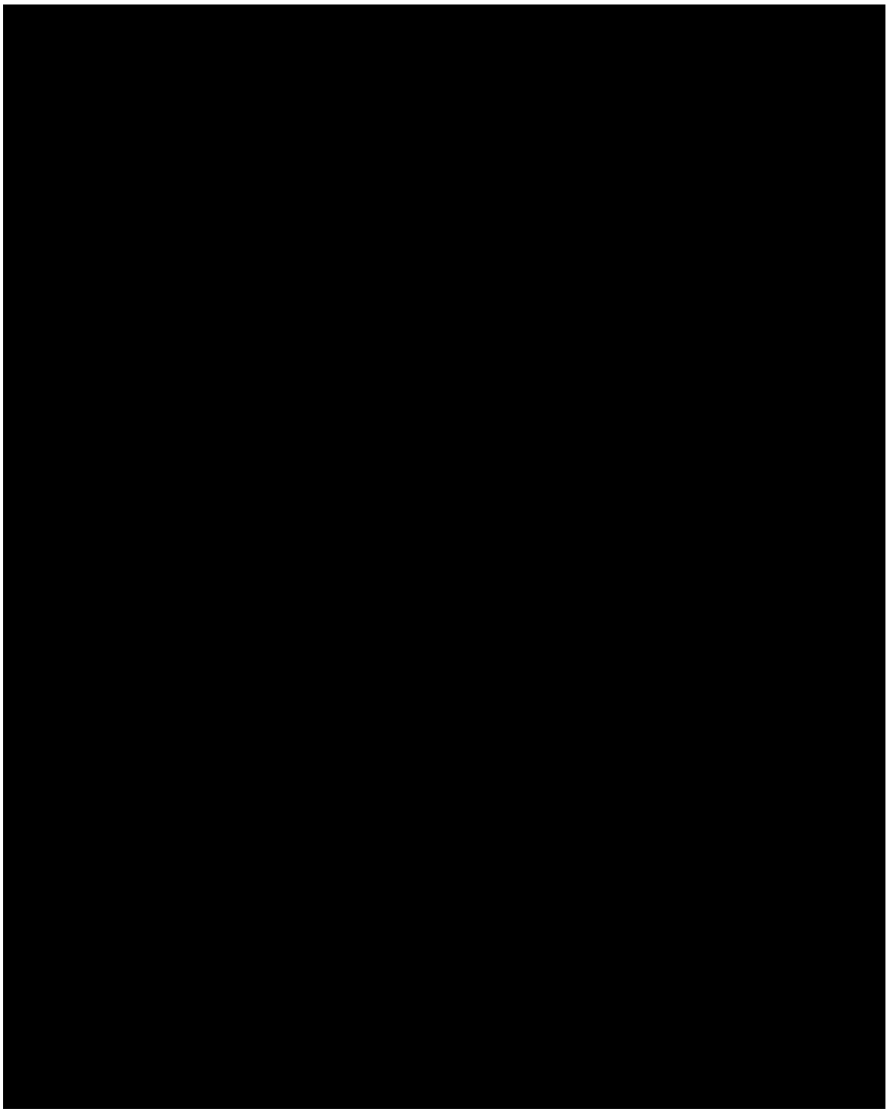


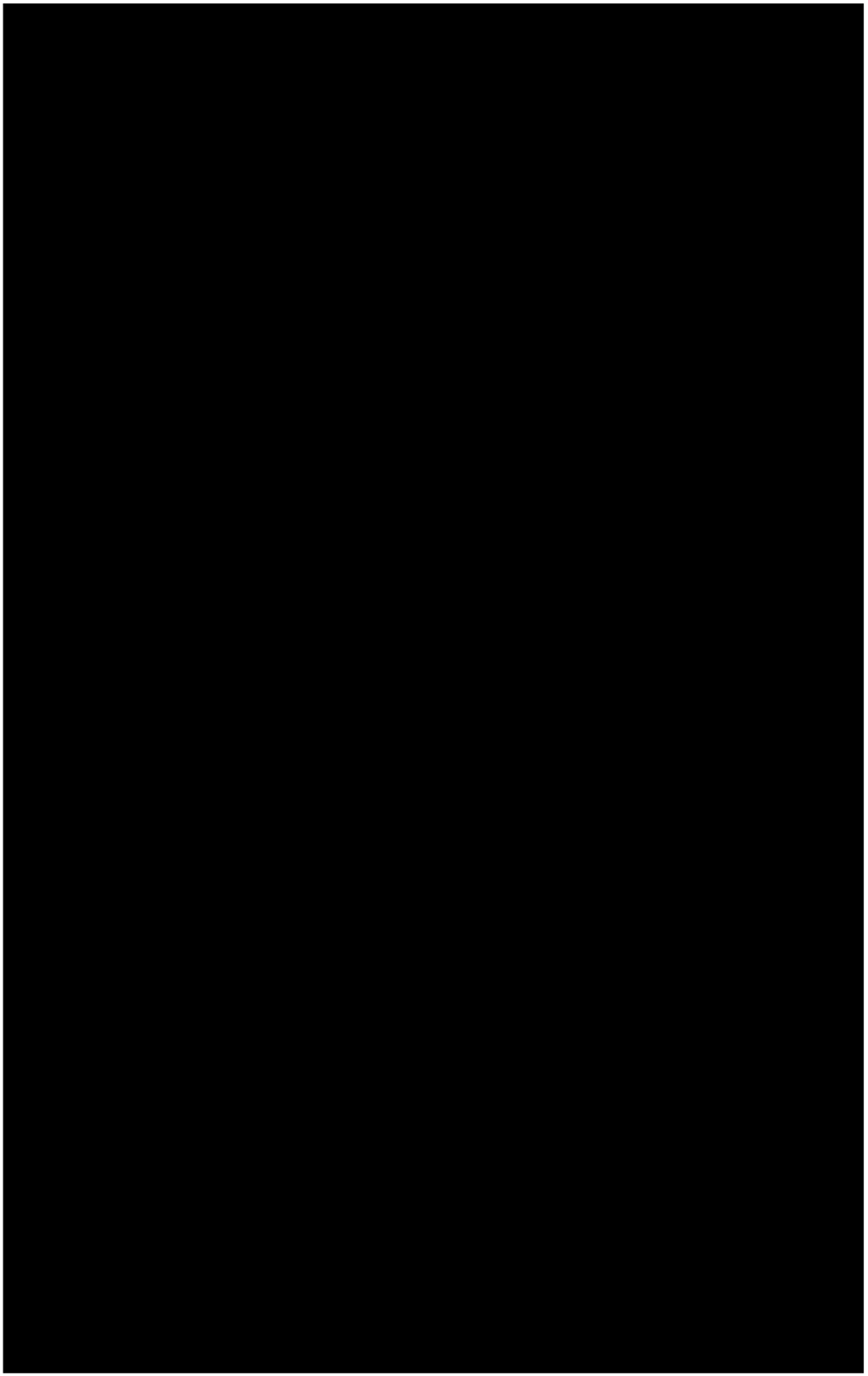


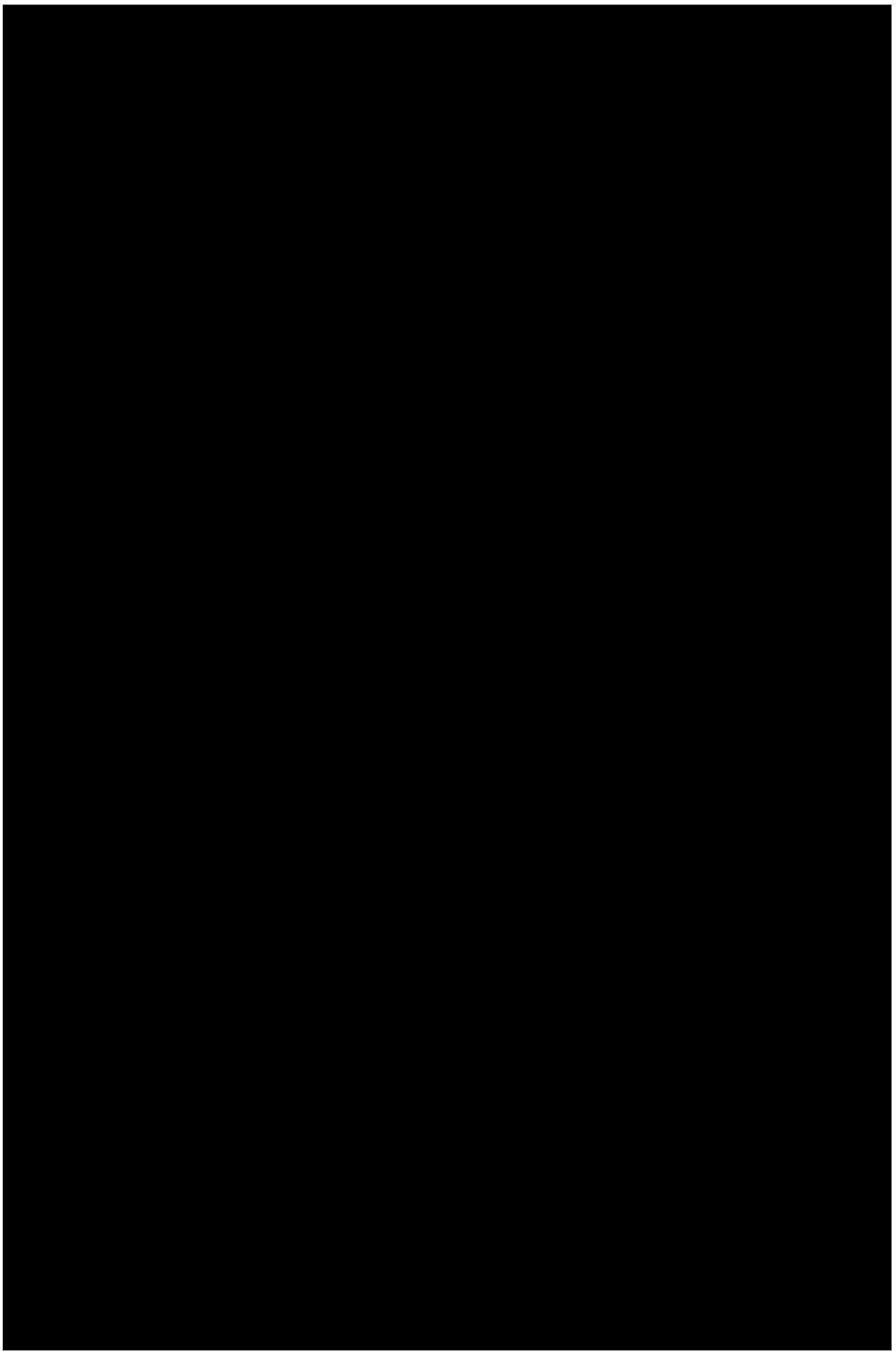


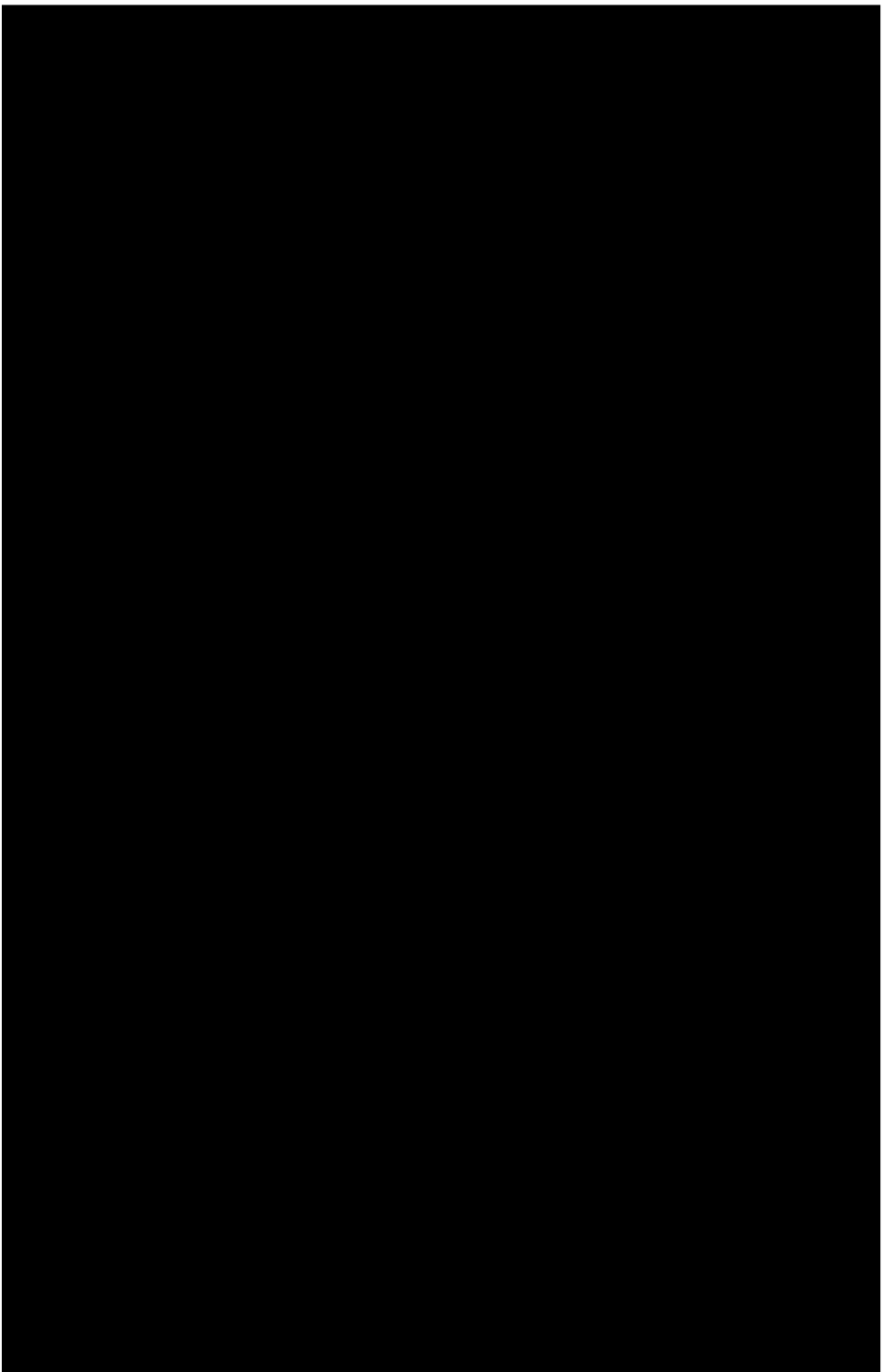


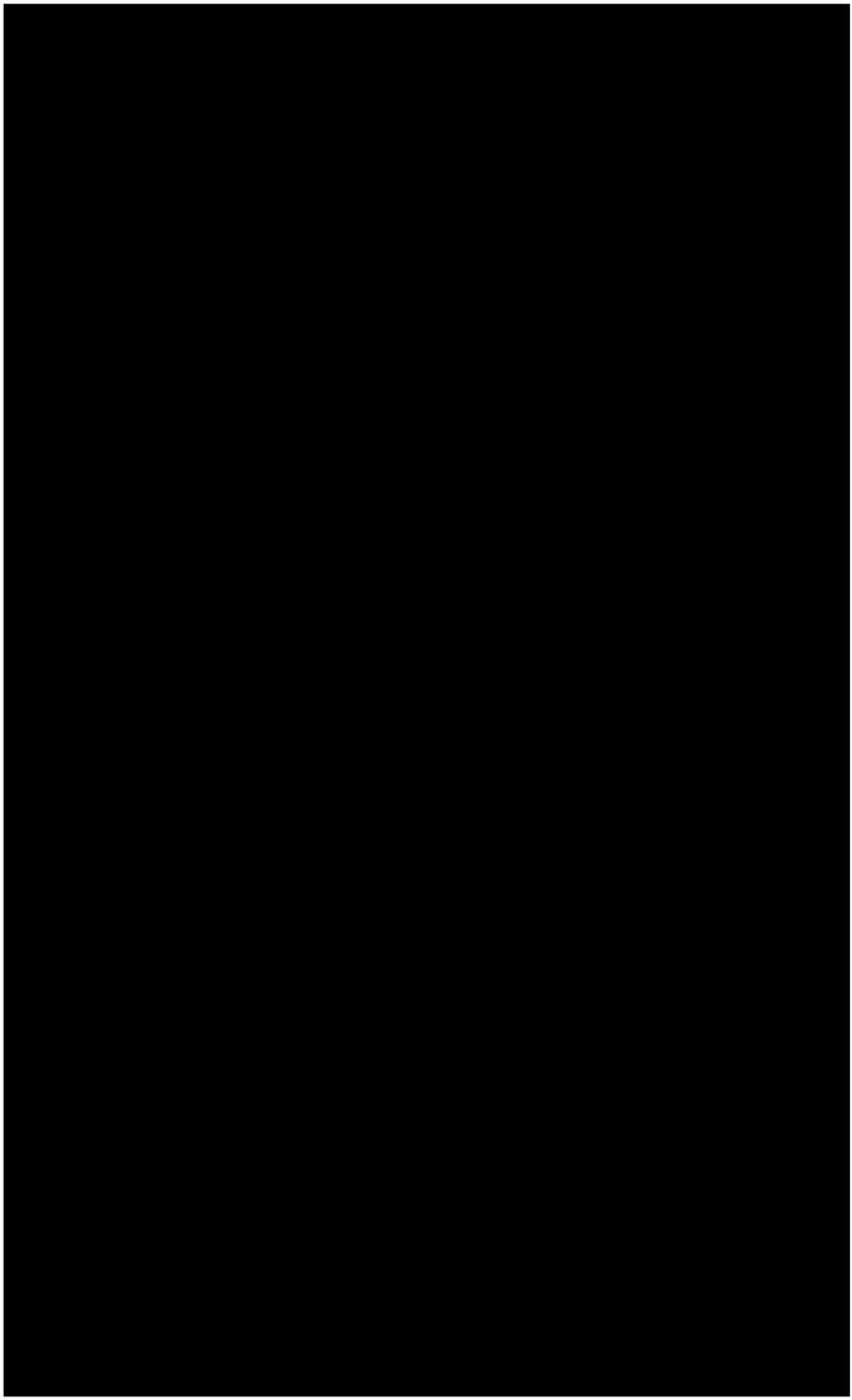


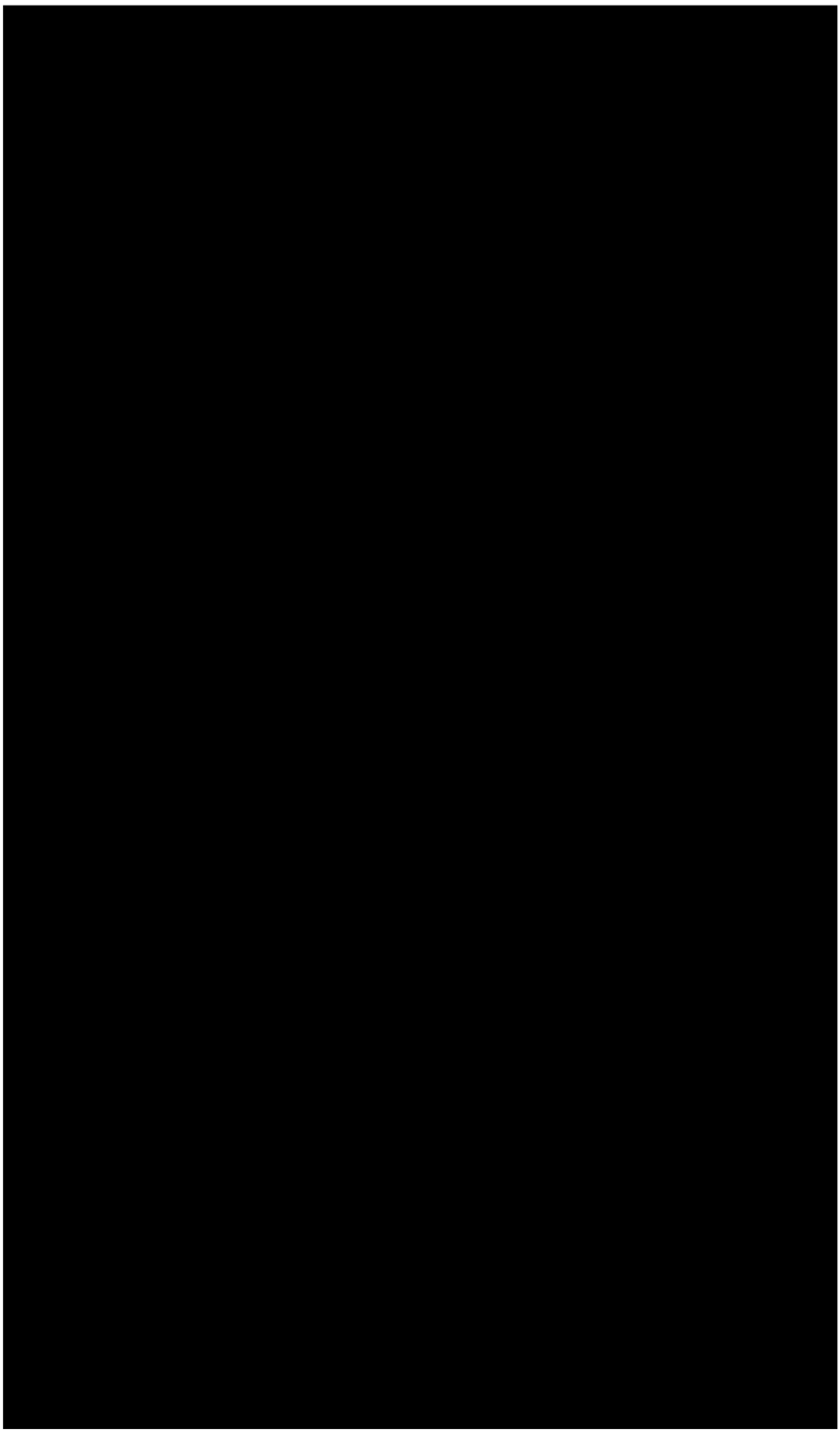


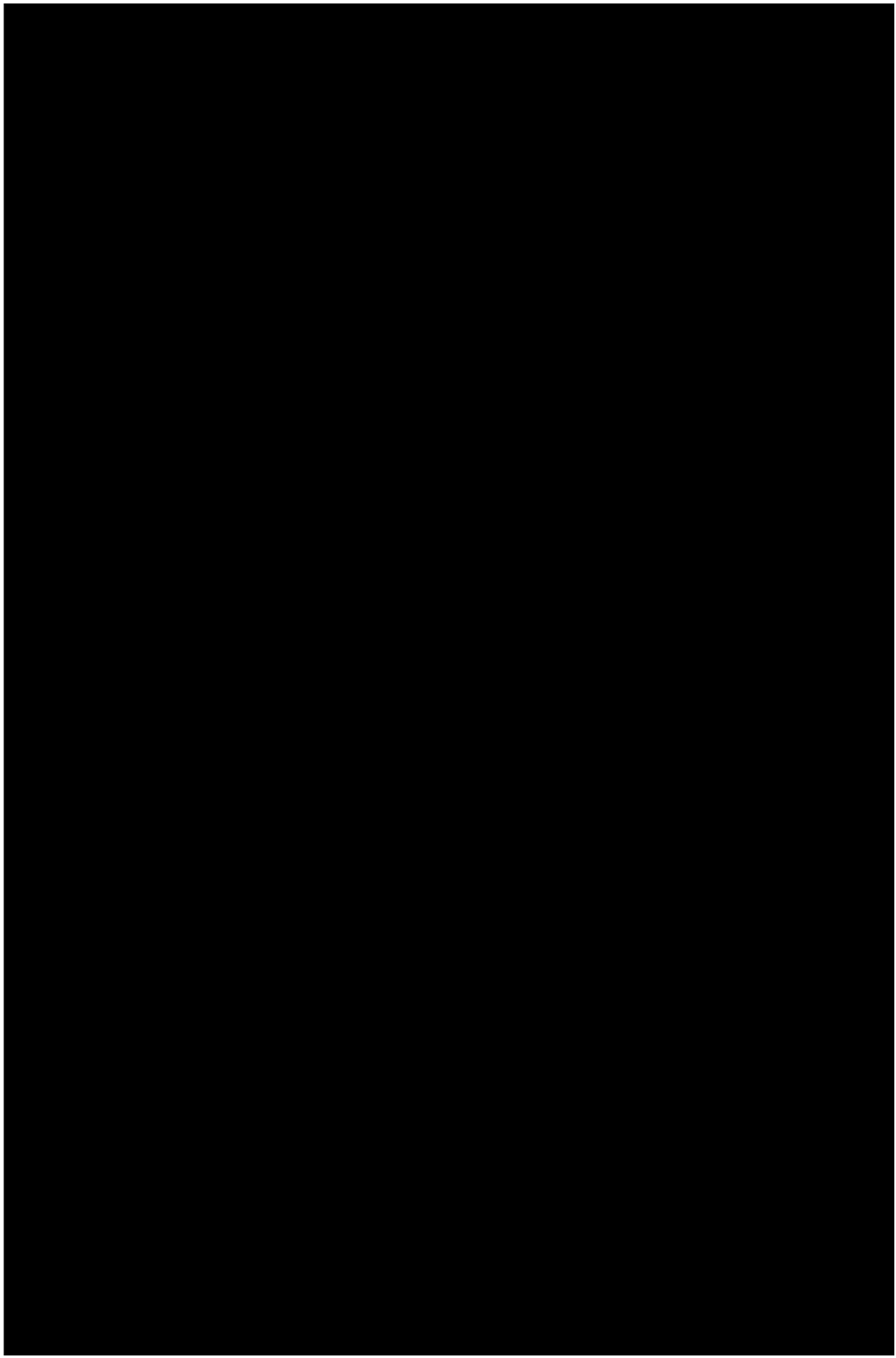


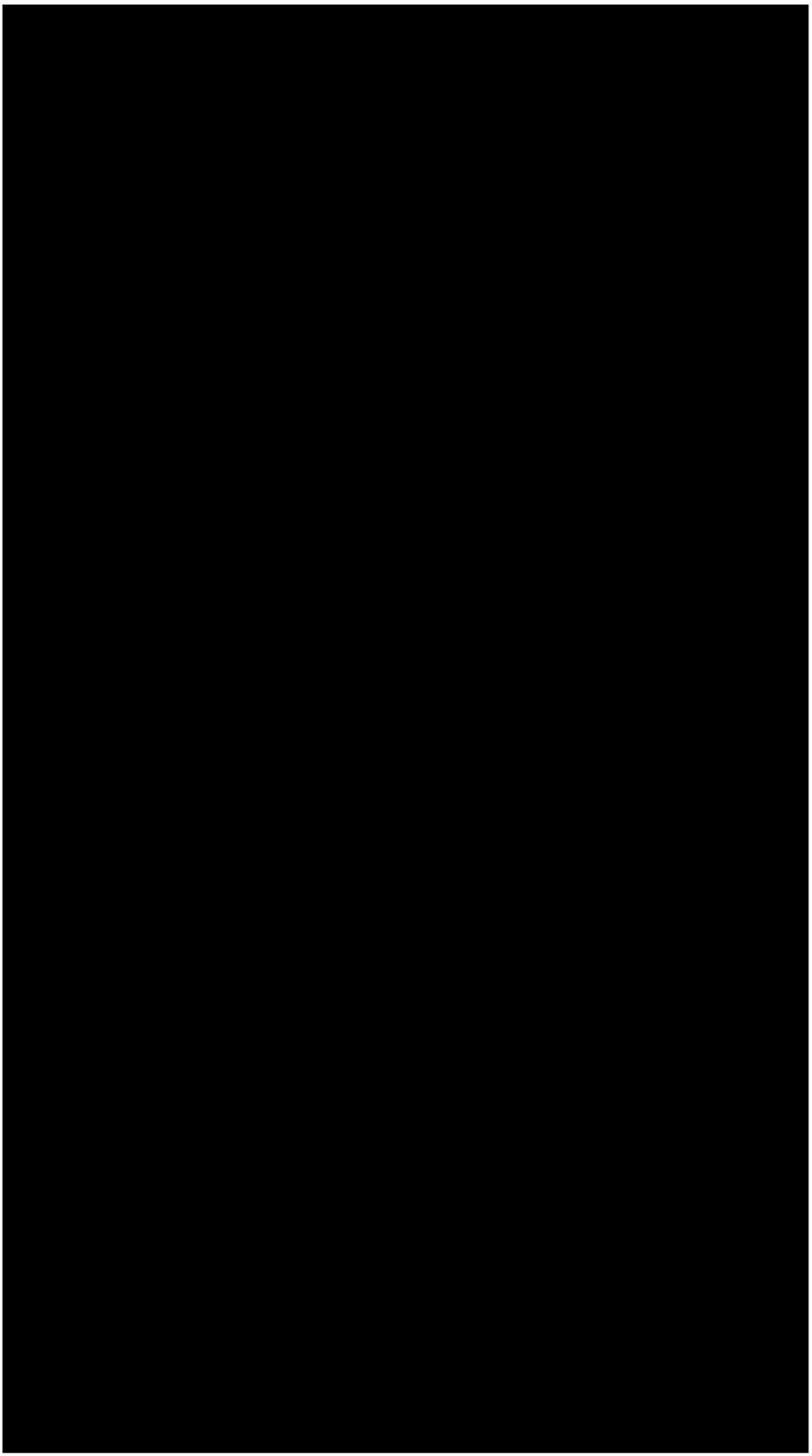


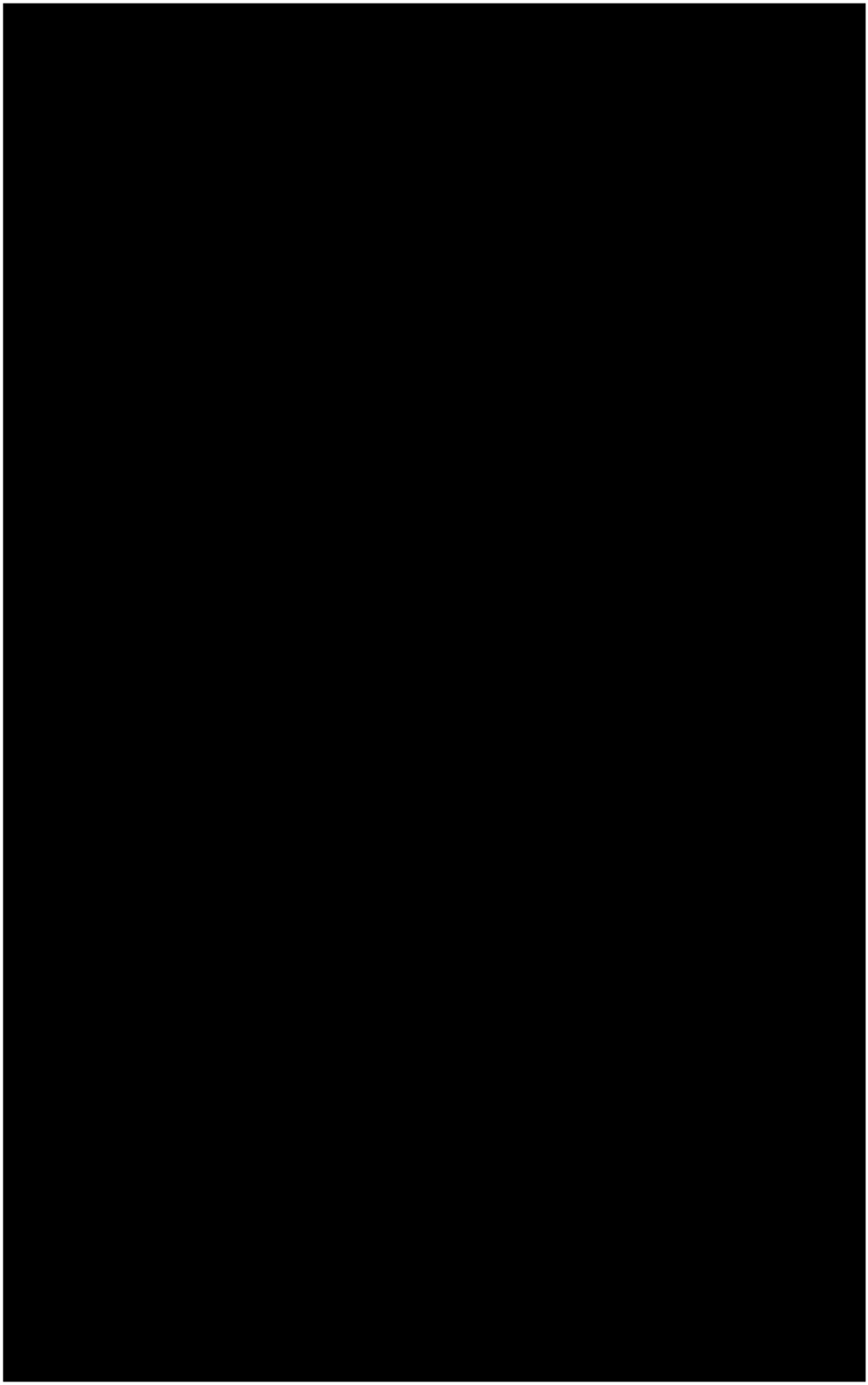


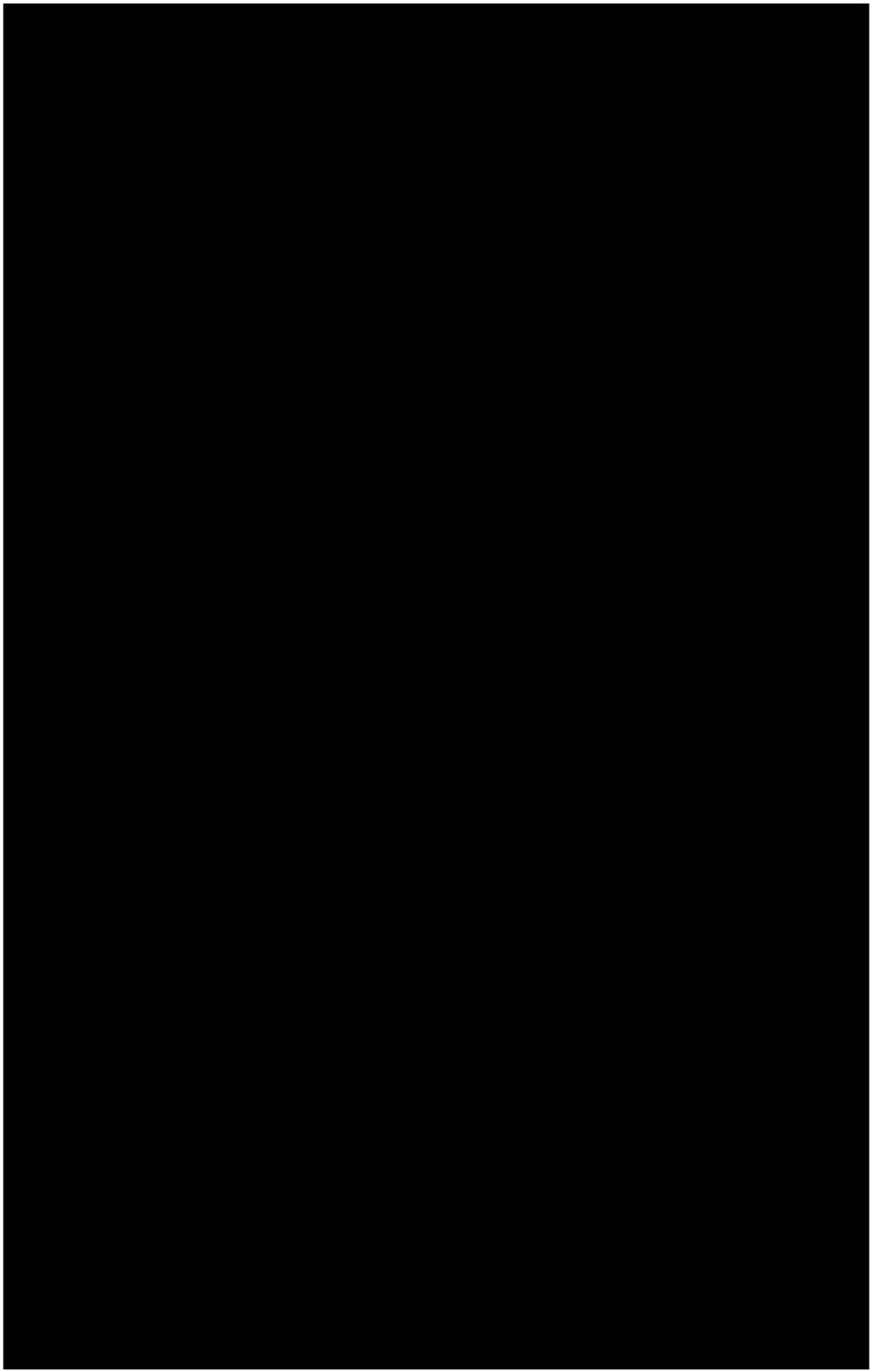


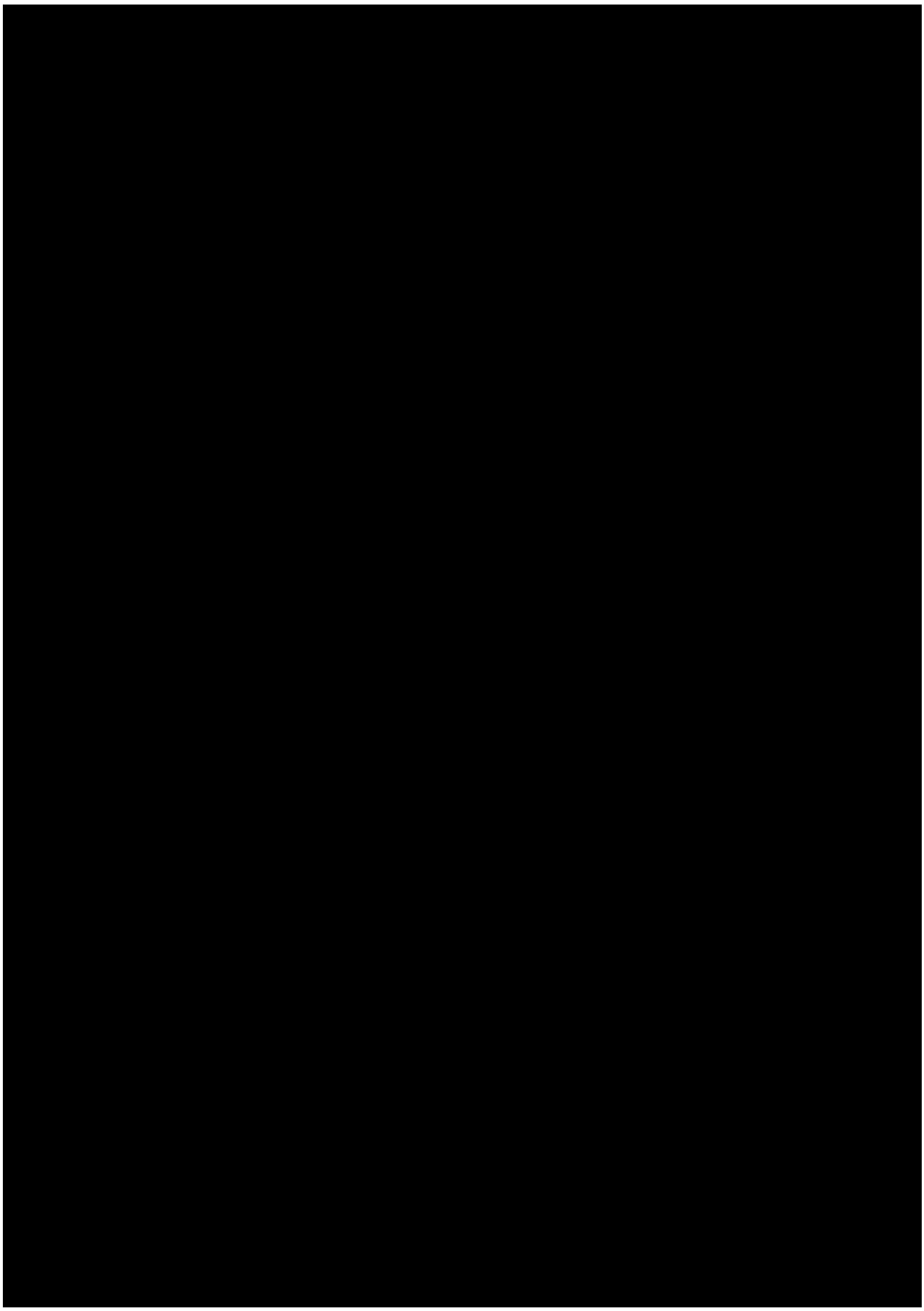












[redacted]

Danny W. TYER *v.* Rebecca A. TYER

CA 96-265 937 S.W.2d 667

Court of Appeals of Arkansas
Division III
Opinion delivered January 29, 1997

[redacted]

[redacted]

Meredith Wineland, for appellant.

R. Ted Vandagriff, for appellee.

SAM BIRD, Judge. This case involves an amended decree of divorce that undertakes to make division of appellant's retirement account that was not divided in the original divorce decree. The record reveals that Danny W. Tyer and Rebecca A. Tyer (Poole) were divorced by decree rendered on July 14, 1994, following a trial. Before the trial there had obviously been some discussions between the parties' counsel in an effort to reach a settlement. Among the subjects covered in the discussions was the division of appellant's retirement account. However, the discussions did not lead to a settlement, and the case proceeded to trial.

During direct examination of appellant at the trial, he stated that he had been employed by Pitney-Bowes for nineteen-and-one-half years and that he had a retirement plan there. He stated that he understood that the part of his retirement plan earned during his marriage to appellee was divisible by the court, and he acknowledged his marriage to appellee on October 30, 1981. A letter from Pitney-Bowes was introduced that described appellant's retirement plan as being 100% vested; that monthly benefits would

become payable at age sixty-five; that distributions were not allowed prior to attainment of age sixty-five; and that the plan contained no loan or lump-sum distribution features. No further evidence was presented at the trial regarding appellant's retirement plan.

At the conclusion of the testimony, the court orally announced its findings by which it (a) granted the divorce to appellant, (b) approved the property division except bills charged to third party credit cards, and (c) granted $200 monthly alimony to appellee for not exceeding eighteen months, terminating upon appellee's remarriage. No mention was made of appellant's retirement account. Likewise, the written divorce decree signed by the chancellor and approved as to form by the parties' attorneys contained no mention or reference to the appellant's retirement plan. In fact, the only mention at all in the divorce decree about the division of property was the statement that "each party shall have that property which is currently in their possession as their separate property and shall be responsible for the indebtedness incurred with the property. . . ." The divorce decree closes with the statement, "this Court maintains jurisdiction for all further orders as may be necessary."

On September 28, 1995, more than thirteen months after entry of the decree of divorce, appellee filed her motion that is the subject of this appeal in which she alleged that appellant's Pitney-Bowes retirement plan was an item of marital property that should have been divided in her divorce from appellant. Appellee alleged in her motion that appellant had admitted through his counsel in a letter before trial that appellee was entitled to one-half of the Pitney-Bowes retirement plan; that pretrial discovery had resulted in a letter from the plan manager setting forth the terms of the plan, including the fact that it was vested and the dates and amount of distributions; that the appellant had acknowledged during his testimony that he understood that the retirement plan was divisible; and that the Court had approved the property division. The motion also alleged that the retirement plan is a "qualified plan" within the meaning of section 401 of the 1986 Internal Revenue Code and Ark. Code Ann. § 9-18-101(3) (Repl. 1992), that the court has jurisdiction to enter orders dividing qualified

plans pursuant to Ark. Code Ann. § 9-18-102, and that the court retained jurisdiction in the divorce decree for the entry of all further orders as may be necessary. Appellee's motion prays for an order compelling appellant to "make coordination for drafting the Qualified Domestic Relations Order," and for other relief not pertinent to this appeal.

Appellant responded with a motion to dismiss in which he alleged that pursuant to Ark. R. Civ. P. 60, the court lacked jurisdiction to amend the divorce decree because a final order had been entered more than twelve months earlier in which the court made no division of the retirement plan.

Following a hearing, which consisted of arguments by counsel, the court rendered a letter opinion in which it is stated that the court had reviewed the tape from the divorce trial on July 14, 1994, and concluded that the omission from the divorce decree of provisions dividing the appellant's retirement plan was clerical error and that the decree should be amended to reflect that the portion of appellant's retirement benefits acquired during the marriage should be divided one-half to each party. An amended decree of divorce containing a provision dividing the retirement plan was entered on November 3, 1995.

We disagree with the conclusion of the chancellor that the omission of a provision dividing the retirement plan from the 1994 decree was "clerical error" within the meaning of Rule 60(a), and we hold that the chancellor lacked authority to amend the divorce decree to include a provision to divide the retirement plan more than ninety days after entry of the original divorce decree.

Rule 60 of the Arkansas Rules of Civil Procedure sets forth the circumstances under which the trial courts can correct judgments and orders. Paragraph (a) deals with the authority of the court to correct clerical mistakes and provides that they "may be corrected by the court at any time on its motion or on the motion of any party after such notice, if any, as the court orders . . . ."

First, we do not believe that amending a divorce decree to add a new requirement for the division of a retirement plan not mentioned in the chancellor's original oral findings or written

decree can be characterized as the correction of a clerical error. In *Luckes v. Luckes*, 262 Ark. 770, 561 S.W.2d 300 (1978), the supreme court held that clerical error had occurred when a clerk made a mistake in adding up a column of numbers on an adding machine and gave the incorrect total to the chancellor, who accepted the total as correct and included it in his order. An amended order changing the incorrect total was allowed. Correcting a clerk's error in addition is significantly different from adding an entirely new provision to a decree.

Secondly, under Ark. R. Civ. P. 60(b), action to correct an error or mistake in a chancellor's order or decree must be taken within ninety days of its filing with the clerk. In *Phillips v. Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991), the supreme court held that the ninety-day limit referred to in Rule 60(b) for the prevention of miscarriage of justice is also a reference to those clerical errors and mistakes described in Rule 60(a). We earlier held, in *Jones v. Jones*, 26 Ark. App. 1, 759 S.W.2d 42 (1988), that a chancellor lacks jurisdiction after ninety days from the filing of a divorce decree to distribute property that was not mentioned in the original decree unless grounds existed under Rule 60(c) for modifying a judgment after ninety days. Therefore, in the present case, even if the chancellor's failure to include in the original decree a provision dividing appellant's retirement plan was clerical error, he lost jurisdiction to correct it after the lapse of ninety days following the filing of the original decree with the clerk. The provision in the original decree that appears to reserve jurisdiction indefinitely "for all further orders as may be necessary," was ineffectual insofar as it would override the provisions of Rule 60.

Appellee cites *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986), in support of the chancellor's authority to reserve jurisdiction over property division issues in a divorce action for more than ninety days after the filing of a decree. In *Cox*, the chancellor had entered a divorce decree making detailed findings as to the division of marital property and debts, but not including any finding as to the income-tax liability of the parties. The decree concluded with a provision by which the court retained jurisdiction "for the entry of other and further orders as may be necessary herein. . . ." More than ninety days later the chancellor modified the decree to

require Mrs. Cox to either sign a joint 1983 tax return or to pay half of the additional tax liability that would result from her refusal to sign it. We upheld that modification, finding that Rule 60 was not applicable in that situation. However, in *Cox* there was extensive testimony in the record to support the chancellor's finding that Mrs. Cox had agreed during her testimony that she would file a joint income tax return for 1983 and pay any tax liability. The chancellor found that in drafting the original divorce decree he relied upon Mrs. Cox's testimony and that it led him to believe that she would sign the tax returns.

[redacted] In the present case, however, the record contains only a brief reference to appellant's retirement plan to the effect that he agreed that it was marital property to the extent that it accrued during the marriage, and that it was divisible. There was no testimony that appellant agreed to any particular formula for division or any other details. There was no testimony as to how much of the retirement benefits accrued during the parties' marriage nor any testimony about the appropriate formula to be applied in determining how much of the pension benefits should be awarded to appellee. There was simply no record made at the trial that would justify the chancellor in amending the decree to include a provision dividing the retirement plan on the strength of a provision in the original decree reserving the right to enter "all further orders as may be necessary." If such a reservation is to be given any validity, the "further orders" must at least relate to and be supported by some evidence in the record. The evidence here is simply not sufficient to support the chancellor's action.

The other points argued by appellee are found to be without merit. Therefore, we reverse and dismiss.

JENNINGS and GRIFFEN, JJ., agree.

Tommy BAIN *v.* STATE of Arkansas, Child Support Enforcement Unit, and Tina Lawrence

CA 96-363 937 S.W.2d 670

Court of Appeals of Arkansas
Division IV
Opinion delivered January 29, 1997

[redacted]

[redacted]

Thaxton, Hout & Howard, by: *Marvin D. Thaxton*, for appellant.

Vickie A. Warner, for appellee.

ANDREE LAYTON ROAF, Judge. This is the second appeal by Tommy Bain in this paternity case. We dismissed Bain's first appeal in an unpublished opinion issued December 8, 1994, under Ark. R. Civ. P. 54(b), because the judgment of paternity did not provide for child support and was thus not a final, appealable order. The trial court entered an order for regular and back support on February 6, 1996, and Bain again appeals the adjudication of paternity. He asserts that the chancellor erred in admitting into evidence reports of two blood tests performed on him; that the testimonial evidence does not support a finding of paternity without the erroneously admitted blood-test reports; that the decision should be reversed because the chancellor evidenced a lack of impartiality; and that the appellee should be ordered to repay all sums paid pursuant to the order of support if the paternity judgment is reversed. We hold that the chancellor properly admitted the first of the two blood-test reports and affirm.

Tina Lawrence claims that Bain is the father of her child born on February 18, 1991. A paternity action was filed against Bain by the appellee, Child Support Enforcement ("CSE"), on June 12, 1991. An order for blood draw designating Genetic Design, Inc. ("Genetic Design"), as the court-appointed expert to perform the blood test was entered on July 10, 1991. The test was instead performed by Roche Biomedical Labs ("Roche"). Roche submitted a report dated September 20, 1991, finding a 99.98% probability that Bain was the father of Lawrence's child.

After receiving the test result, Bain filed an answer denying paternity and cross-complained, alleging that James Priddy was the father of Lawrence's child. Bain asked that a blood test also be performed on Priddy. Priddy voluntarily submitted to the blood test, which was also performed by Roche; CSE did not obtain a court order authorizing this test.

During a hearing on the merits held on May 11, 1992, Lawrence testified that she had sexual relations with Bain during the period of conception, and also testified to relations with James Priddy approximately a week before she learned she was pregnant. Bain denied having any sexual contact with Lawrence. CSE attempted to introduce the blood-test reports on Bain and Priddy. The trial court admitted the report on Bain over the objection of Bain's counsel that the test was not performed by the court-appointed expert as required by Arkansas statute. However, the court sustained Bain's objection to admission of the report of Priddy's test.

At the conclusion of the hearing, the trial court requested briefs on the issue of whether additional testing of Bain could be ordered. An additional test was performed on Bain by Genetic Design and its report dated December 31, 1992, found that there was a 99.97% probability that Bain was the father. A second hearing was held on February 5, 1993, during which Bain objected to the admission of the Genetic Design report because it was not properly certified as required by Arkansas statute. The trial court again overruled Bain's objection and allowed the second test report to be introduced.

On August 27, 1993, the trial court entered an order which found that Bain was the father of Lawrence's child based on the second blood-test report and on the testimony of the parties and other witnesses. Bain's appeal of this order was dismissed for lack of finality. A subsequent hearing was conducted during which the amount of regular and back child support was determined. Bain again appeals the trial court's determination that he was the father of Lawrence's child.

Bain's first two arguments on appeal pertain to the admission of the reports of the two blood tests performed on him. Bain relies on the language of Ark. Code Ann. § 9-10-108 (1987) and on two cases decided by this court and the Arkansas Supreme Court for his argument that neither of these reports should have been admitted into evidence. Because these arguments are related, we discuss them together.

At the time the two blood tests were performed and the hearing held on the merits of the paternity complaint, § 9-10-108 provided in pertinent part:

> (a)(1) Upon motion of either party in a paternity action, the trial court shall order that the putative father, mother, and child submit to blood tests or other scientific examinations or tests. . . .
> (2) *The tests shall be made by a duly qualified expert or experts to be appointed by the court.*
> (3)(A) A written report of the test results prepared by the duly qualified expert conducting the test, *or by a duly qualified expert under whose supervision or direction the test and analysis have been performed, certified by an affidavit* duly subscribed and sworn to by him or her before a notary public, may be introduced in evidence in paternity actions without calling the expert as a witness unless a motion challenging the test procedures or results has been filed within thirty (30) days of the trial on the complaint and bond is posted in an amount sufficient to cover the costs of the duly qualified expert to appear and testify. (Emphasis supplied.)

(Ark. Code Ann. 9-10-108 (a)(1)-(3) (Repl. 1993) (now amended as Ark. Code Ann. 9-10-108 (a)(1), (4), and (5)(A)).

Bain asserts that the first blood test should have been excluded because Roche was not named in the blood-test order as the expert appointed by the court, as required by § 9-10-

108(a)(2). Bain further relies on the holdings in *Ross v. Moore*, 30 Ark. App. 207, 785 S.W.2d 243 (1990), and *Boyles v. Clements*, 302 Ark. 575, 792 S.W.2d 311(1990), for the proposition that strict adherence to the statute is required before a blood-test report may be admitted in the absence of the expert who performed or supervised the test.

With regard to the second blood test performed by Genetic Design, Bain asserts that because the written report does not comply with the foundational prerequisites set forth in § 9-10-108 (a)(3)(A), the holdings in *Ross* and *Boyles* also mandate its exclusion.

In the case of the second test performed by Genetic Design, Bain's argument is well taken. Section 9-10-108(a)(3)(A) requires that a report be certified by the duly qualified expert who either conducted the test *or* supervised or directed the test and analysis, if the report is to be introduced without calling the expert as a witness. The report submitted by Genetic Design was signed by Dr. Deborah Cutter, who certified under oath only that she had "read the foregoing report" and "that the facts and results therein are true and correct as I verily believe." The certification lists Cutter, along with seven others, as directors or associate directors of Genetic Design. In a separate affidavit, which set forth her qualifications as an expert in genetic testing, Cutter simply stated that she was an associate director of Genetic Design.

We do not agree with CSE's assertion that Bain was required to give 30 days' notice in order to object to admission of the report, because such notice is required only where the chain of custody, test procedures, or results are contested. *See Parks v. Ewans*, 316 Ark. 91-B, 871 S.W.2d 343 (1994). Nor do we agree with CSE that Cutter's certification and affidavit constitute strict compliance with § 9-10-108(a)(3)(A), and that the expert need not attest that he or she personally either performed or directed the performance of the test. Moreover, this issue was addressed in our holding in *Ross*, *supra*, which involved a similarly defective test report. In *Ross*, a blood-test report was admitted over the objection of the putative father. At the time, the paternity-test statute required that the report be certified by the expert who performed

the test. The report in *Ross*, like that of Genetic Design, was merely signed by the laboratory director and did not indicate that he performed the test or whether he was a qualified expert. This court held that the statutory foundation, which was a prerequisite to admission of the report, had not been established and that the trial court had thus abused its discretion in admitting the report.

[redacted] Although the statute has since been amended to also allow for certification by an expert under whose supervision or direction the test has been performed, Cutter's statements that she is a director of Genetic Design and that she had read the report likewise fall short of meeting the foundational prerequisites for admission under the amended statute. Moreover, the following rationale for requiring strict adherence set forth in *Ross* applies equally in the instant case:

> Prior to the adoption of Ark. Code Ann. 9-10-108, this report would have been considered inadmissible hearsay, and in order to be admissible and fall into one of the exceptions to the hearsay rule, certain foundational requirements must have been met. . . .
>
> The purpose of 9-10-108 is to relax these foundational requirements and make it less difficult to introduce paternity testing results into evidence. However, to insure the reliability of this type of testing, the foundational prerequisites in the statute must be met. *See Newton v. Clark*, 266 Ark. 237, 582 S.W.2d 955 (1979). In light of the fact that recently developed genetic testing can, with a high degree of certainty, identify the father of a child and, thus, be viewed as conclusive by the fact-finder in paternity suits, we do not think that strict adherence to the statutory prerequisites is unreasonable.

Id. at 210-11, 785 S.W.2d at 245.

[redacted] Finally, the supreme court has adopted the rationale and conclusion of *Ross* in a case involving a report that was only signed by two laboratory directors and notarized, stating:

> As in *Ross v. Moore, supra*, there is nothing in the report to indicate the identity of the person who performed the test or whether the person who performed the test was a duly qualified expert. Although the report is signed by Dr. Smith and Mr. Gutendorf and states their positions to be Laboratory Director

> and Scientific Director respectively, there is nothing in the report to indicate that these two men performed the test or that they are qualified experts.

Boyles, 302 Ark. at 579, 792 S.W.2d at 314. We therefore hold that the trial court abused its discretion in admitting the second test performed by Genetic Design.

[redacted] As to the first test performed by Roche, we reach a different conclusion. Although CSE does not argue the merits of this issue, and merely states that the question is moot because the trial court did not rely on the first report in making the adjudication of paternity, we do not agree that the matter is moot. Rather, if the trial court in fact erroneously admitted this report, the error would be harmless if the trial court relied solely upon the report by Genetic Design. Moreover, in reviewing chancery cases, we consider the evidence de novo on the record. *Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993). Accordingly, we can consider the report of the Roche blood test, if properly admitted, in determining whether the chancellor's finding of paternity is clearly against the preponderance of the evidence, and we can affirm if the chancellor reached the right conclusion for the wrong reason. *See, e.g. Estate of Gaston v. Ford Motor Co.*, 320 Ark. 699, 898 S.W.2d 471 (1995); *Southern Farm Bureau Cas. Ins. Co. v. Pettie*, 54 Ark. App. 79, 89, 924 S.W.2d 828 (1996).

[redacted] In arguing that the Roche report was erroneously admitted, Bain again relies on *Ross* and *Boyles* for the proposition that the statutory directive that the expert be appointed by the court requires strict compliance. He does not challenge the test procedures or the results of the test performed by Roche, nor does he argue that Roche is not an expert qualified to perform paternity blood tests or that he would have objected to the appointment of Roche. In short, he does not suggest that he was in any way prejudiced by the substitution of Roche in the first blood test.

After Bain objected to the admission of the Roche report, CSE advised the trial court that it had used both Roche and Genetic Design to perform paternity blood tests and that both companies had been approved by the court in prior cases. However, CSE stated that their office had switched to Roche exclu-

sively after the entry of Bain's blood-test order, because of problems with Genetic Design's chain of custody and affidavits. CSE characterized the erroneous designation of Genetic Design in the order as an administrative error and argued that the use of Roche was substantial compliance with the statute. The trial court found that there had been substantial compliance or good-faith compliance with the statute, even though Roche was not specifically named in the blood-test order, and that Roche was a recognized company and denied Bain's motion to exclude the report.

[redacted] Under the circumstances of this case, we cannot say that the trial court erred in admitting this report. The Roche report was properly certified by a director who set forth his expert qualifications and attested that he had supervised and directed the test, and neither the holdings nor the rationale set forth in *Ross* and *Boyles*, which pertain to the foundational requirements of the report, mandate the exclusion of this report.

Bain next argues that the trial court erred in finding that he was the father of Lawrence's child. He in essence argues that Lawrence's uncorroborated testimony that she had sexual relations with Bain and her admission that she had sexual relations with Priddy shortly before learning she was pregnant do not support the finding of paternity if the two blood-test reports were erroneously admitted and are thus excluded from evidence. Lawrence's testimony may be summarized as follows. She stated that she had sexual relations with Bain five to ten times between April and July of 1990, at her home and one time at his place of employment. She stated that her doctor advised her that her probable date of conception was in May of 1990, and that she first had sexual relations with James Priddy the weekend before she learned she was pregnant on June 18, 1990. She candidly testified that she wanted a blood test because although she believed Bain to be the father of her child, there was a slight possibility that Priddy could have fathered the child.

[redacted] Bain denied having any sexual relations with Lawrence, but admitted that he visited her in her home during the relevant period. He and his wife testified that he was completely impotent

during the months of April through July 1990 due to medication he was taking for high blood pressure. Bain's pharmacist testified that his impotence could have resolved with intermittent withdrawal from the medication. Moreover, in a paternity client questionnaire completed by Lawrence for CSE in April 1991 when her child was two months old, she stated that Bain was unable to achieve an erection the first five or six times they attempted intercourse. Finally, the Roche blood-test report found a 99.98% probability that Bain was the father of Lawrence's child. Arkansas Code Annotated § 9-10-108 (a)(4) provides as follows:

> If the results of the paternity tests establish a ninety-five percent (95%) or more probability of inclusion that the putative father is the biological father of the child, after corroborating testimony of the mother in regard to access during the probable period of conception, such shall constitute a prima facie case of establishment of paternity, and the burden of proof shall shift to the putative father to rebut such proof.

Thus, the Roche blood-test report along with the corroborating testimony of Lawrence constitute a prima facie case of establishment of paternity, and Bain has not met the burden of rebutting this proof. Moreover, in a review of chancery court findings, we will not reverse a finding of fact made by the chancellor unless it is clearly erroneous. *Erwin L. D. v. Myla Jean L.*, 41 Ark. App. 16, 847 S.W.2d 45 (1993). Based on the evidence in the record, we cannot say that the trial court's finding of paternity was clearly against the preponderance of the evidence.

[redacted] Bain next argues that the decision of the trial court should be reversed because the chancellor evidenced a lack of impartiality during the proceedings. Bain in essence complains of certain remarks the trial court made in the first hearing, during discussion of whether the court could order a second blood test of Bain. Bain's counsel asserted that CSE should be required to go forward with its case without benefit of the Roche blood test or further testing. The trial court's remarks occurred during this discussion and indicated a concern about the interest of the child and the ability of the court to require further blood testing if necessary to reach a decision. Bain also argues throughout his brief that the second blood-test order is evidence of the chancellor's

partiality. Bain offers no citation of authority or convincing argument on this point. This court has long held that assignments of error unsupported by convincing argument or authority will not be considered on appeal. *Rogers. v. Rogers*, 46 Ark. App. 136, 877 S.W.2d 936 (1994). Moreover, the welfare of the child is paramount even in paternity proceedings, for the major purpose of Arkansas's filiation law is to identify the putative father so that he may assume his equitable share of the responsibility to his child. *See Davis v. Office of Child Support Enforcement*, 322 Ark. 352, 908 S.W.2d 649 (1995).

Because we affirm the finding of paternity, we do not reach Bain's final argument that he is entitled to a refund of monies paid pursuant to the order of support. We also note that this action was filed by CSE when the minor child was four months old, and had not been finalized as the child approached his seventh birthday in part due to the failure of CSE to ensure that its crucial blood-test reports meet the requirements of the paternity testing statute before introducing them into evidence.

Affirmed.

ROBBINS, C.J., and NEAL, J., agree.

Barry G. COWAN *v.* DIRECTOR, Arkansas Employment Security Department and Forsgren, Inc.

E 96-11 936 S.W.2d 766

Court of Appeals of Arkansas
Divisions I and III
Opinion delivered February 5, 1997

[redacted]

Appellant, *Pro Se.*

Allan Pruitt, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Barry G. Cowan appeals the Board of Review's denial of unemployment compensation benefits in accordance with Ark. Code Ann. § 11-10-513 (Repl. 1996), upon finding that appellant left his last work voluntarily and without good cause connected with the work. He argues that the decision is not supported by substantial evidence. We affirm.

[redacted] We do not conduct a de novo review on the appeal of a decision of the Board of Review. The findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. Ark. Code Ann. § 11-10-529(c)(1) (Repl. 1996); *Perdix- Wang v. Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* Even when there is evidence upon which the Board

might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

[redacted] The Board of Review adopted the findings of fact and conclusions of law made by the Appeal Tribunal. The Appeal Tribunal found that appellant quit his job because of problems with another worker, Kenny Stern. Stern had hidden the appellant's lunch, took keys out of equipment that appellant was operating, and threw the appellant's hat. The appellant believed that they were about to fight and complained to the superintendent, Joe Holland, who instructed the appellant to fight it out. Appellant did not approach the president of the company prior to quitting because he had rarely seen him and he had always answered to Holland. The Appeal Tribunal found that the employer encouraged its employees to resolve problems among themselves or through the superintendent, but that the president would meet with employees to discuss problems if he was approached. One of the elements in determining whether good cause exists for an employee to terminate his employment within the meaning of unemployment compensation law is whether the employee took appropriate steps to prevent the mistreatment from continuing. *See McEwen v. Everett, Director*, 6 Ark. App. 32, 637 S.W.2d 617 (1982); *Teel v. Daniels, Director*, 270 Ark. 766, 606 S.W.2d 151 (Ark. App. 1980). The Appeal Tribunal concluded that while the appellant did talk to his direct supervisor, it would have been appropriate to take his complaint to the president before giving up his job. Therefore, appellant voluntarily left his last work without good cause connected with the work within the meaning of the law. From our review of the record, there is substantial evidence to support these findings and decision. Therefore, we affirm the Board's decision that appellant left his last work voluntarily and without good cause connected with the work.

Affirmed.

PITTMAN and JENNINGS, JJ., agree.

ROGERS, STROUD, and GRIFFEN, JJ., dissent.

JUDITH ROGERS, Judge. I respectfully dissent from the majority's opinion because the result in this case places an unreasonable requirement on an employee to preserve his job rights. In a situation where an employee is threatened by another co-worker, and the resolution of this problem by the employee's supervisor is to "fight it out" with the co-worker, I do not believe that our law requires the employee to physically subject himself to harm to protect his job rights.

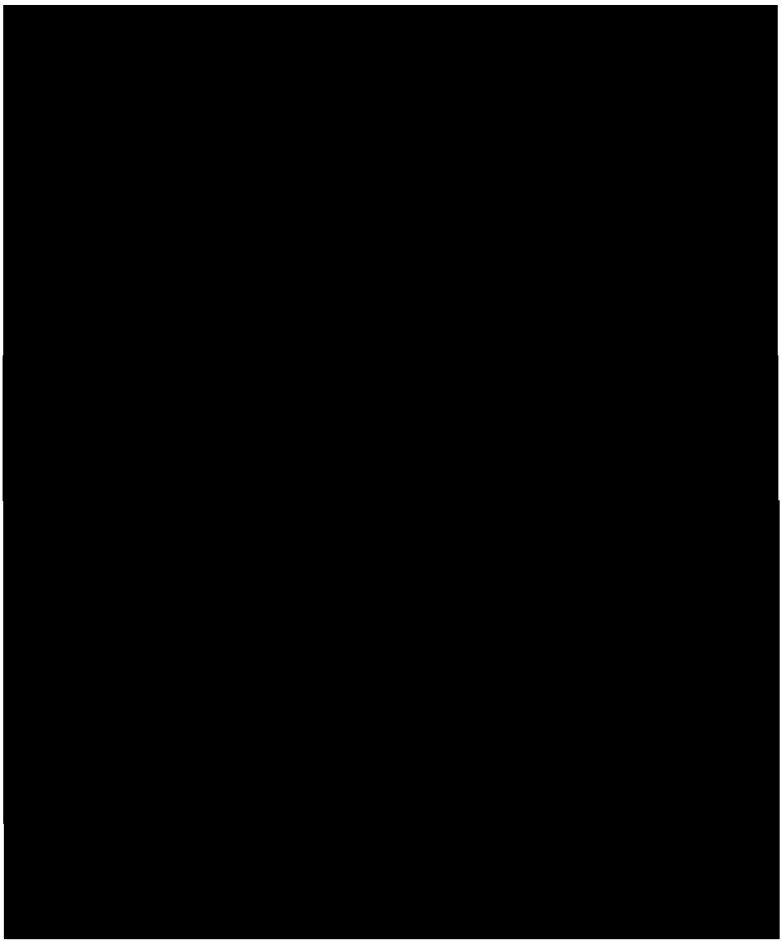
Although our standard of review restricts us from determining questions of fact, I find it unrealistic in this case that appellant should have gone through the chain of command of a company to speak with the president before quitting. Appellant was unable to perform his job because a co-worker had removed the keys from the equipment that appellant was operating. Also, appellant was being taunted and provoked into a fight by a co-worker. Instead of engaging in a fight at work, appellant approached his supervisor and reported the incidents. The supervisor's only response was for appellant to "fight it out." Also, the evidence reflects that the president of the company was not readily available to the employees and that employees were encouraged to resolve problems between themselves and their supervisors. If this affirmance becomes the law, we might be faced with problems in very large or multi-state jurisdictions where it is not possible to reach the president because his office may be in another state. Surely our laws do not require that we give up civility, safe work environments, or responsibility in the chain of command before an employee's rights to a safe work place is guaranteed. Based on the facts of this case, I would reverse.

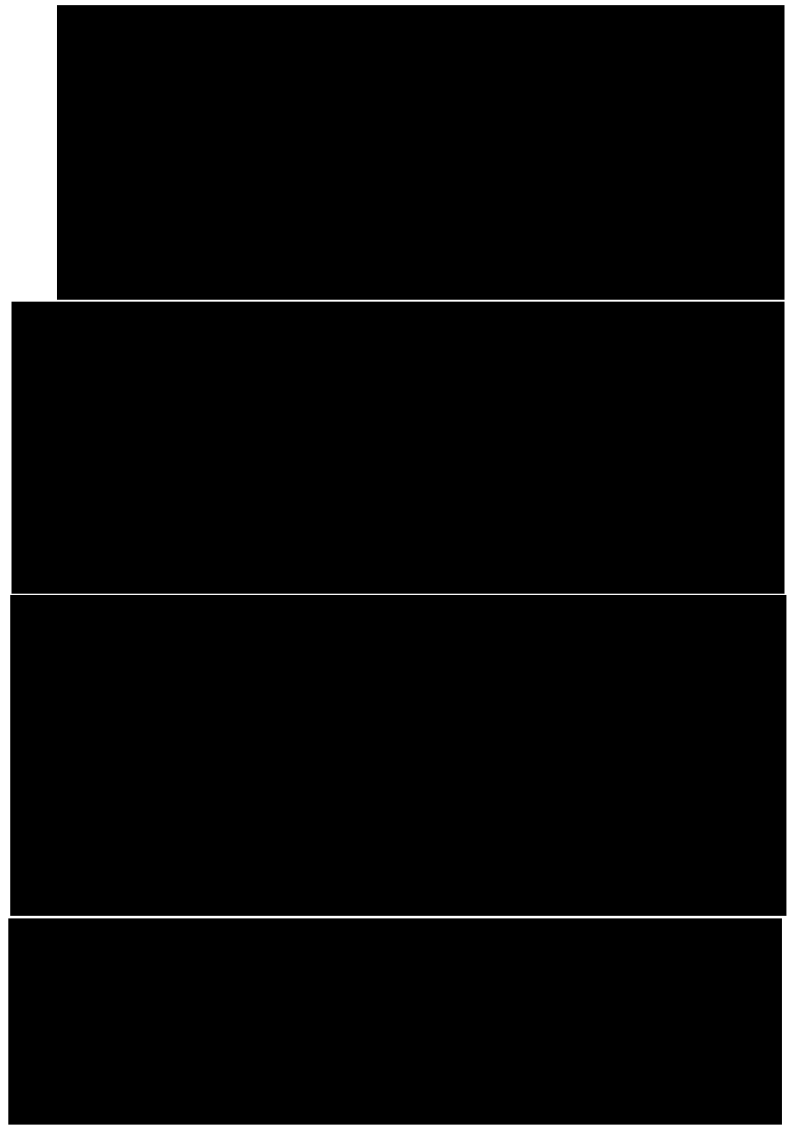
GRIFFEN and STROUD, JJ., join in this dissent.

Robert S. MOORE, Director, Alcoholic Beverage Control Division, et al. *v.* Leo KING

CA 96-119 937 S.W.2d 677

Court of Appeals of Arkansas
Division I and III
Opinion delivered February 5, 1997





Donald R. Bennett, for appellant Alcoholic Beverage Control Board.

Charles R. Singleton, for appellant Billy G. Taylor.

Lyons & Emerson, by: *Jim Lyons*, for appellee.

JOHN B. ROBBINS, Chief Judge. Pocahontas Moose Lodge #2405, one of the appellants herein, filed an application for a private-club permit with appellant Arkansas Alcoholic Beverage Control (ABC) Division on May 20, 1994. The ABC Division thereafter received written objections to the application from the Randolph County Sheriff, the Pocahontas Assistant Chief of Police, and appellee Leo King, a nearby property owner. As a result of the public-official objections, the ABC Division Director initially denied the application on June 23, 1994, and the applicant appealed. After a hearing before the ABC Board, the Board voted to grant the application, and this decision was appealed to the Randolph County Circuit Court on October 18, 1994. The circuit court reversed the decision of the ABC Board and denied the application on October 13, 1995. The appellants now appeal the ruling of the circuit court, arguing that it erred in finding that the ABC Board's decision to grant the permit was not supported by substantial evidence. In addition, the appellants contend that the circuit court erred by usurping the authority and discretion of the ABC Board, thereby substituting its judgment for that of the administrative agency. We affirm the decision of the circuit court.

Review of administrative decisions, both in the circuit court and here, is limited in scope. *In Re Sugarloaf Mining Co.*, 310 Ark. 772, 840 S.W.2d 172 (1992). Such decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. *Arkansas Alcoholic Beverage Control Bd. v. King*, 275 Ark. 308, 629 S.W.2d 288 (1992). Administrative action may be regarded as arbitrary and capricious only when it is not supportable on any rational basis. *Partlow v. Arkansas State Police Comm'r*, 271 Ark. 351, 609 S.W.2d 23 (1980). The appellate court's review is directed, not toward the circuit court, but rather toward the decision of the agency. *In Re Sugarloaf Mining Co., supra.* Judicial review is limited because administrative agencies are better

equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies. *First National Bank v. Arkansas State Bank Comm'r*, 301 Ark. 1, 781 S.W.2d 744 (1989).

Arkansas Code Annotated section 3-9-222(f) (Repl. 1996) provides that the ABC Board may issue a permit to operate a private club if the applicant is qualified and the application is in the public interest. Arkansas Code Annotated section 3-4-201(b) (Repl. 1996) pertains to the restricting of the quantity of permits issued in the state and provides:

> The Alcoholic Beverage Control Board is empowered to determine whether public convenience and advantage will be promoted by issuing the permits and by increasing or decreasing the number thereof; in order to further carry out the policy hereinbefore declared, the number of permits so issued shall be restricted.

There are a number of factors that the ABC should consider before making such a determination, including the number and types of alcoholic permits in the area, economic impact, traffic hazards, remoteness of the area, degree of law enforcement available, input from law enforcement or other public officials in the area, and comments from area residents in opposition or support of the permit. *Edwards v. Arkansas Alcohol Beverage Control*, 307 Ark. 245, 667 S.W.2d 660 (1984).

Gordon Steven Rice is the secretary of Pocahontas Moose Lodge #2405 and testified on its behalf. He stated that the lodge currently had 192 members and had been in existence for a little more than a year. Mr. Rice explained that the continuing practice was for each member to bring his own beer to the lodge, and that no member was allowed to possess more than 24 beers on the lodge premises. He further testified that no alcohol was sold on the premises and that sometimes he would take beer orders and transport alcoholic beverages from a nearby wet county to the lodge, and that this practice made him uncomfortable. Mr. Rice explained that the purpose of the lodge is to provide a social atmosphere and to raise money for charities and the community. According to Mr. Rice, there were no membership dues. Instead,

the members would donate money, which would later be used for operating expenses. Mr. Rice opined that, if the application were granted, this would benefit the community. He based this opinion in part on the fact that there are only two other private clubs in the county, one of which is a relatively expensive country club, and the other of which has its membership restricted to veterans.

Appellee Leo King testified against the private-club application. He stated that he lives 190 feet from the lodge, and that their activities cause a general disturbance. Mr. King gave accounts of loud music being played late at night as well as beer cans littering the premises. He believed that the granting of a permit would lower the value of his property, and he testified that all of the neighbors in the vicinity of the lodge opposed its application.

Sheriff Rob Sammons also testified that he was in opposition to the application. He noted that there were not extensive problems with the existing private clubs, but expressed concern that another club might cause too heavy a burden on the sheriff's office. Sheriff Sammons did, however, acknowledge that the lodge serves a useful purpose in the community.

There was other evidence presented on behalf of the appellee which purported to show that the lodge had previously engaged in illegal activities. For example, it was established that a member of the lodge had been convicted of selling a beer to an ABC agent. In addition, the appellee introduced minutes of some of the lodge's meetings which purported to show that alcohol was being sold on the premises. Minutes from a December 7, 1993, meeting included a handwritten notation indicating that prices on drinks would be $2.00 on everything but Crown [Royal] and $1.00 for beer. Minutes from a January 10, 1994, meeting indicated that a proposal had been made to have a happy hour from 4:00 p.m. until 6:00 p.m., during which drink prices would be reduced by 25 cents.

[redacted] We find that the decision of the ABC Board was characterized by an abuse of discretion and was not supported by substantial evidence. This is because, in granting the private-club permit, the ABC Board failed to abide by two of its own regula-

tions. Therefore, we affirm the circuit court's decision to deny the permit.

[redacted] ABC Regulation 1.32(2) provides the following:

> Section 1.32. PERSONS NOT ENTITLED TO ISSUANCE OF PERMIT. No permit shall be issued to:
>
> (2) *PERSONS GIVING FALSE INFORMATION OR STATEMENTS IN APPLICATION OR HEARING.* Any individual, partnership or corporation if such individual or any member of such partnership or any officer, director, managing agent or stockholder holding more than five percent (5%) of the stock in such corporation knowingly gave any false information or made any false statements on any application or any hearing required by these Regulations or by any Alcoholic Beverage Control Law of the State of Arkansas[.]

In the instant case, secretary Gordon Steven Rice acknowledged that a lodge member, namely Tommy Starr, had previously sold a beer to an ABC agent and had been reprimanded for doing so. In addition, Mr. Rice was aware of lodge minutes which indicated that the lodge would have a happy hour and would charge for alcoholic beverages. Despite having this knowledge, Mr. Rice testified that, "We do not sell liquor in violation of the law," and further stated, "To my knowledge we have never sold liquor at all." It is apparent from the evidence presented that, on at least one occasion, the lodge had engaged in the practice of selling beer. Because Mr. Rice knowingly provided false information at the hearing, the ABC Board erred in issuing the permit.

[redacted] From an inquiry into the record of this case, it is also evident that ABC Regulation 1.32(6) had been violated; this regulation reads as follows:

> Section. 1.32 PERSONS NOT ENTITLED TO ISSUANCE OF PERMIT. No permit shall be issued to:
> (6) *PERSONS CONVICTED OF CERTAIN CRIMES.* Any individual, partnership or corporation if such individual or any member of such partnership or any officer, director, managing agent or any stockholder holding more than five percent (5%) of the stock of such corporation has been convicted of a felony or has within (5) five years before the date of application been under the sentence of any Court for the conviction of any violation of the laws

> of the State of Arkansas or any state of the United States relating to alcoholic beverages[.]

It is undisputed that Tommy Starr had previously violated alcoholic-beverage laws and was convicted after illegally selling a beer on lodge premises. Minutes from a lodge meeting held on April 25, 1994, listed the officers who were elected for 1994 and 1995. Among these officers was three-year trustee Tommy Starr. Because an officer of the nonprofit corporation had been convicted of an alcohol-related offense within five years of application for the permit, the ABC Board was without authority to issue the permit pursuant to its own rules.[1]

The appellant's remaining argument is that the circuit court erroneously usurped the authority and discretion of the ABC Board in reversing its decision. We disagree. It is the function of the circuit court to uphold decisions of the ABC Board when such decisions are supported by substantial evidence. In the instant case, the circuit court properly exercised its authority, and its decision to reverse the board was a correct one in light of the fact that the pertinent ABC regulations prohibited the issuance of a private-club permit.

Affirmed.

STROUD and GRIFFEN, JJ., agree.

PITTMAN, JENNINGS, and ROGERS, JJ., dissent.

JUDITH ROGERS, Judge, dissenting. Today's decision of the court is unprecedented in the annals of our jurisprudence, for in the process of overturning the ABC Board's decision to grant a permit, this court boldly makes findings of fact of its own on questions never offered to the Board as grounds for the denial of the permit. Our function on appeal does not entail making find-

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[1] We acknowledge that we have gone to the record to determine that Mr. Starr was an officer. However, in the instant case we are affirming the decision of the circuit court, and it has been established that an appellate court may go to the record to affirm. *See Hosey v. Burgess*, 319 Ark. 183, 890 S.W.2d 262 (1995). Although this case is a unique one in that we are actually reviewing the decision of the ABC Board and not the circuit court, we know of no authority that prevents this court from affirming a case without the benefit of an abstract that demonstrates the error committed by the administrative agency.

ings of fact nor is it proper to overturn a fact-finder's decision based on arguments never presented to the fact-finder for determination. I am thus compelled to protest this blatant usurpation of the Board's authority.

In the prevailing opinion, the court overturns the Board's decision based on the perceived violation of two regulations. The first regulation concerns the authority of the Board to deny a permit when it finds that false statements are made at the hearing. However, appellee did not refer to this regulation at the hearing and never so much as argued to the Board that the permit should be denied because this witness's testimony was untruthful. Consequently, the Board made no finding as to the truthfulness of the witness's testimony. Yet this court, on its own initiative, judges the veracity of this witness's testimony and makes a finding of fact that the testimony was knowingly false and untruthful.

The second regulation provides for disqualification when an officer of the *corporation* seeking a permit has been convicted of violating any law relating to alcoholic beverages. The prevailing opinion makes a finding of fact, based on some obscure designation of this individual as a "3 yr. trustee," that this person is an officer of the *corporation*. It is abundantly clear, however, that the subject of this particular regulation appears for the first time in appellee's responsive brief in this court. Appellee did not present testimony that this person was an officer of the corporate applicant[2] and did not rely on this regulation in its opposition to the permit. Since the issue was not raised, the Board was not called upon to make a finding of fact concerning the application of this regulation. As a matter of fact, since this issue was not fleshed out at the hearing, we have no earthly idea what a "three-year trustee" is, and indeed this person's status as an officer of the *corporate* applicant, to which the regulation speaks, is very much a subject of disputed fact because this person is not among those listed as an

[2] Contrary to the assertion in the prevailing opinion, the minutes of the corporation were not introduced into evidence. The minutes are in the record as an accompaniment to the application submitted by appellant for the permit. That portion of the minutes reflecting Mr. Starr's election as "3 yr. trustee" was never mentioned at the hearing, and the testimony throughout the hearing refers to him only as a member of the Moose Lodge Club.

officer of the corporation on the application for the permit or the accompanying articles of incorporation. Nevertheless, in the face of this conflicting evidence, this court resolves this question of disputed fact, concerning an issue raised for the first time on appeal, and finds that this person is an officer of the corporation. That this court is taking on the role of a fact-finder is tacitly admitted in the prevailing opinion, because hidden in a footnote, it acknowledges that it looked to the record "to determine" that this person was an officer of the corporation.

Two principles of law are controlling here. It has been repeatedly held that we will not set aside an administrative determination upon a ground not presented to the agency because to do so would deprive the agency of the opportunity to consider the matter, make its ruling and state the reasons for its action. *Franklin v. Arkansas Dep't of Human Servs.*, 319 Ark. 468, 892 S.W.2d 262 (1995). Secondly, reviewing courts may not supply findings by weighing the evidence themselves, because that function is the responsibility of the administrative agency which sees the witnesses as they testify. *The Green House, Inc. v. Arkansas Alcoholic Beverage Control*, 29 Ark. App. 229, 780 S.W.2d 347 (1989). With these principles in mind and governed by our limited standard of review, it is our task to examine the decision of the Board based on the arguments presented to that body and based on the findings made by the Board in response to those issues placed before it. It is not our function to pass judgment on matters which could have been raised, but were not, or to make findings of fact with respect to issues raised for the first time in this or any appeal from that decision. The circuit court overturned the Board's decision on grounds not argued before the Board and otherwise substituted its judgment for that of the Board. By affirming that decision, this court falls into the same error, and I dissent.

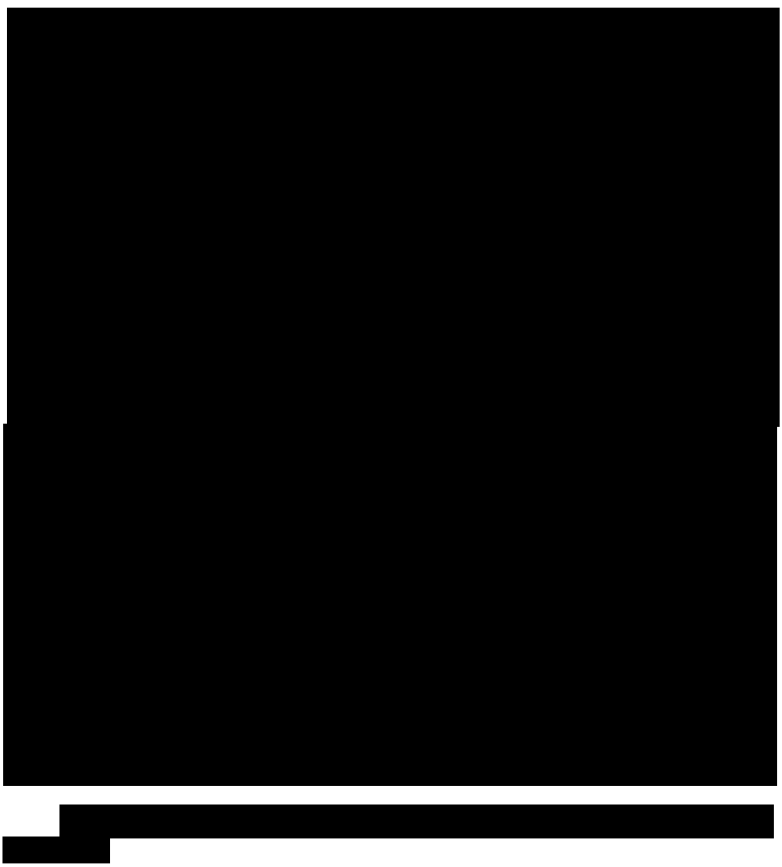
I am authorized to state that Judges Pittman and Jennings join in this dissent.

SOUTH CENTRAL ARKANSAS DRUG TASK FORCE,
et al. *v.* Keith RAY

CA 96-126 937 S.W.2d 682

Court of Appeals of Arkansas
Division IV
Opinion delivered February 5, 1997

[Petition for rehearing denied March 5, 1997.]



Richard S. Smith, for appellants.

McMillan, Turner, McCorkle & Curry, by: *Ed McCorkle*, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellee Keith Ray is an employee of appellant South Central Arkansas Drug Task Force (SCDTF). On June 29, 1993, Mr. Ray was involved in a drug raid and injured his right knee while attempting to kick in a door. He subsequently underwent knee surgery and incurred medical expenses for his treatment. Mr. Ray filed for workers' compensation benefits, but compensation was controverted by the Public Employee Claims Division (PECD) based on its assertion that Mr. Ray was not a state employee. Alternatively, the PECD contended that, even if Mr. Ray was considered a state employee, benefits should be denied because the SCDTF and its employees are not covered under the Public Employee Workers' Compensation Act (PEWCA). After a hearing, the Workers' Compensation Commission found Mr. Ray to be a state employee and awarded compensation. In addition, the Commission found that, even if Mr. Ray were not a state employee, he would still have been entitled to compensation as a public employee within the intent of the legislature when it enacted PEWCA.

SCDTF and PECD now appeal the decision of the Commission. For reversal, the appellants argue that the Commission erred in finding that Mr. Ray is a state employee within the meaning of PEWCA. In addition, the appellants contend that the Commission erred in finding that, even if Mr. Ray is not a state employee, he would nonetheless be covered by the Act for purposes of receiving workers' compensation benefits. We affirm.

At the hearing before the Commission, Mr. Ray testified on his own behalf. He stated that he is a certified Arkansas police officer and had been working for SCDTF for approximately four years prior to his injury. Mr. Ray indicated that the group he works with has five employees and is supervised by Joe Thomas. The program is directed by the prosecutor's office for the Eighth Judicial District, and Mr. Ray's paychecks are drawn against the prosecutor's office.

Brent Haltom, Prosecuting Attorney for the Eighth Judicial District, also testified. He stated that the program is funded by

grant money, which he receives from the state. Because Mr. Haltom is a state official, the state matches certain funds that are provided by the federal government through a federal grant program. According to Mr. Haltom, the funds appropriated for 1993 included $228,204.00 from the federal government and $76,068.00 from the State of Arkansas. Mr. Haltom did not use any of this money to purchase workers' compensation insurance for the agents of SCDTF because he considered the agents to be state employees covered by PECD. He based this belief, in part, on the fact that Mr. Ray and other agents were provided with health and retirement benefits by the State of Arkansas.

Sandra Rodgers, fiscal officer for SCDTF, testified that she sends in a request and receives a check directly from the state. According to Ms. Rodgers, all of the federal and state funds appropriated for the program are deposited by the Department of Finance and Administration into the State Treasury. The money is then disbursed upon request for operating expenses and salaries for the agents.

Roland Robinson, Assistant Director for PECD, testified on its behalf. He acknowledged that prosecuting attorneys are constitutional officers and are covered by the PECD. However, he stated that, to his knowledge, no PECD funds are available to pay claims for employees of a drug task force operating under the direction of a prosecutor.

In awarding compensation against PECD, the Commission cited PEWCA, which is codified at Ark. Code Ann. § 21-5-601 (Repl. 1996) *et seq.* Arkansas Code Annotated § 21-5-602 (Repl. 1996) explains the legislative intent of the Act and provides, in pertinent part:

> It is the purpose of this subchapter to:
>
> (1) Provide workers' compensation coverage through state funds for all public employees, as defined in this subchapter, who are not otherwise covered under a workers' compensation liability insurance policy written and issued by a private workers' compensation liability carrier[.]

"Public Employee" is defined by Ark. Code Ann. § 21-5-603 (Repl. 1996), which provides in pertinent part:

> (a) The term "public employee", as used in this subchapter, unless the context otherwise requires, includes:
>
> (1) STATE EMPLOYEES AND OFFICERS. Any officer or employee of any state agency, board, commission, department, institution, college, university, or community college receiving an appropriation for regular salaries, extra help, or authorized overtime payable from funds deposited in the State Treasury or depositories other than the State Treasury by the General Assembly, provided that inmates of state correctional facilities who perform work for the state while incarcerated or while on a work-release program shall not be considered state employees[.]

The Commission determined that Mr. Ray was a state employee for purposes of the Act and, therefore, was entitled to benefits.

For reversal, the appellants first argue that the Commission erred in finding Mr. Ray was a state employee. Specifically, the appellants maintain that drug task forces are not covered by the Act because most of the financing comes from federal sources, including the financing that is appropriated for the agents' salaries. The appellants contend that workers' compensation coverage for such individuals, if there is to be any, should come out of the funds received for operation of the task forces.

We find the first argument raised by the appellants to be unpersuasive. As the appellee points out, if the State of Arkansas does not provide compensation coverage for individuals such as he, this would result in all drug task force workers of this state working without the benefit of workers' compensation. We find that Mr. Ray qualifies as a state employee, and that his compensation was correctly assessed against the PECD.

[redacted] The evidence in this case demonstrated that all funds to be disbursed to the SCDTF were handled by the state through the State Treasury. Moreover, the state provided health and retirement benefits to individuals such as Mr. Ray. Mr. Ray is a police officer certified by the state, and he works in a program operated by a state officer. The stated purpose of the Act is to provide coverage for public employees not covered by a private entity. In

the case at bar, it is undisputed that Mr. Ray was without the benefit of private compensation coverage. Furthermore, from the particular facts presented in this case, it is apparent that he is a "state employee" and therefore is a "public employee" entitled to compensation under the Act.

The findings of the Workers' Compensation Commission must be upheld on review if there is substantial evidence to support them. *Scarbrough v. Cherokee Enterprises*, 306 Ark. 641, 816 S.W.2d 876 (1991). Before we can reverse a decision of the Commission, we must be convinced that fair-minded persons with the same facts before them could not have reached the same conclusion reached by the Commission. *Public Employee Claims Division v. Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992). In the instant case, we find the Commission's determination that Mr. Ray qualified as a state employee is supported by substantial evidence.

The appellants' remaining argument is that the Commission erred in determining that, even if Mr. Ray was not a state employee, he nevertheless was entitled to coverage as a public employee. However, due to our disposition of the first issue on appeal, we need not address this argument. The Commission's order directing PECD to provide workers' compensation benefits to Mr. Ray is affirmed.

Affirmed.

NEAL and ROAF, JJ., agree.

B.J. and D.R., Juveniles *v.* STATE of Arkansas

CA 96-378 937 S.W.2d 675

Court of Appeals of Arkansas
Division II
Opinion delivered February 5, 1997

[redacted]

Robert A. Newcomb, for appellants.

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

MARGARET MEADS, Judge. Appellants, B.J. and D.R., are juveniles who were adjudged delinquent for having each committed two counts of battery in the third degree and one count of violent criminal group activity. On appeal, they argue that the trial court erred in adjudicating them delinquent on the charge of engaging in violent criminal group activity under Ark. Code Ann. § 5-74-108 (Repl. 1993). Appellant B.J. also contends that the evidence is insufficient to support the finding that he committed battery in the third degree with regard to Charles Sypret. We find these arguments without merit and affirm the convictions as modified herein.

The charges stem from two separate incidents which occurred on December 12, 1995. B.J., D.R., Tony Cragar, and Dana Reed were riding in a car driven by Daniel Reed. They followed a truck carrying Robert Washburn and passenger Nick Summers into a cul de sac, blocked the truck's path, and a fight between occupants of the respective vehicles ensued.

Summers testified that both he and Washburn were pulled from the truck, he was hit several times, was chased down the street, and was kicked repeatedly after he fell down. Summers identified both D.R and B.J. as his assailants. Beth Longing testified that she saw three or four men pulling another young man out of the truck and then chasing him down the street. She went inside her house to call 911 and saw that the young man was bloody when she came back outside.

Later that day, Charles Sypret was attacked by four individuals as he walked home from school. Sypret testified that Daniel Reed, B.J. and Tony Cragar surrounded him, that B.J. hit him in the nose and broke it, and that he would require surgery. Sypret testified that D.R. was also present during the fight. Marcus Joliett testified that he witnessed the altercation between Sypret

and Cragar, Daniel Reed, B.J., and D.R. and corroborated Sypret's testimony that B.J. hit Sypret.

Tony Cragar, Dana Reed, Daniel Reed, B.J., and D.R. testified that neither B.J. nor D.R. hit or kicked Summers during the first fight, and that Daniel Reed had taken B.J. home before the Sypret incident. However, Sypret testified that B.J. hit him in the nose, and Marcus Joliett testified that B.J. was both hitting and kicking Sypret. Both Dana and Daniel Reed admitted they had lied under oath at the detention hearing.

B.J. contends there was insufficient evidence to support his conviction of battery in the third degree regarding Charles Sypret. The offense of battery in the third degree is defined at Ark. Code Ann. § 5-13-203 (Repl. 1993) as follows:

> (a) A person commits battery in the third degree if:
>
> (1) With the purpose of causing physical injury to another person, he causes physical injury to any person; or
>
> (2) He recklessly causes physical injury to another person; or
>
> (3) He negligently causes physical injury to another person by means of a deadly weapon; or
>
> (4) He purposely causes stupor, unconsciousness, or physical or mental impairment or injury to another person by administering to him, without his consent, any drug or other substance.
>
> (b) Battery in the third degree is a Class A misdemeanor.

[redacted] In resolving the question of the sufficiency of the evidence in a criminal case, all evidence is viewed in the light most favorable to the appellee, and the decision is affirmed if there is substantial evidence to support the conclusion of the trier of fact. *D.D. v. State*, 40 Ark. App. 75, 842 S.W.2d 62 (1992). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty and precision, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* It is the duty of the trier of fact, the trial judge in the instant case, to resolve any contradictions, conflicts, and inconsistencies in a witness's testimony, *Id.*; and to determine the amount of credibility to be given to each witness's testimony. *Galvin v. State*, 323 Ark. 125, 912 S.W.2d 932 (1996).

[redacted] Here, the trial judge stated that she was "more persuaded by the testimony of Beth Longing, Mr. Summers, and Mr. Washburn, and Marcus Joliett, who have not, to my knowledge, lied under oath in this court, previously. I do not find any credibility, to speak of, in any of the witnesses called by the defense." Based upon the foregoing facts, there is substantial evidence to convict B.J. of third-degree battery in the Sypert incident.

Appellants also contend the trial court erred in finding them guilty of two counts of battery in the third degree, Class A misdemeanors, *and* one count of engaging in violent criminal activity, a Class D felony, because engaging in violent criminal activity is merely an enhancement of punishment statute, not a substantive offense. Therefore, engaging in violent criminal activity, as enumerated in Ark. Code Ann. § 5-74-108, would not be a Class D felony in itself, but rather would raise a third-degree battery Class A misdemeanor to a Class D felony. Appellants contend that the sentence imposed was excessive and improper due to the misapplication of the statute.

Arkansas Code Annotated § 5-74-108 (Repl. 1993) provides, in pertinent part:

> (a) Any person who violates any provision of Arkansas law which is a crime of violence while acting in concert with two (2) or more other persons shall be subject to enhanced penalties.
> (b) Upon conviction of a crime of violence committed while acting in concert with two (2) or more other persons, the classification and penalty range shall be increased by one (1) classification.

Appellee concedes, and we agree, that inasmuch as the commitment orders suggest that Ark. Code Ann. § 5-74-108 requires a separate sentence, they are in error. Yet, because the elements of engaging in violent criminal activity were proved, the trial court properly applied the sentence enhancement statute to appellants.

The trial judge found both appellants guilty of third-degree battery and imposed punishments prescribed in the juvenile code. See Ark. Code Ann. § 9-27-330 (Supp. 1995). Clearly, the trial judge has the authority to deal with delinquents in the manner she deems appropriate. Each of the punishments is specified in Ark.

Code Ann. § 9-27-330(a)(Supp. 1995); therefore, we cannot say that the penalties were excessive or improper.

[redacted] We affirm the decision of the trial court with the modification that Ark. Code Ann. § 5-74-108 should not appear as a separate enumerated offense in the court's orders.

Affirmed as modified.

COOPER and STROUD, JJ., agree.

[redacted]

Harold Eugene KERSH *v.* STATE of Arkansas

CA CR 96-375 938 S.W.2d 569

Court of Appeals of Arkansas
Division IV
Opinion delivered February 5, 1997

[redacted]

[redacted]

Hough, Hough, & Hughes, P.A., by: *R. Paul Hughes III* and *Stephen G. Hough*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen. and *Stuart A. Clearly*, Law Student Admitted to Practice Pursuant to Rule XV(G)(1)(b) of the Rules Governing Admission to the Bar of the Arkansas Supreme Court, for appellee.

ANDREE LAYTON ROAF, Justice. Harold Eugene Kersh was charged with second-degree battery and criminal mischief in Fort Smith Municipal Court. He pled no contest to the charges and the municipal court judgment was entered on June 29, 1995. Kersh filed his notice of appeal and transcript in the Sebastian County Circuit Court on July 31, 1995. The State moved to dismiss the appeal as untimely filed. The circuit judge granted the motion and dismissed Kersh's appeal; Kersh appeals from that ruling. We reverse and remand to the circuit court for further proceedings.

Because the timeliness of Kersh's appeal is the sole issue before us, it is only necessary to discuss the facts relevant to computation of time for the filing of his appeal to circuit court. The municipal court judgment was entered on June 29, 1995. Kersh filed his notice of appeal and transcript in the circuit court on Monday, July 31, 1995, or 32 days after the municipal court judgment was entered. The State argued to the trial court that this appeal was untimely for two reasons: 1) the day of the event (entry of judgment) should be counted in calculating the 30-day period, which would thus have ended on Friday, July 28, 1995; or 2) if the 30th day falls on a Saturday, Sunday, or legal holiday, it should be counted, also requiring Kersh to have filed his appeal on the previous Friday, July 28, 1995.

[redacted] On appeal, Kersh argues that Arkansas Inferior Court Rule 9 should be read in conjunction with either Rule 1.4 of the Arkansas Rules of Criminal Procedure or Rule 6(a) of the Arkan-

sas Rules of Civil Procedure in order to determine first, whether the day of the event should be counted in the calculation of the 30-day period; and second, whether a Saturday, Sunday, or legal holiday should be counted as the final day to appeal. The State concedes in its brief that Inferior Court Rule 9(a) and Ark. R. Civ. P. 6(a) mandate reversal of this case.

Arkansas Inferior Court Rule 9 reads as follows:

> (a) Time for Taking Appeal. All appeals in civil cases from inferior courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within thirty (30) days from the date of the entry of the judgment.

Although Rule 9(a) only applies explicitly to civil cases, this court and the supreme court have repeatedly held that this rule also governs criminal appeals from municipal court to circuit court. *See e.g., Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994); *Laxton v. State*, 49 Ark. App. 148, 899 S.W.2d 479 (1995). While Rule 9 provides no guidance as to the calculation of the time period, Inferior Court Rule 10 states as follows:

> Where applicable and unless otherwise specifically modified herein, the *Arkansas Rules of Civil Procedure* and rules of evidence shall apply to and govern matters of procedure and evidence in the inferior courts of this State. (Emphasis added.)

Finally, Ark. R. Civ. P., Rule 6(a) provides in pertinent part:

> (a) Computation: In computing any period of time prescribed or allowed by these rules, by order of the Court or by any applicable statute, *the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.* (Emphasis added.)

Arkansas Rule of Civil Procedure 6(a) clearly provides, and the Arkansas appellate courts have consistently held, that the day of the event should not be included. *See e.g., Union Nat'l Bank v. Nichols*, 305 Ark. 274, 279, 807 S.W.2d 36 (1991); *Hodge v. Wal-Mart Stores*, 297 Ark. 1, 759 S.W.2d 203 (1988). Thus, the

time for appeal began on June 30, 1995; thirty days from that date fell on Saturday, July 29, 1995.

[redacted] Rule 6(a) also specifically provides that should the time for appeal expire on a Saturday, Sunday, or legal holiday, the period shall extend to the next day that is not a Saturday, Sunday, or legal holiday. Kersh's time for appeal accordingly expired the following Monday, July 31, 1995. Kersh, in fact, timely filed his notice of appeal and transcript that day.

Reversed and remanded.

ROBBINS, C.J., and NEAL, J., agree.

[redacted]

Leslie Wayne KEENE *v.* STATE of Arkansas

CA CR 96-291 938 S.W.2d 859

Court of Appeals of Arkansas
Division II
Opinion delivered February 12, 1997

[redacted]

Jerome J. Paddock, for appellant.

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

MARGARET MEADS, Judge. The appellant, Leslie Wayne Keene, was found guilty in a jury trial of delivery of a controlled substance (methamphetamine) and sentenced to ten years in the Arkansas Department of Correction. Appellant argues that the trial court erred in not granting his motion to recuse and in excluding the testimony of Heather Goff. We disagree and affirm.

Prior to trial, appellant filed a Motion to Recuse alleging that the court should recuse because appellant had filed a complaint against the court with the Judicial Discipline and Disability Commission. At a hearing on appellant's motion held September 5,

1995, counsel argued that when allegations are made against a court, there is an appearance that the court's impartiality might be affected. After listening to counsel's argument, the trial judge stated that the mere filing of the complaint is not a basis for recusal and denied appellant's motion.

Appellant argues that the trial judge erred in not granting his motion and in not disqualifying himself. Appellant relies on Canon 3(E) of the Arkansas Code of Judicial Conduct, which provides that a judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned.

In *Turner v. State*, 325 Ark. 237, 244, 926 S.W.2d 843, 847 (1996), our supreme court said:

> We turn next to the trial court's decision not to recuse in this case, which Turner claims was error. We note at the outset that a judge is required to recuse from cases in which his impartiality might reasonably be questioned. Ark. Code of Judicial Conduct, Canon 3E(1). However, there is a presumption of impartiality, and the party seeking disqualification bears the burden of proving otherwise. The decision to recuse is within the trial court's discretion, and it will not be reversed absent abuse. An abuse of discretion can be proved by a showing of bias or prejudice on the part of the trial court. (Citations omitted.)

In similar circumstances Arkansas appellate courts have held that the trial judge did not abuse his discretion in failing to recuse. *See Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988) (trial judge did not err in failing to recuse when the appellant raised the possibility of a class action federal lawsuit for failure to promptly arraign him and others); and *Korolko v. Korolko*, 33 Ark. App. 194, 803 S.W.2d 948 (1991) (trial court did not err in refusing to recuse on its own motion where appellant's counsel notified the trial judge by letter that he had filed a complaint against him with the Judicial Discipline & Disability Commission).

Here, the trial judge stated that this is a situation involving "soul-searching," and after giving "thought and consideration" to the motion he felt he could be "fair and impartial" and decide the case in a fair and impartial way. Appellant has not alleged any specific instances of bias or shown how he was prejudiced by the

trial judge's failure to recuse. Moreover, appellant's guilt was decided by a jury which imposed the minimum sentence for the offense. We cannot say that the court abused its discretion in failing to recuse.

Appellant also argues the trial court erred in excluding the testimony of Heather Goff. At trial, Charles Rogers, a confidential informant, testified that on February 16, 1995, he and Detective Larry Fiedorowicz went to appellant's house; appellant got into the detective's pickup truck; and they started down the highway. Appellant said he wanted $25 a quarter (a quarter gram) and that he had only three quarters left. Rogers testified that appellant handed him the "quarters" of what appellant said was and what was later proved to be methamphetamine; he handed them to the detective; and the detective handed appellant a one-hundred dollar bill. Rogers testified that he had used drugs in 1980 and 1982; that he had not used drugs since then; that he has simulated using drugs, which means that he acts "like I am doing it but am not really doing it" in order to earn people's trust; and that he has simulated smoking pot around appellant. Rogers said that it is easier to simulate with marijuana than anything else. You do not even have to suck on the "joint," but just put it to your lips and act like you did.

Appellant proffered the testimony of Heather Goff who stated that she had known Rogers for less than one year, had seen him three or four times, and had seen him smoke a "joint." Ms. Goff also stated that she is familiar with the term "simulation" and has no doubt that Rogers was not pretending.

Appellant argues that the trial court erred in excluding the proffer because the issue of Rogers's drug use had been raised during direct examination and Ms. Goff would have contradicted Rogers. Appellant contends Ms. Goff's testimony was proper impeachment by contradiction.

When a witness testifies on direct examination that he has not committed collateral acts of misconduct, that testimony may be contradicted by extrinsic evidence. *Hill v. State*, 33 Ark. App. 135, 803 S.W.2d 935 (1991). However, we are not persuaded that Ms. Goff's testimony was contradictory. Although

Ms. Goff would have testified that she saw Rogers smoke a "joint," Rogers acknowledged that on occasion he had "simulated" the use of marijuana in order to gain trust.

Even if Ms. Goff's testimony was erroneously excluded, the appellate court does not reverse on the basis of nonprejudicial error. *Hardcastle v. State*, 25 Ark. App. 157, 755 S.W.2d 228 (1988). At trial, Detective Fiedorowicz testified that he had worked with Rogers since 1994, and that on the night in question he picked Rogers up at his residence and patted him down. They drove to appellant's residence; Rogers went to the door; and Rogers and appellant came back and got into the car. Rogers then asked appellant how much he had; appellant said he only had three quarter-grams; and appellant instructed the detective to drive off. They drove down the street, and the detective pulled into a parking lot. Fiedorowicz testified that appellant removed three quarter- grams of methamphetamine from his pocket; appellant showed it to Rogers; and Rogers looked at it and handed it to the detective. Fiedorowicz testified that he saw appellant take it out of his right-hand pocket and that he handed appellant $100.

Therefore, we believe Rogers's testimony was merely cumulative, and even if the trial court erred in not allowing Ms. Goff's testimony, any error was nonprejudicial.

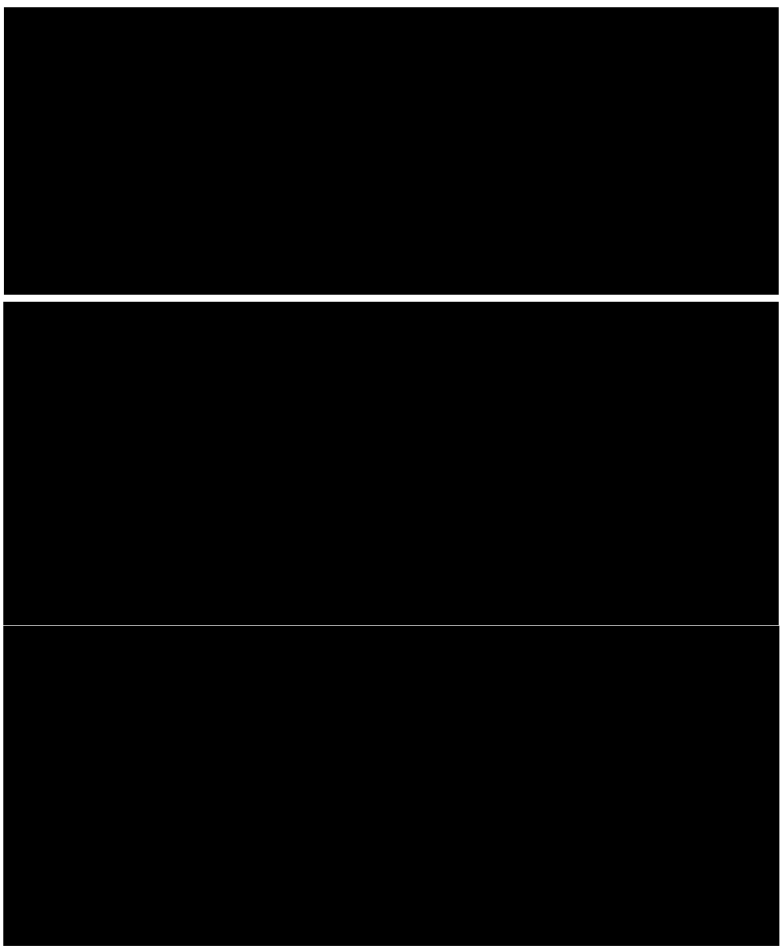
Affirmed.

COOPER and STROUD, JJ., agree.

James F. WILSON *v.* STATE of Arkansas

CA CR 96-600 939 S.W.2d 313

Court of Appeals of Arkansas
Division IV
Opinion delivered February 19, 1997



[redacted]

William R. Simpson, Jr., Public Defender, by: *Llewllyn J. Marczuk*, for appellant.

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

JOHN B. ROBBINS, Chief Judge. On January 3, 1996, the appellant was tried before the court and convicted of attempted theft by deception, a Class C felony. Appellant was sentenced as an habitual offender to five years in the Arkansas Department of Correction, with five days of jail credit. Appellant contends on appeal that the evidence was insufficient to support the conviction of theft by deception, and that the trial court erred in denying him jail credit of 400 days. We find no error and affirm.

[redacted] Where the sufficiency of the evidence is challenged on appeal in criminal cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the appellee and affirm if there is substantial evidence to support the conviction. *Muhammed v. State*, 27 Ark. App. 188, 769 S.W.2d 33 (1989). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable and material certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Wilson v. State*, 277 Ark. 43, 639 S.W.2d 45 (1982). The fact that some evidence is circumstantial does not render it insubstantial. *Alford v. State*, 33 Ark. App. 179, 804 S.W.2d 370 (1991).

The evidence before the trial court indicated that Nancy Babb was contacted by a friend who worked at the American Legion. Ms. Babb's son was involved in activities that had resulted in criminal charges being brought against him. Ms. Babb went to the American Legion and met with the appellant, James Wilson, who informed her that he was the director of an organization called FAMM. Ms. Babb testified that the appellant told her he was purchasing land and a home in Cabot for the purpose of operating a program to keep juveniles out of criminal trouble and jail.

Appellant told her that her son would have to go through his nine-month program to stay out of jail.

Ms. Babb testified that the appellant later contacted her by telephone, and they met at the American Legion a few more times. At appellant's request, Ms. Babb drove him to the prosecutor's office and the Pulaski County Jail, allegedly for appellant to make some contacts concerning her son.

On January 4, 1995, after appellant telephoned her and stated, "The money's here. I need you to come up here," Ms. Babb met with him at the American Legion for the last time. When Ms. Babb arrived, her boyfriend, Mike Laneer, and appellant were talking about Mr. Laneer having money to pay the appellant. Mr. Laneer left, and Ms. Babb and appellant discussed how the appellant was going to help her son stay out of jail. The appellant told Ms. Babb that her son would not have to serve any jail time, but would have to participate in his nine-month program. He told Ms. Babb that "it's going to cost you Five Thousand Dollars." When she asked how he could guarantee that her son would not go to prison and asked what all the money was for, the appellant stated, "part of it will go to the judge, part of it to the prosecutor." She asked the appellant if this was an "under the table" transaction, and the appellant told her it was. Appellant pressured Ms. Babb to go to Mr. Laneer's home that night to get the money, but she told him to call her in the morning.

The next morning, January 5, 1995, Ms. Babb called Larry Jegley at the prosecutor's office to tell him what was occurring. After she explained everything, Mr. Jegley had North Little Rock Police Detective Jim Scott contact Ms. Babb. At one point Ms. Babb was talking to the appellant when Detective Scott telephoned. She informed the detective of the situation and put him on a three-way telephone call with the appellant, without the appellant being aware that the detective was monitoring the call. The appellant went over the plan step by step, and they arranged to meet at Mr. Laneer's auto parts store later that morning.

Detective Scott and Detective David Dallas met Ms. Babb at the parts store prior to the appellant's arrival. Ms. Babb worked at this store as her boyfriend's (Mr. Laneer's) secretary and had an

office with a two-way mirror. The store was also equipped with a video and audio monitor. The detectives positioned the camera so they could observe the appellant and Ms. Babb prior to his arrival.

When the appellant arrived, he and Ms. Babb went over the plan one final time while the detectives listened. Detective Scott corroborated Ms. Babb's testimony and further testified that the appellant explained to Ms. Babb that for five thousand dollars he would have her son's charges taken care of by paying off certain officials. Detective Scott testified that the appellant stated he would be keeping seven hundred and fifty dollars for himself and the rest would go to the prosecutors and judges, but never mentioned any names. Appellant agreed to accept a check for three thousand dollars that day and set up a payment plan for the two-thousand-dollar balance. Both Ms. Babb and Detective Scott testified that Ms. Babb wrote the appellant a check for three thousand dollars, and the appellant wrote out a receipt. Ms. Babb gave the check to the appellant and then went out of the store to her vehicle. Mr. Laneer, who corroborated this testimony, informed the appellant to wait fifteen minutes before cashing the check so Mr. Laneer could transfer sufficient funds into the account to cover the check. As the appellant exited the building, the detectives exited the office and arrested him with the check and the receipt in his possession.

The appellant contends on appeal that the evidence was insufficient to support his conviction. He specifically argues that he did not obtain anything of value because the check was "hot," and that he did not deceive the victims (Ms. Babb and Mr. Laneer) because they knew it was a scam. While the appellant cites several cases for his argument that there must be value and deception, the cases cited deal with theft and theft by deception that were actually consummated. The appellant in this case was convicted only of *attempted* theft by deception which makes only his state of mind and what he believed the facts to be the issue, not whether the check had some actual value, or whether he actually "deceived" the victims.

Arkansas Code Annotated section 5-36-103(a)(2) (Supp. 1995), provides that a person commits theft of property if he "knowingly obtains the property of another person, by deception or by threat, with the purpose of depriving the owner thereof." Arkansas Code Annotated section 5-36-101(A)(i) and (v) (Repl. 1993), defines deception as:

> Creating or reinforcing a false impression, including false impressions of fact, law, value, or intention or other state of mind that the actor does not believe to be true[.]
>
> * * *
>
> (v) Employing any other scheme to defraud;

Arkansas Code Annotated section 5-3-201(a)(1) and (2) (Repl. 1993) states:

> (a) A person attempts to commit an offense if he:
>
> (1) Purposely engages in conduct that would constitute an offense *if the attendant circumstances were as he believes them to be*; or
>
> (2) Purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense *whether or not the attendant circumstances are as he believes them to be.* (Emphasis supplied.)

[redacted] In this case, the appellant believed he was deceiving the victims by telling them that he could pay off the prosecutor and judge to keep Ms. Babb's son out of jail. At the time of his arrest, the appellant had a check for three thousand dollars that he believed could be drawn on sufficient funds in just a few minutes. The trial court found that the appellant attempted to take the three thousand dollars and that he believed he had accomplished just that at the time of his arrest. We cannot say that this evidence was insufficient to support the court's decision.

The appellant contends in his second point that the trial court erred in not giving him 400 days jail credit toward his sentence. Appellant argues that, because he was arrested on January 5, 1995, and was not sentenced until February 14, 1996, some 405 days' later, he was entitled to 405 days' jail credit rather than the five days that the trial court gave him.

[redacted] Arkansas Code Annotated section 5-4-404 (Repl. 1993) provides that a defendant shall be given credit for time spent in custody against the sentence for which he is being held for trial. However, in this case the court found that the appellant was on parole at the time of his arrest on January 5, 1995, and his parole was revoked January 10, 1995. As the court correctly held, the appellant was actually being held after January 10, 1995, for his parole violation and not simply pending a trial on the present charge. As the State points out, the supreme court has held that a defendant is not entitled to jail credit on a subsequent sentence for time spent in jail on a parole revocation, even if the parole revocation resulted from the crime for which he received the subsequent sentence. *Hughes v. State*, 281 Ark. 428, 664 S.W.2d 471 (1984). We find no merit to the appellant's argument concerning jail credit.

Affirmed.

NEAL and ROAF, JJ., agree.

[redacted]

Kenneth Dennis WARREN *v.* Magdalene Warren KORDSMEIER

CA 96-355 938 S.W.2d 237

Court of Appeals of Arkansas
Division III
Opinion delivered February 19, 1997

[redacted]

Ed Phillips, for appellant.

Ralph M. Patterson, for appellee.

SAM BIRD, Judge. Appellant Kenneth Dennis Warren appeals a December 8, 1995, order of the Montgomery County Chancery Court that held that appellant's motion to reduce his child support was barred by the parties' property-settlement agreement. The parties were divorced on July 21, 1987. They had entered into a contractual property-settlement agreement that contained the following provision:

> Due to the nature of the parties' property settlement agreement, and the operation of the poultry business by the Defendant, the parties have agreed and contracted between the two of them the amount of child support shall remain the same from now until the children reach 18 years of age and that the Plaintiff

will not seek to increase the support at any time hereafter, nor will the Defendant seek to decrease the support obligation as agreed to and set forth herein.

Appellant first argues that the court erred in holding that because of the wording of the contract the amount of child support could not be altered. He cites numerous cases that hold that regardless of whether provisions are in a divorce decree or in a property-settlement contract, the court always retains jurisdiction to modify child-support obligations. We agree with appellant's argument and reverse and remand for a new hearing regarding the modification of child support.

In *Keesee v. Keesee*, 48 Ark. App. 113, 891 S.W.2d 70 (1995), we said:

> Appellant is correct in his assertion that, in cases in which the parties' contract is incorporated into the decree, the general rule is that the court cannot alter or modify it. *See McInturff v. McInturff*, 7 Ark. App. 116, 644 S.W.2d 618 (1983). However, our courts have recognized an exception to this rule in child custody and support matters, and have held that provisions in such independent contracts dealing with child custody and support are not binding. *Id. See also Lake v. Lake*, 14 Ark. App. 67, 684 S.W.2d 833 (1985). In *Crow v. Crow*, 26 Ark. App. 37, 759 S.W.2d 570 (1988), we held that the chancellor always retains jurisdiction and authority over child support as a matter of public policy, and that, no matter what an independent contract states, either party has the right to request modification of a child support award. *See also Williams v. Williams*, 253 Ark. 842, 489 S.W.2d 744 (1973).

48 Ark. App. at 115-16, 891 S.W.2d at 72. And in *Paul M. v. Teresa M.*, 36 Ark. App. 116, 818 S.W.2d 594 (1991), a paternity case, we said:

> In the context of divorce litigation, while parties may enter into contractual agreements with regard to contributions for child support, nevertheless, it is settled law in this state that the duty of child support cannot be bartered away permanently to the detriment of the child. *Storey v. Ward*, 258 Ark. 24, 523 S.W.2d 387 (1975); *Robbins v. Robbins*, 231 Ark. 184, 328 S.W.2d 498 (1959). *See also Barnhard v. Barnhard*, 252 Ark. 167, 477 S.W.2d 845 (1972). Likewise, we have held that an agreement not to

> seek any increases or decreases in child support is void as against public policy. *Crow v. Crow*, 26 Ark. App. 37, 759 S.W.2d 570 (1988). These holdings are based on the principles that the interests of minors have always been the subject of jealous and watchful care by courts of chancery, and that a chancery court always retains jurisdiction over child support as a matter of public policy, such that regardless of what an independent contract states, a chancellor has the authority to modify an agreement for child support to meet changed conditions. *Id.*

36 Ark. App. at 119, 818 S.W.2d at 595.

Appellee admits the general rule, points out what she calls an exception to the rule, and argues that appellant failed to show adequate change of circumstances to justify a reduction in child support. Appellee cites *McInturff v. McInturff*, 7 Ark. App. 116, 644 S.W.2d 618 (1983), as providing an exception to the rule that child support can always be modified. In that case we said, "However, even though child support has been a recognized exception to the general rule, the Supreme Court has on one occasion refused to modify a parties' independent agreement when it provided for a $200 monthly payment which was designated as alimony *and* child support. In other words, the amount attributable to child support was not severable from the alimony award.

[redacted] *Bachus v. Bachus*, 216 Ark. 802, 227 S.W.2d 439 (1950)." *McInturff*, 7 Ark. App. at 118. (Emphasis in the original.) In *Crow*, the court held McInturff was applicable only to its facts.

> We think that the result in *McInturff*, that the husband was not entitled to a *pro rata* refund, was correct, but our reliance on *Bachus* and its progeny was misplaced. *Nooner*, [see citation below] was decided only a few weeks before *McInturff*, and *Nooner* clearly allows a chancellor to determine which amounts are child support if the independent contract does not so state. Again, *McInturff* involved a refund of a lump sum child support payment rather than the chancellor's authority to order prospective child support payments and, as we noted, our ruling did not preclude the husband from petitioning the chancery court for future child support. 7 Ark. App. at 119. The issue of the refund in *McInturff* did not involve the same public policy considerations as cases dealing with prospective child support payments, because

refusing to refund the money to the father did not deprive the children of support. *See Nooner v. Nooner*, 278 Ark. 360, 645 S.W.2d 671 (1983). *McInturff* should be strictly limited to its unique fact situation because it involved a refund of a non-severable, lump sum child support payment rather than an order of child support based on changed circumstances and the best interests of the children.

Crow, 26 Ark. App. at 41, 759 S.W.2d at 572-73. We conclude that the chancery court always has the jurisdiction and authority to modify child support.

Reversed and remanded for a hearing on appellant's motion to reduce child support.

JENNINGS and GRIFFEN, JJ., agree.

Eugene T. KELLEY and Joye R. Kelley *v.* William F. WESTOVER, Patricia M. Westover, and William E. Westover

CA 96-412 938 S.W.2d 235

Court of Appeals of Arkansas
Division II
Opinion delivered February 19, 1997

Gill Law Firm, by: *Glenn E. Kelley*, for appellants.

Stephen Lee Wood P.A., by: *Stephen Lee Wood*, for appellees.

JOHN F. STROUD, JR., Judge. This is a prescriptive easement case in which appellants, Eugene and Joye Kelley, claim a prescriptive right of passage over property belonging to appellees, William F. Westover, William E. Westover, and Patricia M. Westover. The chancellor determined that appellants had sporadically crossed appellees' property for more than twenty years, but that their use of the property was not continuous and uninterrupted, and therefore had not established a prescriptive easement. We agree and affirm.

In 1951, appellee William F. Westover purchased twenty acres of unimproved property in Benton County. He subsequently executed a warranty deed that conveyed the twenty-acre tract to his son and daughter-in-law, appellees William E. and Patricia M. Westover, but he retained a life estate in the property. In 1971, appellants, Eugene and Joye Kelley, purchased property adjacent to the twenty-acre tract. Approximately three years later, appellants built a house on their property. Mr. Kelley testified that

eighty to ninety percent of the time, his family used their own driveway to get to and from Walnut Valley Road. Occasionally, however, they used a portion of Mr. Westover's property as an alternate access to and from another road, Cloverdale Road, particularly in times of bad weather because their driveway is very steep. This use continued for an approximate twenty-year period.

During this twenty-year period, appellees used various methods to keep appellants from crossing the property. For example, they asked appellants by telephone and in person to stay off the property; they ran barbed wire across the road; they replaced barbed wires cut by appellants; they removed a gate installed by appellants and replaced the fence wire; they piled brush, logs, and other debris across the road; they posted no trespassing signs; they called the sheriff's office; and they felled trees across the road. The following colloquy between Mr. Kelley and appellees' counsel is demonstrative:

> Q. [Appellees' counsel]: When do you believe the Westovers had knowledge that you were crossing their property to Cloverdale Road?
>
> A. [Eugene Kelley]: From the very beginning because they kept putting debris in and putting up the wire and we kept taking it down. When I took the wire down, I didn't go back, unless — if I took it down and like I was in my car, you know, I might put it back up again, but, generally, like I said, I had a front end loader. When I thought he was doing it just to close off the road, then I just drove through it. I would go down there with my front end loader and just drive right through it because most of the times when he did that, he also put brush on it and I just took care of it all at one time.
>
> . . .
>
> Q. So, I understand from your testimony that since, from the very beginning, when you purchased your property, Mr. Westover, or people acting for him, someone consistently had been trying to thwart your attempts to use that pathway down Cloverdale Road?
>
> A. Yeah.

In 1995, appellants filed a complaint in chancery court asking that appellees be "enjoined from interfering with [appellants'] use

of the roadway [appellants] have prescriptively used more than twenty years. . . ." The chancellor found in favor of appellees, and this appeal followed.

Appellants raise four points of appeal: (1) that the chancellor erred in finding the appellants' use of the property was too sporadic to meet the requirement of continuous and uninterrupted use; (2) that the chancellor erred in finding the location of the claimed easement was not clearly defined; (3) that the chancellor erred in relying upon a particular case; and (4) that the chancellor erred in not granting the appellants' prayer for a prescriptive easement over the appellees' property. The first and last of these issues control this appeal and can best be discussed together.

A prescriptive easement may be created only by the adverse use of privilege with the knowledge of the person against whom the easement is claimed, or by use so open, notorious, and uninterrupted that knowledge will be presumed, and the use must be exercised under a claim of right adverse to the owner and acquiesced in by him. *Childress v. Richardson*, 12 Ark. App. 62, 670 S.W.2d 475 (1984). The following explanation is helpful in understanding the concept of acquiescence in establishing a prescriptive easement:

> The foundation of a right by prescription is acquiescence of the owner of the servient tenement in the acts relied on to establish the easement by prescription. Acquiescence is here used in its ordinary sense; it does not mean license or permission in the active sense, but means passive assent or submission, quiescence, or consent by silence.
>
> . . .
>
> In some jurisdictions, mere verbal protests by the owner of land to its use by another are sufficient to disprove an acquiescence by him in such use. In other jurisdictions, however, a mere verbal act on the premises over which an easement is claimed, resisting its exercise and denying its existence, does not disprove acquiescence by the owner unless it is accompanied by an overt act which in fact obstructs the use of the alleged easement. Where this rule prevails, one isolated instance of an attempt to interrupt a use not resulting in actual interruption and

> not followed by an attempt to test the right to use does not, as a matter of law, necessarily disprove acquiescence.

25 AM. JUR. 2d, *Easements and Licenses* §§ 72 & 73 (1996). Moreover, "any unambiguous act of the owner of the land which evinces his intention to exclude others from the uninterrupted use of the right claimed breaks its continuity so as to prevent the acquisition of an easement therein by prescription." *Id.* at § 69.

Here, the appellees did not sit idly by and allow appellants to use the property. They not only protested verbally, they also pursued a series of overt acts to obstruct the use of the alleged easement. The chancellor determined that appellants' use of appellees' property had not been of such a continuous and uninterrupted nature as to vest in them a prescriptive easement. A chancellor's finding with respect to the existence of a prescriptive easement is a finding of fact and will not be reversed by this court unless it is clearly erroneous. *Stahl v. Thompson*, 6 Ark. App. 275, 641 S.W.2d 721 (1982). We find no clear error here.

Concluding as we have that the chancellor did not err in refusing to grant appellants a prescriptive easement over appellees' property, we do not find appellants' second and third points persuasive.

Affirmed.

COOPER and MEADS, JJ., agree.

JUNCTION CITY SCHOOL DISTRICT *v.* Margaret ALPHIN

CA 96-288 938 S.W.2d 239

Court of Appeals of Arkansas
Division IV
Opinion delivered February 19, 1997

[redacted]

Brazil, Adlong, Murphy & Osment, by: *William Clay Brazil* and *Compton, Prewett, Thomas & Hickey, P.A.*, by: *William I. Prewett*, for appellant.

Mitchell, Blackstock, & Barnes, by: *Clayton R. Blackstock*, for appellee.

OLLY NEAL, Judge. Appellant school district takes this appeal from a November 28, 1995, order of the Union County Circuit Court. Appellee Margaret Alphin is a school teacher in the Junction City School District who, by action of the Junction City School Board on April 28, 1994, suffered a loss of 3/7th of her regular salary when the district unexpectedly resolved to reduce its expenditures by eliminating or reducing staff positions during the 1993-94 school year. The trial court correctly found that appellant's action in reducing Ms. Alphin's contract was in violation of the Arkansas Teacher Fair Dismissal Act, Ark. Code Ann. § 6-17-1501 et seq., and, therefore, we affirm the judgment. The court's decision to disallow appellee an attorney's fee was erroneous as a matter of law, and we therefore reverse on Ms. Alphin's cross-appeal.

Junction City School District is located on the Arkansas-Louisiana state line and is comprised of students from both states. Historically, both states have shared the financial burden of providing an education for the district's students. In March 1994, the district was notified by the Arkansas Education Department that the State of Arkansas would immediately terminate turn-back funds that Arkansas had provided in previous years. Upon the school district's request, the Union County Circuit Court entered a temporary injunction, holding the impending termination of funding in abeyance until the 1994-95 school year. Ms. Alphin requested a hearing before the school board, which was granted, and the hearing was conducted July 6 and 7, 1994. The board ultimately decided to offer appellee a part-time position, which amounted to a 3/7th reduction in her salary instead of the original proposition of a 4/7th reduction. Ms. Alphin accepted the modification subject to her right to appeal the board's decision. She subsequently took an appeal to the Union County Circuit Court.

In the circuit court's November 28, 1995, order, the court adopted the findings it set out in its September 20, 1995, letter opinion. The court found that appellant failed to comply with its own policy and applicable state law in reducing appellant's contract, and that the board's decision to do so was arbitrary and capricious. Ms. Alphin was awarded back pay for the period in which she received a reduced salary, reinstatement of her full-time status as a teacher, and an attorney's fee. The court later retracted the award of attorney fees.

At trial, Junction City School Superintendent Alvin Kelly testified that when it became apparent that the district would have to eliminate some staff positions, it was he who was designated by the school board to develop criteria to be used in determining which contracts to reduce or terminate. At the time of the 1993-94 "funding crisis," the district had two separate policies in effect. Policy GAAB related to the hiring, termination, and demotion of certified personnel and contained both objective and subjective standards for employee dismissal. Policy GKBA dealt with selection and dismissal of professional personnel and contained a provision for the development of a reduction in force policy by a committee composed of representatives from the major categories

of personnel in the district, and approval by the board. The Junction City School Personnel Policy Committee devised a reduction in force policy (RIF), which was submitted to the board on April 26th and 28th 1994, and ultimately rejected. Mr. Kelly admitted that teaching certification and seniority in the district were the sole factors he considered in terminating employees.

The district urges first that the applicable standard of appellate review of judicial determinations pursuant to the Arkansas Teacher Fair Dismissal Act is whether the trial court erred in finding that the board's decision is supported by a rational basis. This is somewhat of a misstatement of the law. In such appeals our review is limited to a determination of whether the circuit court's decision is clearly erroneous. *Helena-West Helena School District v. Davis*, 40 Ark. App. 161, 842 S.W.2d 873 (1992); *Murray v. Altheimer-Sherril Public Schools*, 294 Ark. 403, 743 S.W. 2d 403 (1988) (decision under prior law). Here, the trial court held that the manner in which the board attempted to reduce appellee's contract was not in compliance with its own personnel policies and therefore violated state law. The court concluded that because the board made its decision without reference to its own policies, any action the board took was, as a matter of law, arbitrary and capricious.

The Teacher Fair Dismissal Act has three requirements: 1) that each district have a set of written personnel policies; 2) that each district have a committee on personnel policies consisting of five classroom teachers and three administrators; and 3) that the school board approve or adopt any proposed policy or modification to existing policy. Ark. Code Ann. § 6-17-201; 6-17-203; and 6-17-205. Strict compliance with the Teacher Fair Dismissal Act has been required by law since 1989. *See Lester v. Mount Vernon-Enola School District*, 323 Ark. 728, 917 S.W.2d 540 (1996). School policy is part of teachers' contracts as a matter of law, and teachers may reasonably expect the district to comply with its own declared policy. Ark. Code Ann. § 6-17-204(a) (Repl. 1993); *Lauren Maxwell v. Southside School District*, 273 Ark. 89, 618 S.W.2d 148 (1981).

At the time Ms. Alphin's contract was reduced, appellant had a personnel policy in place. The only provision in the unified policy that specifically addresses the issue of reduction in force is the portion of policy GKBA which states:

> The Board of Education shall have the authority to terminate, demote, or reassign personnel within the School District at times when reduction in staff becomes necessary and essential to the successful financial operations of the district. . . . A specific and detailed plan of action for the reduction in the number of personnel, developed by representatives from the administrative, instructional, and auxiliary staff, and recommended to the superintendent for presentation to the Board of Education will be in compliance with statutory requirements and in accordance with Board of Education Policies.
>
> Should a RIF become necessary, implementation procedures will be designed (1) to maintain a high quality educational program and (2) to assure fair and equitable treatment of all district employees.

Under these terms, the district guaranteed only that it would reduce its force in a manner that would maintain educational standards, that it would not discriminate against any employee, and that any RIF policy would be developed by the committee and approved by the board. Inherent is the requirement that the board must adopt any standard to be used.

Policy GAAB, which was also in effect, addresses generally the issue of teacher dismissal, demotion, selection, and transfer. That section of the policy provides that both objective and subjective criteria will be used in determining action on teacher contracts. Those criteria include teacher certification, years experience teaching, years experience teaching in the district, years experience teaching a certain grade or subject, and any degrees, endorsement hours beyond degree, and voluntary participation in workshops, seminars, etc. Subjective considerations include past performance, ability, leadership, and personality. It is undisputed that superintendent Kelly used only two of thirteen enumerated criteria.

[redacted] The court concluded that policy GAAB supplied the criteria for reduction that were missing from policy GKBA. The

authority to set standards is vested in the committee by operation of law and required by policy GKBA. Because superintendent Kelly testified that he alone decided which criteria to use in reducing the district's work force and because he failed to provide the guarantees enumerated in policy GAAB, we cannot say the trial court's finding that appellant failed to strictly comply with its own policy is clearly erroneous. Although the district had no specific RIF policy, the terms contained in policy GAAB were a part of its contract with appellee. We recognize that the district was under stringent time restraints. However, state law precludes the district from circumventing the criteria for fairness in dismissal set out in its own policy. *See Murray v. Altheimer-Sherril Pub. Schools*, 294 Ark. 403, 743 S.W.2d 403 (1988) (decision under prior law).

An action brought pursuant to the Fair Dismissal Act is both a civil action and "a claim for 'labor or services'" within the meaning of Ark. Code Ann. § 16-22-308, the general statute authorizing attorney's fees. *Sosebee v. County Line Sch. Dist.*, 320 Ark. 412, 897 S.W.2d 556 (1995); *City of Ft. Smith v. Driggers*, 305 Ark. 409, 808 S.W.2d 748 (1991). The supreme court held in *Driggers* that the subject matter of the underlying litigation is solely dispositive of whether Ark. Code Ann. § 16-22-308 may be invoked.

Because the trial court failed to exercise its discretion to award or deny an attorney's fee, reversal and remand is required for consideration of the issue. *See Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990).

Affirmed on direct appeal; reversed and remanded on cross appeal.

ROBBINS, C.J., and ROAF, J., agree.

Willie Lee HILL *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

CA 96-280 937 S.W.2d 684

Court of Appeals of Arkansas
Division III
Opinion delivered February 19, 1997

[redacted]

[redacted]

Gary Eubanks and Associates, by: *James Gerard Schulze* and *William Gary Holt*, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Beverly A. Rowlett*, for appellee.

WENDELL L. GRIFFEN, Judge. This is the second appeal in a suit by Willie Lee Hill (Appellant) to recover medical expenses from her insurer, State Farm (Appellee), resulting from an automobile accident. The first trial resulted in a directed verdict for appellant. We reversed the trial court's decision and remanded the case for retrial. Appellant now appeals from a defense verdict following the retrial, and argues that the trial court erred when it allowed a chiropractor to testify as an expert in radiology. We agree; therefore, we reverse and remand for a third trial.

Appellant was involved in a car accident on December 9, 1989, and was treated by Dr. Michael Courtney, a doctor of chiropractic, from December 18, 1989, until September 21, 1990. Testimony at the second trial revealed that appellant complained of a sore head, neck, and back. Dr. Courtney treated appellant 117 times during that period. He diagnosed appellant as having multiple cervical subluxations (segmental dysfunctions) and subluxation of the lumbar spine, and he testified that this diagnosis was corroborated by the physical exam. The maximum amount payable under the insurance policy for care and treatment of injuries from an accident is $5,000.00. Appellee had previously paid $1,404.00, but appellant sought an additional $3,665.00 to pay Dr. Courtney the remainder due for his services. Appellee refused payment, contending that it was not reasonable and necessary, and at the jury trial presented expert opinion testimony from Dr. Melvin Rose, a chiropractor from Illinois.

Dr. Rose testified that in his opinion the length of appellant's treatment was excessive. He also disagreed with Dr. Courtney's interpretation of the appellant's x-rays. Counsel for appellee

attempted to elicit testimony from Dr. Rose regarding whether a medical radiologist would interpret appellant's x-ray studies as demonstrating a subluxation. Appellant objected, arguing that Dr. Rose was not qualified to express an opinion on that issue because he was not a medical radiologist. The trial court overruled appellant's objection; Dr. Rose then testified that a medical radiologist would not read appellant's x-rays to show multiple subluxations as reported by Dr. Courtney. At the close of all evidence, the jury rendered a verdict for State Farm from which appellant has appealed. She contends that the trial court erred when it overruled her objection to Dr. Rose's opinion about what a medical radiologist would have concluded regarding the existence or nonexistence of subluxations based upon the x-rays interpreted by Dr. Courtney.

The qualification of an expert witness is within the sound discretion of the trial court and will not be reversed absent abuse of discretion. *Dillon v. State*, 317 Ark. 384, 877 S.W.2d 915 (1994). Questions concerning the qualification of a witness or admissibility of evidence are preliminary questions that are determined by the court. Ark. R. Evid. 104(a). A witness who is qualified as an expert by knowledge, skill, experience, training, or education may provide opinion testimony at trial, if it will assist the trier of fact in understanding the evidence or to determine a fact in issue. Ark. R. Evid. 702. While the trial court has discretion to qualify an expert witness, that discretion is not absolute. *Thomas v. Sessions*, 307 Ark. 203, 818 S.W.2d 940 (1991). We see no error in the trial court's decision to permit Dr. Rose to testify about his understanding of the distinction in the meaning of "subluxation" as that term is used by practitioners of chiropractic and medical doctors. However, there was no evidentiary foundation for him to render an opinion on how a medical radiologist would have interpreted Hill's x-rays. There was no proof that Dr. Rose possessed any knowledge, skill, experience, training, or education in medical radiology.

Dr. Rose testified that while he was not certified in radiology, he has had postgraduate studies in, among other things, chiropractic roentgenology. Dr. Rose was allowed to testify, over appellant's objection, that a radiologist or other medical physician

would define a "subluxation" as a "very significant bone that is . . . out of place to a rather significant degree," where a chiropractor would define "subluxation" as "something more dynamic," such as a "locking up of the bone." Dr. Rose also testified that if a radiologist reviewed appellant's x-rays, he/she would not have found any subluxations. We acknowledge that if there is a reasonable basis to find that the witness has knowledge of a subject beyond that of ordinary knowledge, then the witness may be qualified as an expert. *Poyner v. State*, 288 Ark. 402, 705 S.W.2d 882 (1986). However, if a proper foundation is not laid, the witness should not be allowed to testify as an expert. *Hardy v. Bates*, 291 Ark. 606, 727 S.W.2d 373 (1987).

In *Hardy*, a chiropractor was prohibited from discussing whether a victim had suffered from permanent bodily impairment where a proper foundation had not been laid to show that he had specialized knowledge in that field. On appeal, the supreme court held that while a chiropractor is competent to testify concerning matters within the scope of profession and practice of chiropractic, the trial judge did not abuse his discretion in prohibiting the chiropractor from testifying as to whether an automobile accident victim had suffered any permanent bodily impairment, as the proper foundation had not been laid to show the scope of the chiropractic's field. *Hardy*, 291 Ark. at 608, 727 S.W.2d at 373. The general rule concerning expert medical testimony by chiropractors limits the testimony to matters within the scope of the profession and practice of chiropractic. *Id.*

The trial court in this case allowed Dr. Rose to testify regarding how a radiologist would define "subluxation" and how a radiologist would interpret appellant's x-rays. However, there was no evidence that he was competent regarding medical radiology through training, knowledge, formal education, or other experience. We do not know how much weight was given to this testimony and, therefore, cannot consider this error harmless. Thus, we reverse on this issue, as it is dispositive of the entire case, and remand for a third trial.

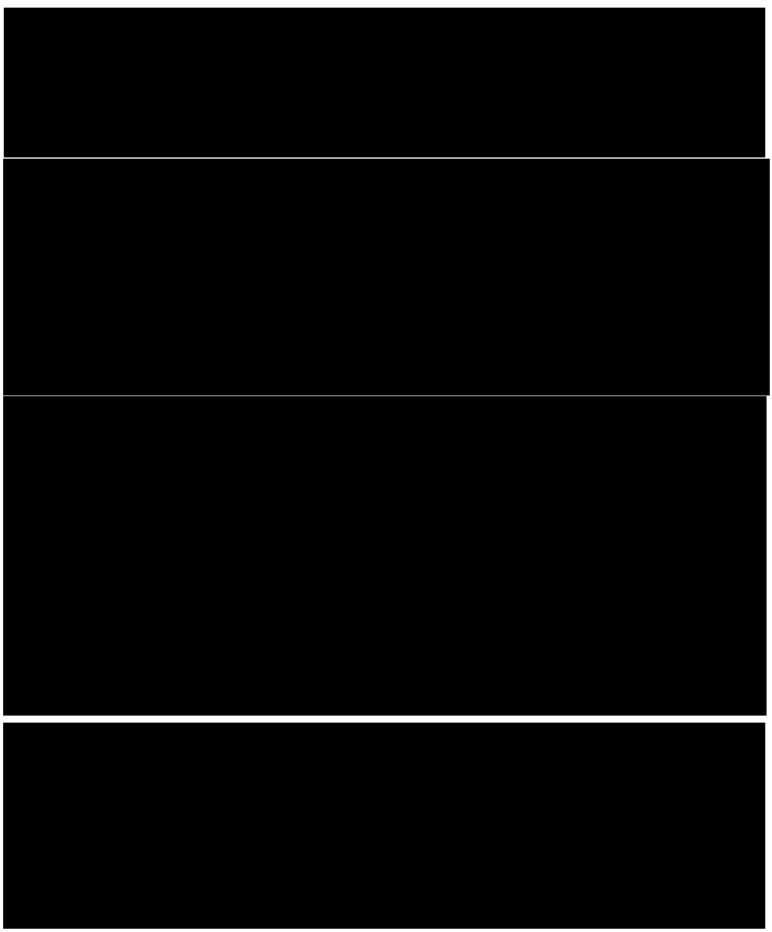
Reversed and remanded.

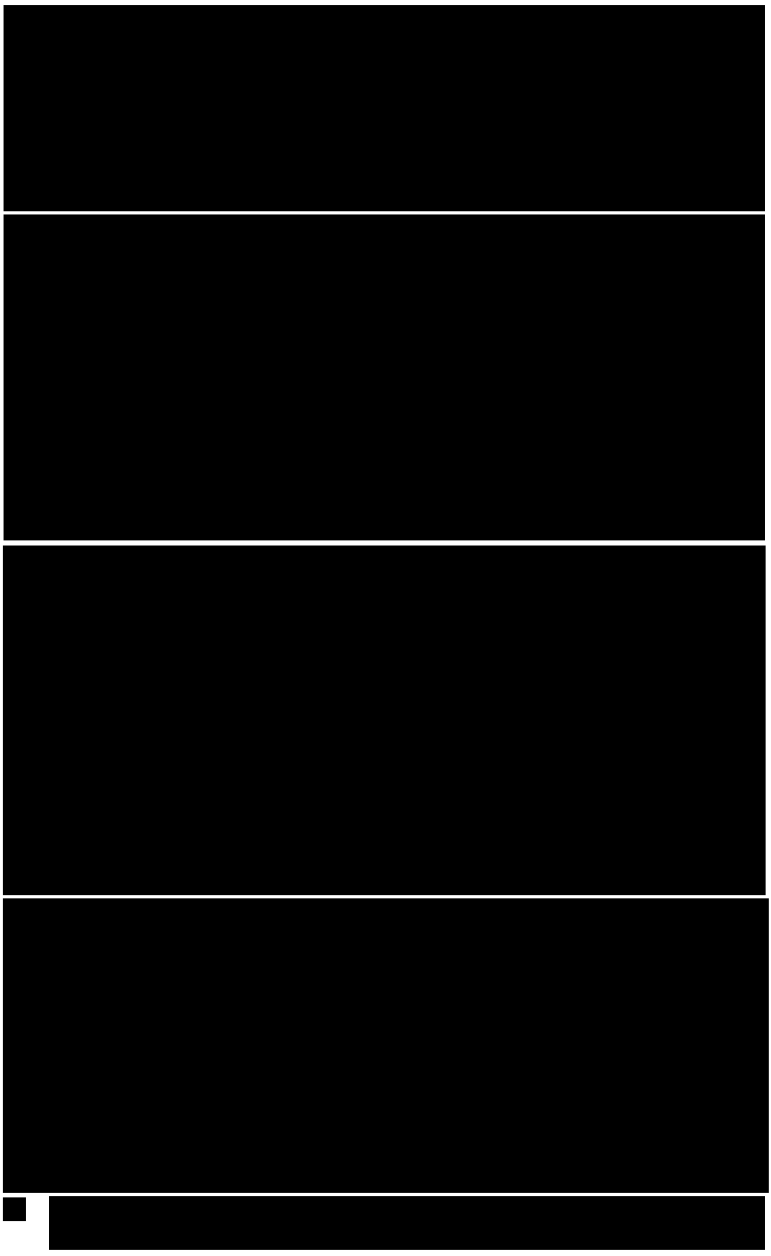
JENNINGS and BIRD, JJ., agree.

Val JAMISON and Sara Lynn Jamison *v.* The ESTATE OF Robert Sims GOODLETT, Deceased

CA 96-361 938 S.W.2d 865

Court of Appeals of Arkansas
Division III
Opinion delivered February 19, 1997





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

Harrell & Lindsey, P.A., by: *Paul E. Lindsey*, for appellee.

WENDELL L. GRIFFEN, Judge. Val Jamison and his wife, Sara Lynn Jamison, appeal from a decree by the Hempstead County Chancery Court that granted judgment in favor of the estate of Robert Sims Goodlett, deceased, against them for $185,645.30, plus prejudgment interest of $29,418.43 for the period beginning December 21, 1992, until August 11, 1995, upon a finding that appellants failed to prove that Robert Sims Goodlett made an *inter vivos* gift to them of all his land and personal property when he gave Val Jamison a power of attorney dated September 4, 1987. The chancellor also decreed that appellants are to return a 315-acre farm and all other property that they hold that was previously owned by the decedent and which they obtained after Val Jamison transferred that property to Sara Lynn Jamison and himself by using the power of attorney. Appellants argue: (1) that the chancellor erred in granting a directed verdict in favor of the administrator of the estate of Robert Sims Goodlett and declaring the alleged gift to be invalid; (2) that the chancellor erred by holding that the statute of limitations had not run on the estate's claim

against Val Jamison for breach of fiduciary duty for refusing to deliver all of the decedent's money and property where the estate brought suit on the breach of fiduciary duty claim within three years of December 21, 1992, the date of the decedent's death; (3) that the chancellor erred in holding that appellants are required to return the undivided one-fourth interest of Reese Goodlett in the 315-acre farm; and (4) that the chancellor erred in awarding appellees $17,765.00 for attorney fees, and $2,940.25 for costs. We have conducted a *de novo* review of the record and hold that the chancellor's decision was not clearly erroneous. Therefore, we affirm the chancellor's decree on all points raised in the appeal.

Factual History

Robert Sims Goodlett lived in Hempstead County, never married, and had no offspring. During his later years, he lived with one of his brothers, David Sloman Goodlett ("Sloman"), with whom he operated a 315-acre farm that the two brothers owned as tenants in common as well as a country store in Ozan, Hempstead County, Arkansas. Sloman Goodlett died February 2, 1987, survived by Robert Goodlett and another brother, Jordan Reese Goodlett ("Reese"), who lived in Hot Springs, Arkansas, with his wife, Marie. Reese Goodlett inherited a one-fourth undivided interest in the farm when Sloman died, leaving Robert Goodlett with an undivided three-fourths interest.

Robert Goodlett was a first cousin to Rafe Goodlett, the father of appellant Sara Lynn Goodlett Jamison, and Rafe Goodlett had a farm on land adjoining the farm owned by Robert. During Rafe Goodlett's lifetime, appellant Val Jamison would fix fences, cut bushes, and keep cattle on the Rafe Goodlett farm, and would visit Robert Goodlett. During the first few days of September 1987, Robert Goodlett became very ill. He arranged for Val Jamison to be contacted, and requested that Jamison take him to a local hospital for emergency treatment by his personal doctor. On the day after he was admitted to the hospital, Robert Goodlett informed Val Jamison that he needed to pay some pending bills and that he had a checking account at First National Bank of Hope. Val Jamison contacted a bank official (Martha Horn), who went with another bank employee (Alan Green) to visit Goodlett

in order to obtain his consent to add Val Jamison's signature to the checking account so that Jamison could pay Goodlett's bills. After Horn questioned Goodlett to confirm that he understood the effect of adding Jamison's signature to the account, Jamison signed the signature card and Goodlett initialed it.

According to Jamison, during the September 1987 hospitalization Goodlett became concerned about his health condition after his doctor indicated that he needed to undergo a surgical procedure and stated that he should place his affairs in order. Jamison testified that Goodlett stated that he wanted to give all of his money and property to Jamison and his wife, Sara Lynn. There were no other witnesses to the alleged conversation. On September 4, 1987, Jamison obtained a power of attorney from Goodlett that was prepared by Ed Alford, an attorney selected by Jamison. It does not appear from the record that Alford interviewed or otherwise conferred with Goodlett regarding preparation of the power of attorney. In fact, Goodlett had directed Jamison to consult another attorney concerning preparation of the power of attorney, but Jamison testified that the designated attorney (Jim Bob Steel) was unavailable so Jamison arranged for Alford to prepare the power of attorney instead.

Jamison began transferring Goodlett's property to himself and to his wife after he obtained the power of attorney. On September 8, 1987, Goodlett underwent an endoscopic procedure that left him too weak to permit the surgical procedure that his doctor had contemplated. On September 11, 1987, Jamison obtained a warranty deed from Reese and Marie Goodlett, and Robert Goodlett (by Val Jamison under the power of attorney), which conveyed the 315-acre farm to Sara Lynn Jamison. Val Jamison had first asked Alford (the attorney who prepared the power of attorney) to prepare the warranty deed for the 315 acres to himself. After Alford indicated that this conveyance was unsound, Jamison directed that the land be conveyed to Sara Lynn, his wife. The deed was recorded on September 29, 1987. Jamison also began closing or combining all of Goodlett's bank accounts, including three accounts at First National Bank of Hope, one account at Citizens National Bank of Hope, two accounts at Citizens National Bank of Nashville, two accounts at

First Federal Savings of Arkansas, and an account at First National Bank of Nashville. Jamison later moved Goodlett's personal property to his (Jamison's) house. These actions were taken using the authority vested by the power of attorney that Goodlett had given Jamison and, according to Jamison, were consistent with and pursuant to Goodlett's statement that he intended to give Jamison and his wife all of the money and property. Jamison maintained Goodlett's finances and personal property separate from his own, kept records of all transactions concerning Goodlett's property and financial transactions related to his money, and reported to Goodlett about the warranty deed that conveyed the farm to Sara Lynn Jamison as well as the actions to close or combine Goodlett's bank accounts.

Jamison testified at trial that Goodlett approved of the actions that were taken based on the power of attorney and did not express a desire to repudiate or change them. Jamison paid Goodlett's bills each month, transacted his farm business, and handled the filing of his annual tax returns. In February 1989, Jamison signed a crop-share lease, as attorney-in-fact for Goodlett, in favor of Leroy Morrow. Goodlett's tax returns from 1987 until 1990 reflect that profits from interest income, farm income, rents, and royalties were claimed as income on Goodlett's tax returns, but Jamison testified that the profits from these items were actually placed in a separate account in Jamison's name that he maintained for Goodlett's benefit. At some point in time Jamison sold a car and cattle trailer that belonged to Goodlett, and deposited the sale proceeds into that account. He later purchased Goodlett's GMC truck and deposited the $1,500 purchase price into the account that he maintained for Goodlett's benefit. On September 10, 1990, Jamison changed the beneficiary on a life insurance policy that Goodlett had purchased from Reese Goodlett to Sara Lynn Jamison following Reese Goodlett's death on July 23, 1990.

Robert Goodlett died intestate on December 21, 1992. As of that date, $185,645.30 remained from the money that he owned. His estate made demand upon Val Jamison and Sara Lynn Jamison for the return of all property and monies held by them as trustees for Robert Goodlett. Appellants refused to return the property and monies, contending that Goodlett had made a valid

inter vivos gift to them. The estate then filed suit for an accounting; imposition of a constructive trust covering all monies and property held by appellants based upon the fiduciary relationship between Robert Goodlett and Val Jamison; for a determination that any gift alleged by appellants was void; and for reasonable attorney's fees, costs, and interest. Appellants resisted the suit and contended that Goodlett made a valid *inter vivos* gift to them of the monies and property. Alternatively, appellants argued that the statute of limitations had run before the estate filed suit, and that the estate's claim was barred by the equitable doctrine of laches.

After receiving testimony from thirteen witnesses, and following the estate's motion for directed verdict, the chancellor granted the estate's motion and entered a decree finding that appellants had failed to prove the validity of a gift from Robert Goodlett "beyond a reasonable doubt." The chancellor also ruled that the appellants failed to prove by a preponderance of the evidence that a gift was made or intended by Robert Goodlett. The chancellor held that the power of attorney executed by Goodlett in favor of Val Jamison created a fiduciary relationship that Jamison breached when he failed to return Goodlett's monies and property to Goodlett's estate after his death, and that the three-year statute of limitations for the breach-of-fiduciary-duty claim did not begin to run until Goodlett died on December 21, 1992, and had not expired when the estate filed its lawsuit in 1994. Based upon those findings and conclusions, the chancellor entered the decree from which this appeal has been taken by appellants.

The Inter Vivos *Gift Argument*

Appellants first contend that the chancellor applied the improper standard of proof in ruling on the estate's motion for directed verdict. In the decree, the chancellor addressed the burden of proof as follows:

> The Court finds and determines that the burden of proof required to prove the validity of a gift of this magnitude and made in this manner requires a standard of proof "beyond a reasonable doubt." The Court is noting this standard of proof in the event there is an appeal because the law is not clear as to the appropriate

standard of proof required to prove a gift made under these circumstances.

The Court finds that the Defendants have not only failed to prove beyond a reasonable doubt that a gift was made by the decedent, but that they have also failed to prove by a preponderance of the evidence that a gift was made or intended by the decedent.

Appellants rely upon *Mercantile Bank v. Phillips & Glasco*, 260 Ark. 129, 538 S.W.2d 277 (1976), for the proposition that a donee who has a fiduciary relationship with a donor must present clear and convincing evidence to overcome the presumption that a gift arising from that relationship is void. Appellee concedes that this is a correct statement of the law, citing *Birch, Adm. v. Coleman*, 15 Ark. App. 215, 691 S.W.2d 875 (1985), for the same proposition. Thus, the parties agree that the chancellor erred by ruling that appellants were obligated to prove that the decedent intended and effected a gift of his property and monies beyond a reasonable doubt.

However, the chancellor's misapprehension regarding the burden of proof does not preclude an appellate court from undertaking a *de novo* review of the case and entering judgment upon the proper standard of proof. *See Maroney v. City of Malvern*, 320 Ark. 671, 899 S.W.2d 476 (1995), where the Arkansas Supreme Court held that although a chancellor had based his decision upon an erroneous conclusion, the appellate court was not precluded from reviewing the case *de novo* and entering judgment as was proper. The relevant inquiry is not merely whether the chancellor erred concerning the burden of proof, but whether his judgment was proper when the proof is measured by the proper standard.

It is well settled that a directed verdict is only proper where the evidence, when viewed in the light most favorable to the nonmovant, is so insubstantial as to require a jury verdict for the movant to be set aside. *City of Little Rock v. Cameron*, 320 Ark. 444, 897 S.W.2d 562 (1995). On appeal from a chancery court order granting a directed verdict, the court on appeal must decide specifically whether the plaintiff made out a *prima facie* case of enti-

tlement to the relief requested. *Shaver v. Spann*, 35 Ark. App. 118, 813 S.W.2d 280 (1991). This requires that the evidence presented by the party against whom the directed verdict is sought must be given the highest probative value, taking into account all reasonable inferences therefrom. *Cameron* at 446.

Although the chancellor erred by holding appellants to the beyond-a-reasonable-doubt standard of proof regarding the validity of the alleged *inter vivos* gift from the decedent, our *de novo* review of the record leads us to conclude that the error was harmless because appellants failed to meet the clear-and-convincing-evidence standard of proof required to sustain an *inter vivos* gift. Arkansas law is clear that one seeking to sustain an *inter vivos* gift must prove by clear and convincing evidence that: (1) the donor was of sound mind; (2) an actual delivery of the property took place; (3) the donor clearly intended to make an immediate, present, and final gift; (4) the donor unconditionally released all future dominion and control over the property; and (5) the donee accepted the gift. *Howard v. Weathers*, 55 Ark. App. 121, 932 S.W.2d 349 (1996). In *Howard*, we held that these elements had not been established where the proof showed that a decedent received a monthly stipend from money that she inherited from a sister. *Id.* at 124. The decedent had instructed Weathers to "take care" of the money that she was to inherit, and to send her $100 monthly, and had told Weathers that he could keep the remainder of the money when she died. After the decedent's death, Weathers refused the request by the executrix of her estate to turn over the money, claiming that the decedent had made a gift of the money to him. We reversed the trial court's decision dismissing the estate's complaint, holding that the proof did not establish the elements necessary for a valid *inter vivos* gift because the decedent received the monthly stipend and retained authority to demand additional sums at her own pleasure, thus showing that she did not completely surrender dominion and control over the money by placing it with Weathers, and showing that she did not make an unconditional or irrevocable immediate and final gift of the money. *Id.*

We believe that the case before us involves a similar failure of proof. The chancellor held that appellants failed to present proof

sufficient to establish, either beyond a reasonable doubt or by a preponderance of the evidence, that Robert Goodlett made a valid *inter vivos* gift to appellants when he executed the September 4, 1987, power of attorney. Although the beyond-a-reasonable-doubt standard is inapplicable because it is higher than the clear and convincing evidence burden that properly applies to analysis of evidence concerning alleged *inter vivos* gifts, the proof in this case contains shortcomings similar to that presented in *Howard.*

Appellants failed to establish by clear and convincing evidence that an actual delivery of Robert Goodlett's money and property took place; that Goodlett clearly intended to make an immediate, present, and final gift; that Goodlett unconditionally released all future dominion and control over the money and property; and that they accepted the money and property as a gift. Despite Val Jamison's testimony that Robert Sims Goodlett intended to give all of his money and property to him and his wife when he executed the power of attorney, and that Goodlett never repudiated or objected to the transfer of his money and land into appellants' names through the use of the power of attorney, Jamison continued to account to Goodlett for the money and property. Jamison executed a crop-share lease in Goodlett's name on February 20, 1989, in favor of Leroy Morrow, despite having transferred title to the land on which the crop was raised to Sara Lynn Jamison. The lease payments were credited to Goodlett, not to Jamison, even though Sara Lynn Jamison was the titled owner of the land that had been leased. Tax returns for Goodlett were prepared at Val Jamison's direction, signed by him as attorney-in-fact for Goodlett, and reported interest earned on money attributed to him and held by appellants. Val Jamison maintained careful records of Goodlett's money that had been transferred from the various bank accounts into accounts held in appellants' names, and always kept Goodlett's money separate from appellants' money. Val Jamison admitted giving Goodlett periodic reports concerning the money and property, admitted that he paid Goodlett's bills using Goodlett's money, admitted that he did not use any of Goodlett's money for his own purposes during Goodlett's lifetime, and admitted that if Goodlett or his surviving brother (Reese Goodlett of Hot Springs) had expressed a desire to assume

control over the money and property he would have accommodated that desire.

It is especially noteworthy that when Val Jamison decided to purchase a truck, he *purchased* a GMC truck from Goodlett, paid $1,500 for it, and deposited the sale proceeds into an account that he maintained exclusively for Robert Goodlett despite his assertion that Goodlett had already given the truck to him by virtue of the power of attorney. These and other factors constitute clear and convincing proof that Goodlett did not unconditionally release all future dominion and control over his property, that appellants did not accept his property as a gift (otherwise they would not have purchased and paid for what they already owned, as in the pickup truck), that actual delivery of his property did not take place, and that Goodlett did not intend to make an immediate, present, and final gift of his property.

[redacted] Arkansas law has long held that all five elements must be established by clear and convincing proof in order for an *inter vivos* gift to be sustained. *Irvin v. Jones*, 310 Ark. 114, 832 S.W.2d 827 (1992); *Wright v. Union Nat'l Bank*, 307 Ark. 301, 819 S.W.2d 698 (1991); *Phipps v. Wilson*, 251 Ark. 377, 472 S.W.2d 929 (1971); *Maloy v. Stuttgart Memorial Hosp.*, 42 Ark. App. 16, 852 S.W.2d 819 (1993). It is not enough that a purported donor intend to make a gift, or intend even that the donor take actions that may support the view that he intended for a purported donee to have his property. The law requires clear and convincing proof that the donor was of sound mind, *and* that actual delivery of the property took place, *and* that the donor clearly intended to make an immediate, present, and final gift, *and* that the donor unconditionally released all future dominion and control over the property, *and* that the donee accepted the gift. *Wright*, 307 Ark. at 304. Even if one accepts appellants' argument that Robert Sims Goodlett's manic depressive condition did not deprive him of the soundness of mind required for effecting an *inter vivos* gift, they clearly failed to produce clear and convincing proof on the other four elements. Therefore, the chancellor's decision that they failed to establish an *inter vivos* gift was not clearly erroneous, despite the fact that the chancellor applied an improper standard of proof.

Our decision sustaining the chancellor's holding should not be interpreted as a judgment about the good faith of appellants in believing that Robert Goodlett had given his property to them, nor should it be viewed as disregarding the scrupulous attention that Val Jamison clearly gave to Goodlett's care and to the upkeep of his affairs. Instead, our decision and the chancellor's holding simply mean that appellants failed to present clear and convincing evidence that the well-established legal requirements for establishing an *inter vivos* gift were satisfied. Those requirements exist because claims of *inter vivos* gifts, by their very nature, are often susceptible to fraud and imposition. *Howard*, 55 Ark. App. at 124; (citing Krickerberg v. Hoff, 201 Ark. 63, 143 S.W.2d 560 (1940)). In many instances these gifts are claimed, as here, based upon parol evidence from the purported donee after the purported donor has died. The exacting requisites and clear-and-convincing-proof standard serve sound public-policy purposes of preventing mistake and confusion, as well as fraud and imposition. The law sets the standard of proof and defines the elements of proof that must be established; it is up to property owners and the persons who claim to be donees to supply the required proof.

The Statute of Limitations

Appellants also argue that the chancellor erred in holding that the statute of limitations had not run on appellee's claim against them for breach of fiduciary duty. Arkansas Code Annotated § 16-56-105 is the applicable statute of limitations for breach of fiduciary duty. *Smith v. Elder*, 312 Ark. 384, 849 S.W.2d 513 (1993). Appellants argue that the three-year limitations period prescribed by that statute began running no later than September 1987, when Val Jamison used the power of attorney to convey the 315-acre farm to Sara Lynn Jamison, as demonstrated by the warranty deed that was recorded on September 29, 1987. Because the administrator of Robert Goodlett's estate did not commence this lawsuit until 1994, appellants maintain that the breach of fiduciary duty claim is barred by limitations.

Appellants' limitations argument fails because there is no proof that Val Jamison acted to deprive Robert Goodlett of the rightful use and benefit of his money and property, even after he

conveyed the 315-acre farm to Sara Lynn Goodlett. As already mentioned, Val Jamison was scrupulous in maintaining records of all monies earned by Goodlett and from his possessions. There is no proof that Val Jamison appropriated any part of Goodlett's money or property for personal benefit during Goodlett's lifetime. Indeed, the evidence shows that Jamison used several thousand dollars of Goodlett's money to retire the debt on his (Jamison's) personal residence, but this action took place only after Goodlett's death. Goodlett died on December 21, 1992, and there is no allegation or proof that he or anyone acting for him was denied use of his property by Val Jamison before he died. Therefore, Jamison's refusal to turn over Goodlett's money and property obtained by way of the power of attorney to the administrator of Goodlett's estate was the first action that was adverse to Goodlett's estate for which a claim of breach of fiduciary duty could be asserted. The administrator of the estate filed this lawsuit in 1994, less than three years after Jamison refused to turn over Goodlett's property and money. Accordingly, we do not find the chancellor's rejection of appellants' statute-of-limitations defense to have been erroneous.

The Reese Goodlett Interest in the Farm

We also find unpersuasive appellants' challenge to that part of the chancellor's decree that ordered them to return to appellee the undivided one-fourth interest in the farm that Reese and Marie Goodlett conveyed to Sara Lynn Jamison. Although appellants accurately assert that the decree did not specifically refer to the interest obtained from Reese Goodlett and that the prayer for relief did not specifically include a request for reconveyance of that interest, these arguments overlook the fact that appellee sued to have the deed set aside that conveyed the 315-acre farm in which Reese Goodlett held an undivided one-fourth interest and specifically sought to have the property revert to appellee. The complaint that appellee filed also sought an accounting of all money and property that appellants held for Robert Goodlett's benefit.

[redacted] Sara Lynn Jamison clearly held the deed to the farm by virtue of one transaction, namely the warranty deed dated September 11, 1987, from Robert Goodlett, by Val Jamison pursuant to the power of attorney, *and* from Reese and Marie Goodlett.

The deeded farm was part of the rest of Robert Goodlett's property covered by appellee's lawsuit that sought imposition of a constructive trust over all property that appellants obtained from Robert Goodlett and held for his benefit. These factors persuade us that the chancellor's ruling was not clearly erroneous insofar as it ordered appellants to return the one-fourth interest that they obtained from Reese Goodlett.

Attorney's Fees and Costs

Appellants' challenge to the provisions of the chancellor's decree that awarded attorney's fees of $17,765.00, and costs of $2,940.25, is also unpersuasive. There is no indication that appellants objected to appellee's application for attorney's fees and costs before the chancellor. The failure to timely object to what one believes to be trial court error has long been viewed a waiver of the objection, and we have consistently held that parties may not raise on appeal objections that were not made and preserved below. *Estate of Tucker v. Tittertington*, 46 Ark. App. 322, 881 S.W.2d 226 (1994); *Garibaldi v. Dietz*, 25 Ark. App. 136, 752 S.W.2d 771 (1988).

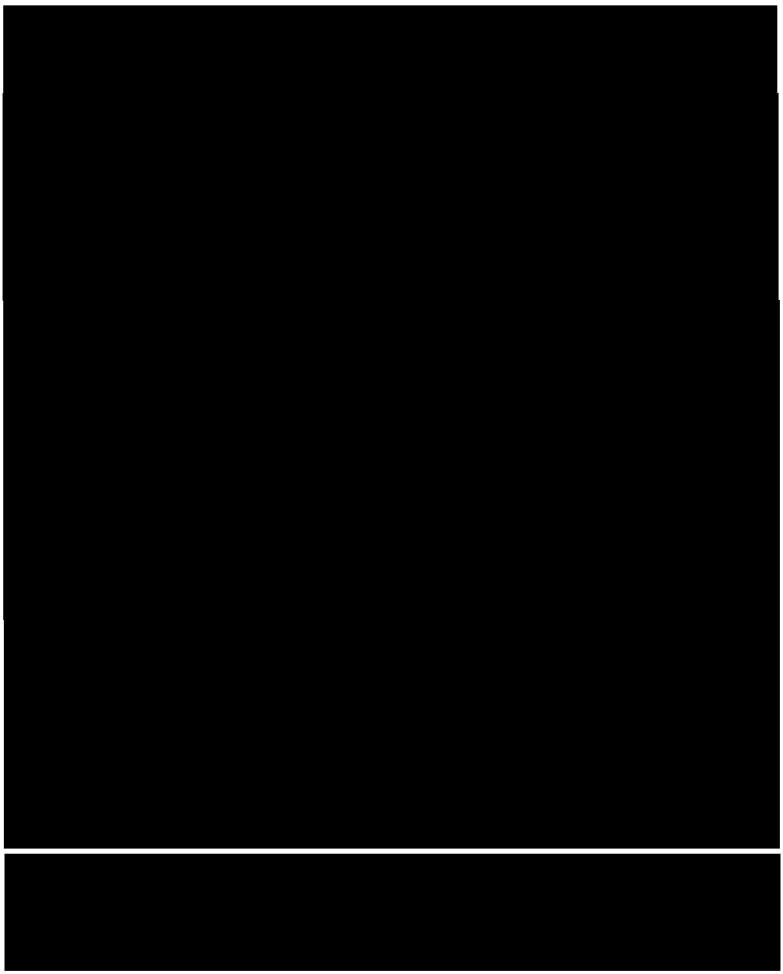
Affirmed.

JENNINGS and BIRD, JJ., agree.

CITY of OZARK *v.* James NICHOLS, et al.

CA 96-491 937 S.W.2d 686

Court of Appeals of Arkansas
Division II
Opinion delivered February 19, 1997



[redacted]

Walters, Hamby, & Verkamp, by: *John P. Verkamp*, for appellant.

Daily, West, Core, Coffman & Canfield, by: *Jerry L. Canfield* and *Turner & Mainard*, by: *James C. Mainard*, for appellees.

MARGARET MEADS, Judge. The City of Ozark, Arkansas, filed a condemnation complaint against appellees on June 14, 1993, for the purpose of constructing and maintaining a water-storage tank, water line, and roadway on land owned by appellees. Ozark posted a seventy-five hundred dollar ($7,500.00) bond with the circuit clerk's office, and the circuit court entered an order of possession in favor of Ozark on June 14, 1993. Ozark filed a second amended complaint on November 30, 1994, to add newly discovered defendants. Answers were filed seeking a jury trial for the purpose of determining just compensation for the condemned property. A jury trial on the issue of compensation was held on January 11, 1996, and the jury awarded appellees $28,500 for their property.

The appellees requested attorney's fees during the trial and after the return of the jury's verdict. Plaintiff objected to an award of attorney's fees on the basis that they were not authorized by law at the time the condemnation case was instituted or at the time the order of possession was entered. The judgment provided that "the said City of Ozark shall pay, in addition to the sum aforesaid, the sum of $8,634.05 to defendants' attorney in accordance with Ark. Code Ann. § 18-15-605." It is from this award of attorney's fees that the City of Ozark appeals. We find no error and affirm.

[redacted] It is established that attorney's fees are not allowed except when expressly provided for by statute. *Damron v. Univer-*

sity Estates, Phase II, Inc., 295 Ark. 533, 750 S.W.2d 402 (1988) (citing *Harper v. Wheatley Implement Co.*, 278 Ark. 27, 643 S.W.2d 537 (1982)). In the case at bar, the statute governing damages for an eminent domain proceeding by a water company was amended to mandate attorney's fees in certain situations, after entry of the order of possession but before trial and entry of the judgment.

Arkansas Code Annotated § 18-15-605 (1987), the statutory provision in effect when suit was instituted, provided:

> 18-15-605. *Damages — Deposits.*
> The further proceedings in the matter of assessment of damages and the making of deposits to secure the owner shall be the same as is now prescribed by law in reference to condemnation proceedings by railroad, telegraph, and telephone corporations.

This statute, as revised by Act 1207 of 1995 and made effective April 11, 1995, now provides:

> 18-15-605. *Damages — Deposits.*
> (a) The further proceedings in the matter of assessment of damages and the making of deposits to secure the owner shall be the same as is now prescribed by law in reference to condemnation proceedings by railroad, telegraph, and telephone corporations, except that the measure of damages shall be the fair market value of the condemned property at the time of the filing of the petition by the corporation or water association as may be determined by a jury based on the opinion of a licensed appraiser.
> (b) In the case of application for orders of immediate possession by the corporation or water association, if the amount awarded by the jury exceeds the amount deposited by the corporation or water association in an amount which is more than twenty percent (20%) of the sum deposited, the landowner shall be entitled to recover the reasonable attorney's fees and costs.

Ark. Code Ann. § 18-15-605 (Supp. 1995).

There is no question that the jury's award of $28,500 as compensation for the land exceeded the $7,500 deposit by more than twenty percent. Therefore, if the statute has retroactive application, appellees are clearly entitled to recover reasonable attorney's fees.

Appellant cites *Arkansas Rural Med. Prac. Student Loan Bd. v. Luter*, 292 Ark. 259, 729 S.W.2d 402 (1987), in support of its contention that there should be no retroactive application of the statute. However, *Luter* is distinguishable from the present case, because the statutory changes involved in that case impeded upon a substantive, or "vested," right for which the student loan board contracted in promissory notes for loans made to Dr. Luter. The supreme court, in reversing the trial court's decision to deny the student loan board relief, held, "The general rule can be stated categorically — laws affecting substantive rights operate prospectively." *Luter*, 292 Ark. at 261, 729 S.W.2d at 403 (1987). There are no substantive rights at issue in the case at bar.

Both parties cite *City of Fayetteville v. Bibb*, 30 Ark. App. 31, 781 S.W.2d 493 (1989), for their positions. The applicable statute in that case, Ark. Code Ann. § 16-22-308 (1987), allowed reasonable attorney's fees to be assessed by the court and collected as costs. The trial judge in *Bibb* declined to award attorney's fees on the basis that the act was not in effect when the action was commenced. The court of appeals, upon review, held that the correct resolution regarding whether or not a statute could be retroactively applied turned on whether the statute in question was characterized as "substantive" or "procedural." *Bibb, supra.* In *Bibb*, the court cited *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962):

> The rule by which statutes are construed to operate prospectively does not ordinarily apply to procedural or remedial legislation. The strict rule of construction contended for does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. These should receive a more liberal construction, and should be given a retrospective effect whenever such seems to have been the intention of the Legislature. (Citations omitted.)

30 Ark. App. at 37-38, 781 S.W.2d at 496 (1989).

Appellant cites *Bibb* for the proposition that the best argument which could be made against the retroactive application of the attorney's fees statute is that the statute "deals not with the procedure for enforcing a remedy but rather with the substance of

the remedy itself, i.e. it provides for the award of an attorney's fee where none could be awarded before." *Bibb*, 30 Ark. App. at 38, 781 S.W.2d at 496. However, in the next sentence, this court explicitly rejected that argument and determined that a statute which taxed attorney's fees as costs was procedural in nature and that as such it should be given retrospective application. *Bibb*, *supra*. This rationale from *Bibb* was adopted by the Arkansas Supreme Court in *Barnett v. Ark. Trans. Co., Inc.*, 303 Ark. 491, 798 S.W.2d 79 (1990).

Based upon these precedents, the question is whether the statute (1) is either procedural or remedial in nature or (2) creates a new obligation. In *USAA Life Ins. Co. v. Boyce*, 294 Ark. 575, 745 S.W.2d 136 (1988), the supreme court determined that the allowance of attorney's fees is a procedural matter governed by the laws of the State of Arkansas. In *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987), this court quoted with approval the following language from *Dargel v. Henderson*, 200 F.2d 564 (Emer. Ct. App. 1952):

> We think that this conclusion is in accord with the settled rule that changes in procedural or remedial law are generally to be regarded as immediately applicable to existing causes of action and not merely to those which may accrue in the future unless a contrary intent is expressed in the statute.

22 Ark. App. 196, 200, 737 S.W.2d 663, 665 (1987).

We find that the amendment to Ark. Code Ann. § 18-15-605 was procedural in nature and was instantly applicable to existing causes of action. We affirm the decision of the trial judge in awarding attorney's fees to appellees.

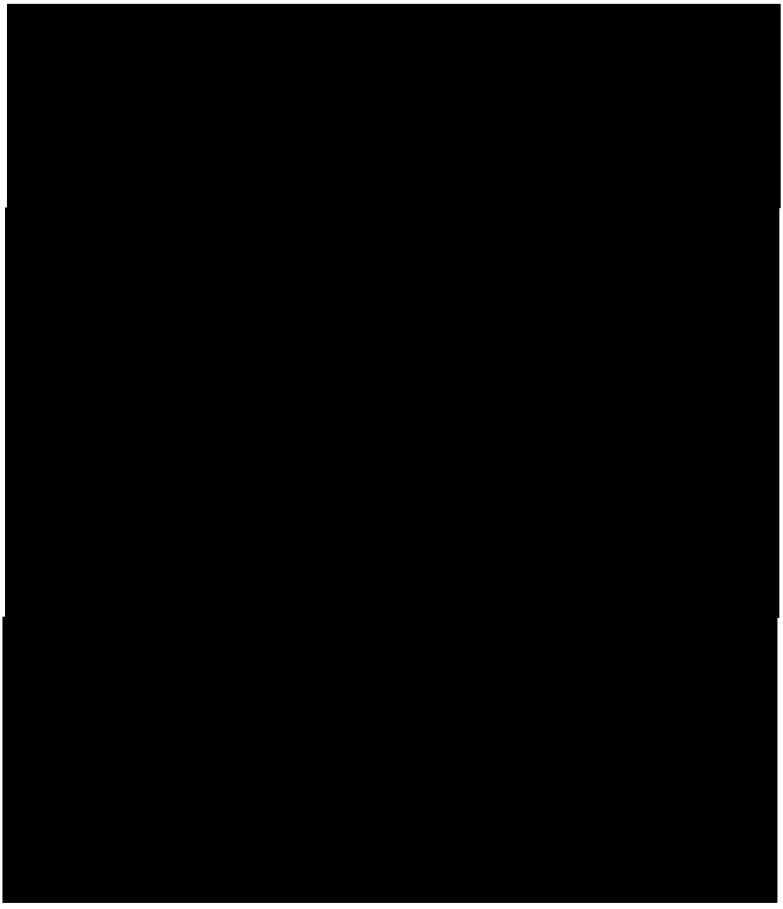
Affirmed.

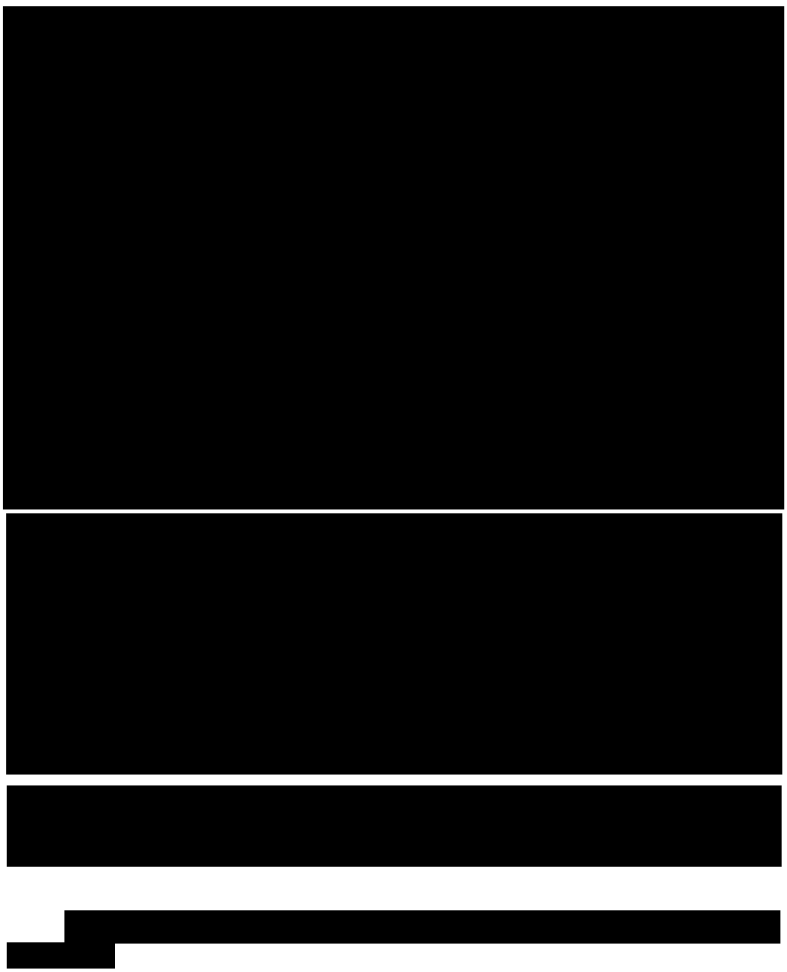
COOPER and STROUD, JJ., agree.

Booker T. CHAMBERS *v.* INTERNATIONAL PAPER COMPANY

CA 96-409 938 S.W.2d 861

Court of Appeals of Arkansas
Division IV
Opinion delivered February 19, 1997





Edward O. Moody, P.A., for appellant.

Bridges, Young, Matthews & Drake, PLC, by: *Michael J. Dennis*, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Booker T. Chambers appeals from a ruling by the Workers' Compensation Commission that his asbestosis claim, filed more than three years after his retirement on permanent disability due to other causes,

was barred by the three-year statute of limitations applicable to asbestosis and silicosis claims. We affirm the Commission's ruling.

Chambers was employed by the appellee, International Paper Company ("IP"), for thirteen years. During this employment, he suffered from high blood pressure, a heart condition, arthritis, and diabetes. The record reflects that Chambers was or may have been exposed to asbestos during his employment with IP and that he was also a smoker. On May 16, 1990, Chambers became ill at work and was hospitalized with congestive heart failure. As a result, he never returned to work and ended his employment with IP in July 1990. Chambers applied for long-term disability benefits in January 1991 and was retired on permanent disability in July 1991.

The pertinent facts that gave rise to Chambers's workers' compensation claim for asbestosis are as follows. During his employment, certain pulmonary screening examinations were performed on Chambers by IP in 1985 and 1989. The 1985 examination indicated a finding of pleural abnormalities consistent with pneumoconiosis (lung disease caused by the inhalation of irritants), and diffuse pleural thickening. There is no evidence that the results of this medical exam were disclosed to Chambers at that time and he continued to work at IP. A second pulmonary-function examination was performed in March 1989 and indicated that Chambers's lung function was so low that he could not use a respirator except in emergency situations. The evidence reflects that the 1989 exam report was either picked up by Chambers or mailed to his personal physician, and that Chambers discussed this report with his physician.

In April 1991, after Chambers had applied for disability retirement, he was examined by a Little Rock physician, who noted "diffuse pulmonary infiltrates, [questionable] cause, with consideration to be asbestosis." Finally, Chambers consulted with another physician between February and August of 1993, and was diagnosed with moderate to severe restrictive lung disease caused by asbestos. Chambers last saw this physician in August 1993. After receiving the diagnosis of asbestosis, Chambers filed a

"notice of injury" on June 28, 1993, more than three years after he last worked at IP on May 16, 1990.

IP timely asserted the three-year statute of limitations for asbestosis claims as a defense; the administrative law judge ("ALJ") agreed that the three-year statute found in Ark. Code Ann. § 11-9-702(a)(2)(A) (Repl. 1996) barred Chambers's claim, but also found that Chambers had suffered an "occupational injury" in May 1990. Chambers appealed to the full Commission, which affirmed and adopted the decision of the ALJ.

On appeal, Chambers makes two arguments: 1) based on the facts of his case, the ruling of the Commission is contrary to the Arkansas workers' compensation law; and 2) the ruling of the Commission violates state and federal due process, equal protection, and the American with Disabilities Act of 1990.

1. Arkansas Workers' Compensation Laws

For his first point, Chambers argues that the statute of limitations in a latent disease case involving the exposure to asbestos begins to run from the date of an informed diagnosis of an asbestos-related disease, and the Commission's failure to apply this standard violates Arkansas law. The ALJ found that Chambers's claim for asbestosis was barred by the three-year statute of limitations found in Ark. Code Ann. § 11-9-702(a)(2)(A) (Repl. 1996), which states in pertinent part:

> [a] claim for compensation for disability on account of silicosis or asbestosis must be filed with the Commission within one (1) year after the time of disablement, *and* the disablement must occur within three (3) years from the date of the last injurious exposure to the hazard of silicosis or asbestosis.

(Emphasis provided.)

As Chambers last worked for IP on May 16, 1990, and his notice of injury was filed on June 28, 1993, his claim was clearly filed more than three years after the date of his last possible injurious exposure. Moreover, the ALJ found that Chambers suffered an "occupational injury" in May 1990, and Chambers retired on full permanent disability no later than July 1991; Chambers does

not assert that he suffered any disablement within the year prior to filing his asbestosis claim in 1993, and within three years of his last injurious exposure in May 1990, as required by the statute of limitations. Chambers instead argues that the Commission misapplied the three-year statute of limitations in his case because he should be excepted from the requirement that his claim be timely filed, pursuant to Ark. Code Ann. § 11-9-701 (Repl. 1996). Section 11-9-701, entitled "Notice of Injury or Death," provides in pertinent part:

> (a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee *shall report the injury to the employer.* . . .
>
> . . . . (b)(1) Failure to give the notice shall not bar any claim:
>
> (A) *If the employer had knowledge of the injury* or death;
>
> (B) *If the employee had no knowledge that the condition or disease arose out of and in the course of the employment*; or
>
> (C) If the commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

(Emphasis provided.)

However, this statutory exception is inapplicable to Chambers's case for two reasons. The statute requires that an employee immediately give notice of an injury to the *employer* and the exception provided serves only to excuse the employee's failure to notify the employer of an injury. Chambers's case does not turn on the failure to notify IP of his injury but rather the failure to timely file his claim, and the statutory exception relied upon by Chambers thus has no direct application to the facts of his case. Although Chambers also relies upon *Gunn Distrib. Co. v. Talbert*, 230 Ark. 442, 323 S.W.2d 434 (1959), for the proposition that his failure to give timely notice of injury does not bar his claim because IP did not plead or prove prejudice, *Talbert* is also inapplicable to this case. Unlike IP, the employer in *Talbert* failed to timely raise the statute of limitations as a defense and had actual knowledge of the injury, a heart attack, because of a medical claim filed by Talbert. The court reasoned in *Talbert* that the employer and his insurer thus had not been prejudiced by the failure to give timely notice of the injury.

Chambers's argument that he is entitled to an exception lacks merit for a second reason — it is based on a faulty premise: that IP had certain knowledge of a compensable injury, or that Chambers had no knowledge that his condition arose out of and in the course of his employment. This contention is contrary to the findings of fact by the ALJ, who found that Chambers picked up a copy of his 1989 pulmonary-function test and that he accordingly had knowledge of his condition at least by 1989. Chambers also testified that he took the test report to his family physician and discussed with her the fact that he had pain in his chest. Consequently, Chambers's argument that, under the facts of his case, he should be excused from the requirement that he timely file his claim is without merit.

With regard to the finding by the Commission that Chambers's claim was barred by the statute of limitations, this court views the evidence and all reasonable inferences deducible therefrom in a light most favorable to the findings of the Commission and affirms that decision if it is supported by substantial evidence. *Arkansas Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993). We will reverse the Commission's decisions only when convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Patrick v. Arkansas Oak Flooring Co.*, 39 Ark. App. 34, 833 S.W.2d 790 (1992). If reasonable minds could reach the Commission's conclusion, we must affirm the decision. *Arkansas Dep't of Health v. Williams*, *supra.*

Here, Chambers has not shown that the Commission's ruling was not supported by substantial evidence. It is obvious from the record that both IP and Chambers had the 1989 medical information prior to Chambers's May 16, 1990, heart problem which ended his employment. Subsequently, Chambers had several medical evaluations that further documented his condition. Consequently, the Commission's finding that Chambers knew or should have known of his condition is clearly supported by substantial evidence in the record and was correctly found to be the basis for applying the statute of limitations to his claim. Because it is uncontroverted that Chambers did not return to work after May 16, 1990, that day had to be his last possible injurious exposure to asbestos, and the three-year limitation logically began to run no

later than that date. It is also uncontroverted that Chambers did not file his claim until June 28, 1993, nearly six weeks after the three-year statute of limitations had expired.

Finally, Chambers contends that Ark. Code Ann. § 11-9-529 (Repl. 1996), which requires employers to file a report within 10 days of receipt of notice or of knowledge of injury to the Workers' Compensation Commission, was violated by IP in this case, and as a result, the Commission's decision was erroneous as a matter of law. Chambers cites no authority for this contention, and although he fails to explain how this alleged violation is applicable in his case, this argument apparently has reference to IP's knowledge of the 1985 and 1989 examination results. However, the law in Arkansas is well settled that an employer's knowledge that certain facts may exist that might or might not result in a claim does not require the employer to recognize a claim before it is filed with the Commission. *See Garrett v. Sears*, 43 Ark. App. 37, 858 S.W.2d 146 (1993). We thus hold that the Commission's decision is supported by substantial evidence.

2. Constitutional Claims

Chambers also argues that the ruling of the Arkansas Workers' Compensation Commission violates state and federal due process, equal protection, and the Americans with Disabilities Act of 1990.

We do not reach these points because Chambers has failed to include any portion of the arguments made on these issues before the Commission or any portion of the Commission's order dealing with these issues. In fact, there is no indication in Chambers's abstract that these issues were even raised to the Commission, and we will not go to the record to determine whether reversible error occurred. *See Death & Perm. Total Disab. Fund v. Whirlpool*, 39 Ark. App. 62, 837 S.W.2d 293 (1992).

Affirmed.

ROBBINS, C.J., and NEAL, J., agree.

Tony ALAMO *v.* Christiaon Susan COIE

CA 96-3 938 S.W.2d 873

Court of Appeals of Arkansas
En Banc
Opinion delivered February 19, 1997

[redacted]

[redacted]

Appellant, *Pro Se.*

Karr & Hutchinson, by: *Charles Carr*, for appellee.

PER CURIAM. This case must be dismissed under Ark. R. App. P.—Civil 4 because the appellant did not file a timely notice of appeal.

Appellee, Christhiaon Susan Coie, Susan Alamo's daughter, sued appellant, Tony Alamo, in the Crawford County Chancery Court in September 1991, alleging that appellant had violated a temporary restraining order prohibiting him and members of the Tony and Susan Alamo Foundation from removing Susan's body

from its mausoleum. In her complaint, appellee stated that appellant had caused the removal of her mother's body from the mausoleum and had concealed its location. Appellee also alleged that appellant's outrageous actions had caused her to suffer emotional distress. She sought damages and an order requiring appellant to deliver the body. On September 14, 1995, the chancellor entered an order directing appellant to produce Susan's body and awarded appellee damages in the amount of $100,000.00 for the tort of outrage. On September 20, 1995, at 4:26 p.m., appellant filed his notice of appeal. At 4:29 p.m., on September 20, 1995, appellant filed a motion for new trial. There is nothing in the record to indicate that the chancellor ruled on appellant's motion for new trial. Additionally, appellant did not file a new notice of appeal.

Arkansas Rule of Appellate Procedure—Civil 4(a) provides that, except as otherwise provided in subsequent sections of this rule, a notice of appeal shall be filed within thirty days from the entry of the judgment, decree, or order appealed from. Arkansas Rule of Appellate Procedure—Civil 4(b) provides that, upon the timely filing in the trial court of a motion for new trial under Ark. R. Civ. P. 59(b), the time for filing the notice of appeal shall be extended as provided in this rule. Arkansas Rule of Appellate Procedure—Civil 4(c) provides:

> If a timely motion listed in section (b) of this rule [such as a motion to amend the court's findings of fact under Ark. R. Civ. P. 52(b), or a motion for new trial under Rule 59(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 other such motion. Provided, that if the trial court neither grants nor denies the motion within thirty (30) days of its filing, the motion will be deemed denied as of the 30th day. A notice of appeal filed before the disposition of any such motion or, if no order is entered, prior to the expiration of the 30-day period shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion or from the expiration of the 30-day period. No additional fees shall be required for such filing.

[redacted] The failure to file a timely notice of appeal deprives this court of jurisdiction. *Williams v. Hudson*, 320 Ark. 635, 638, 898

S.W.2d 465 (1995); *Rossi v. Rossi*, 319 Ark. 373, 374, 892 S.W.2d 246 (1995). Here, appellant failed to file a new notice of appeal within the prescribed time measured from the expiration of the thirty-day period.

In *Mitchell v. Mitchell*, 40 Ark. App. 81, 842 S.W.2d 66 (1992), we were presented with a similar situation. In that case, the appellant filed the notice of appeal on September 4, 1991; on September 5, the appellant filed motions for findings of fact and conclusions of law and for relief from the supplement to the decree. The court orally denied the motions at a hearing held on October 14, 1991. We found it necessary to dismiss the appeal and stated:

> Therefore, under either motion filed by appellant on September 5, 1991, the time to appeal would run from the entry of an order on the motion or from the thirtieth day after the filing of the motion, whichever came first. *See Ferguson v. Sunbay Lodge, Ltd.*, 301 Ark. 87, 781 S.W.2d 491 (1989); *Jasper v. Johnny's Pizza*, 305 Ark. 318, 807 S.W.2d 664 (1991); *Phillips Construction Co. v. Cook*, 34 Ark. App. 224, 808 S.W.2d 792 (1991). These cases also make it clear that even when an appealable order has been entered and a notice of appeal has been filed within 30 days thereafter, the filing of a motion provided for in Appellate Procedure Rule 4(b) will extend the time for filing the notice of appeal, and the notice of appeal filed *before* the time is extended will be ineffective.
>
> In the instant case, the notice of appeal filed on September 4, 1991, was ineffective because of the motions filed on September 5, 1991. Moreover, those motions were deemed denied at the end of 30 days after they were filed — unless the trial court ruled on them before that time. Although the trial court orally denied the motions at a hearing on October 14, 1991, this was more than 30 days after they were filed and they were already deemed denied; therefore, it was necessary to file a new notice of appeal within 30 days after the motions were deemed denied. Because this was not done, no appeal has been perfected. While this issue was not raised by the appellee, it is jurisdictional and we must raise it even if the parties do not. *Eddings v. Lippe*, 304 Ark. 309, 802 S.W.2d 139 (1991).

40 Ark. App. at 85. *See also Schaeffer v. City of Russellville*, 52 Ark. App. 184, 186, 916 S.W.2d 134 (1996); *Snowden v. Benton*, 49 Ark. App. 75, 76, 896 S.W.2d 451 (1995); *Glover v. Langford*, 49 Ark. App. 30, 31, 894 S.W.2d 959 (1995).

[redacted] We therefore dismiss this appeal as untimely.

Dismissed.

[redacted]

Brian K. CROW *v.* STATE of Arkansas

CA CR 96-558 938 S.W.2d 874

Court of Appeals of Arkansas
Division II
Opinion delivered February 26, 1997

[redacted]

Robert E. Irwin, for appellant.

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

JOHN F. STROUD, JR., Judge. Brian K. Crow was convicted in municipal court on a charge of night hunting. In addition to a fine and costs, the municipal court ordered his pickup truck and shotgun forfeited to the State of Arkansas, to be disposed of in accordance with the law. He appealed the conviction to circuit court, where a jury found him guilty. He was sentenced to one year in jail with execution of sentence suspended subject to certain conditions. Just as had been done in municipal court, the circuit judge ordered Mr. Crow's pickup truck and shotgun forfeited following the entry of the verdict and judgment. On appeal, Mr. Crow contends that the circuit court was without jurisdiction to hear his case. His argument is that the municipal court lacked jurisdiction to order a forfeiture and that on appeal the circuit court acquired only such jurisdiction as the municipal court had. We disagree and affirm.

Night hunting and forfeiture of equipment used therein are addressed by the Arkansas Game and Fish Commission Code. Regulation 18.02 provides in part:

> It shall be unlawful to hunt or kill any wildlife at night with or without the use of a light of any type.
>
> . . . .
>
> PENALTY: $500.00 TO $1,000.00
>
> In addition, a jail sentence of up to one year and/or suspension of hunting and fishing privileges may be imposed in accordance with Code 11.05, Revocation of Privileges. Equipment used in such violations (including but not limited to killing devices and lights) may be confiscated by the court, forfeited to the State, and disposed of according to law.

Confiscation and seizure of equipment for night hunting and other violations are addressed by Game and Fish Regulation 01.00-D. It states that any equipment, including but not limited to guns, boats, lights, motors, or vehicles used in willful and deliberate violation of 18.02 may be seized and disposed of according to Commission policy. Furthermore, upon conviction of the defendant, the court having jurisdiction may order title to the equipment forfeited to the Commission with its disposal to be determined by the court for the benefit of the Commission. *See* Arkansas Game and Fish Regulation 01.00-D.

[redacted] Although appellant argues that the circuit court acquired on appeal only such jurisdiction as the municipal court had, he does not question the circuit court's general residual jurisdiction to order a forfeiture in an original proceeding in that court. Arkansas Code Annotated section 16-96-507 (1987) specifies that a case appealed to circuit court shall be tried anew as if no judgment had been rendered. If any defect occurred in the present case at the municipal court level, it was remedied by the *de novo* trial in circuit court. *See Bussey v. State*, 315 Ark. 292, 867 S.W.2d 433 (1993); *Griffin v. State*, 297 Ark. 208, 760 S.W.2d 852 (1988); *Stephens v. State*, 295 Ark. 541, 750 S.W.2d 52 (1988). In the present case, the circuit court had jurisdiction to order forfeiture of the truck and shotgun in the *de novo* trial.

[redacted] Because the *de novo* trial cured any defect at the municipal court level, we need not decide whether the municipal court lacked jurisdiction to order a forfeiture. We note, however, that appellant was not without a remedy to challenge the inherent

power of a municipal court over a forfeiture proceeding. An accused who wishes to prevent a municipal court from exercising jurisdiction over a given matter should seek a writ of prohibition in circuit court. *See State v. Webb*, 323 Ark. 80, 913 S.W.2d 259 (1996); *Griffin v. State*, 297 Ark. 208, 760 S.W.2d 852 (1988).

[redacted] Appellant also contends that the trial court erred in not proceeding with forfeiture as an *in rem* civil action independent of any criminal charges. We do not agree. In *Dennis v. State*, 26 Ark. App. 294, 764 S.W.2d 466 (1989), appellants convicted of the offense of night hunting were sentenced to fifteen days in the county jail, fined $1000, had their hunting privileges suspended for two years, and had a rifle and spotlight confiscated. The *Dennis* appellants argued that the court, in fixing their punishment, clearly exceeded the statutory range of Ark. Code Ann. § 15-43-240 (1987) (since repealed), which limited the penalty for a person convicted of night hunting to a fine of between $10 and $200. We addressed that argument as follows:

> [W]e point out that § 15-43-240 was enacted before Amendment 35 to the Arkansas Constitution was adopted in 1945. Under the provisions of that amendment, the Arkansas Game and Fish Commission was given full and complete authority to promulgate rules and regulations necessary for the conservation and preservation of all wildlife, including regulations setting penalties for violations. . . .
>
> Pursuant to this authority, the Commission promulgated Regulation 18.02, which provides that it is unlawful to hunt or kill any wildlife at night with or without the use of a light. Possible penalties for its violation include a fine of from $250.00 to $1000.00, a jail sentence of up to one year, suspension of hunting privileges of up to two years, and confiscation of all equipment used in the violations. Under the provisions of Amendment 35, these regulations have the effect of law, and courts judicially know and apply such rules and regulations promulgated by administrative agencies pursuant to law. *See Johnson v. State*, 6 Ark. App. 78, 638 S.W.2d 686 (1986).

Dennis v. State, 26 Ark. App. at 298.

[redacted] Here, the circuit court committed no error in confiscating and forfeiting to the State the pickup truck and shotgun of

appellant as a part of his sentence for night hunting pursuant to the regulations of the Arkansas Game and Fish Commission.

Affirmed.

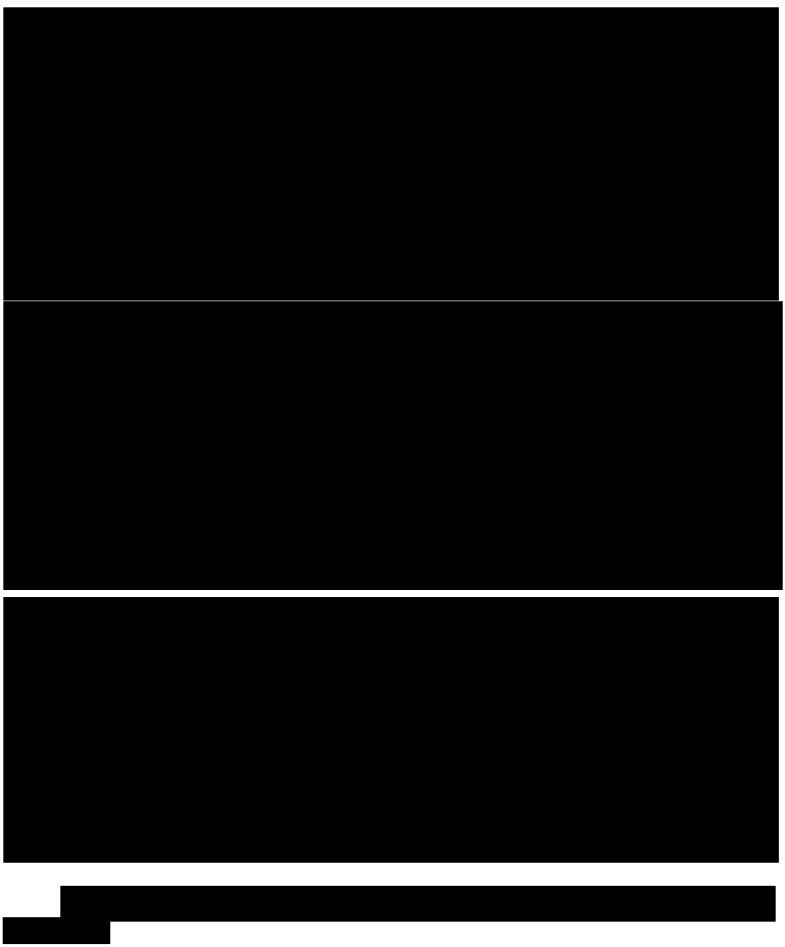
COOPER and MEADS, JJ., agree.

Pierre WEAVER *v.* STATE of Arkansas

CA CR 96-360 939 S.W.2d 316

Court of Appeals of Arkansas
Division I
Opinion delivered February 26, 1997

[Petition for rehearing denied March 26, 1997.]



James R. Marschewski, for appellant.

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

TERRY CRABTREE, Judge. Appellant was convicted of exposing another to human immunodeficiency virus (HIV) in violation of Ark. Code Ann. § 5-14-123 (Repl. 1993) and was sentenced to thirty years in the Arkansas Department of Correction. He asserts three issues on appeal, contending that the trial

court erred by allowing the State to introduce evidence that the victim had tested positive for HIV; that the trial court erred in limiting his cross-examination of the victim regarding other sexual contacts; and that the trial court erred in allowing certain rebuttal testimony. We affirm.

On August 13, 1993, appellant was listed as a contact for HIV and was tested for the virus at the Sebastian County Health Department at the request of Gary Wicke, an investigator for the Health Department. The test returned positive for HIV, and appellant was notified on August 26, 1993. Wicke advised appellant that according to Arkansas law, if he chose to have sexual intercourse, he must first inform his partner that he was HIV positive. Appellant wanted another test, and the Health Department tested him again that day. The results of the second test were also positive.

Appellant's first assignment of error is that the trial court erred by allowing the State to introduce evidence that the victim was HIV positive. Appellant argues that the evidence was irrelevant and that its prejudicial value outweighed any possible probative value. However, appellant, who was acting *pro se* during this part of the trial, failed to preserve this point for appeal. At trial, appellant objected when the State began to question the witness who had participated in testing the victim for HIV as to the results of the victim's test. The following occurred:

Mr. Weaver: I object.

Mr. Tabor: — the September of 1994.

Mr. Weaver: I object.

The Court: Overruled.

Mr. Weaver: Do I need to state the basis why, sir?

The Court: Yes, sir. State it.

Mr. Weaver: Okay. Your Honor, we contend that the aspects that [the victim] is HIV positive

Mr. Tabor: I'm sorry?

The Court: Well, I don't know what his objection is, really.

Mr. Weaver: We contend that that the fact that [the victim] is positive, she's been exposed, this is not infection as been exposed, and that test result indicates that she is positive. This is no exposure.

The Court: Objection is overruled.

[redacted] This court will not consider arguments that are raised for the first time on appeal. *Nix v. State*, 54 Ark. App. 302, 925 S.W.2d 802 (1996). "[T]o be preserved on appeal, an objection must be made to the trial court with sufficient clarity that the trial court has a fair opportunity to discern and consider the argument." *Abernathy v. State*, 278 Ark. 250, 251, 644 S.W.2d 590, 591 (1983) (citations omitted). Appellant did not make clear to the trial court the basis for his objection to the evidence that the victim was HIV positive. The arguments that appellant raises on appeal, that the evidence was irrelevant and unfairly prejudicial, are not deducible from the above-quoted objection. Therefore, the trial court did not have "a fair opportunity to discern and consider the argument," *Abernathy*, *supra*, and we will not consider it on appeal.

[redacted] For his second assignment of error, appellant contends that the trial court erred in limiting his cross-examination of the victim regarding other sexual partners. Appellant argues that the State opened the door to evidence of other sources from which the victim could have contracted the virus by presenting the testimony that the victim was HIV positive. In *Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993), the supreme court rejected the appellant's argument that the trial court should have allowed evidence of a similar murder to show that the same person could have committed the murder of which the appellants were accused. The court stated:

> To address this issue, we must consider under what circumstances evidence incriminating others is relevant to prove a defendant did not commit the crime charged. In *Killian v. State*, 184 Ark. 239, 42 S.W.2d 12 (1931), and *West v. State*, 255 Ark. 668, 501 S.W.2d 771 (1973), the defendants attempted to introduce testimony that other parties had been charged with the offense for which they were being tried. In each case, we upheld

the Trial Court's refusal to allow the testimony because there was no evidence showing the other party was guilty.

Addressing this precise issue, the Supreme Court of North Carolina stated:

> A defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible.

State v. Wilson, 367 S.E.2d 589 (N.C. 1988). The Supreme Court of California has recognized that a defendant has the right to present evidence of third party culpability but stated:

> [T]he rule does not require that any evidence, however remote, must be admitted to show a third party's possible culpability . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

People v. Kaurish, 802 P.2d 278 (Cal. 1990).

Id. at 75-76, 852 S.W.2d at 323.

The number of sexual partners of the victim would only be relevant if appellant could show that one or more had HIV and that the victim was exposed to it through them or that the victim knew they had HIV and disregarded the dangers associated with having sexual intercourse with them. However, appellant did not proffer any evidence that the suspected sexual partners of the victim did have the virus or that the victim contracted the virus by anything other than the relationship she had with appellant. The nexus linking the third parties with the elements of the offense was lacking. Therefore, the trial court properly refused to allow appellant to ask questions concerning the victim's past sexual encounters.

For his last assertion of error, appellant contends the trial court erred by admitting the rebuttal testimony of Gary Wicke, the investigator for the Sebastian County Health Department. At

the close of appellant's case, in which appellant testified that he told the victim that he was HIV positive prior to having sexual intercourse with her, the State informed the trial court that it wished to recall Gary Wicke to testify that appellant had stated to him that if he was truly positive, he would give HIV to everyone he could. The State explained that it had just learned of the statement by appellant and did not use the statement in its case-in-chief because it had not provided it to appellant in discovery. The State contended that the testimony became relevant after appellant testified that he told the victim he had tested positive for HIV and that the testimony of Gary Wicke would refute his testimony.

The trial court did not err in admitting the testimony of Gary Wicke as rebuttal testimony. The prosecuting attorney is required, upon a timely request, to disclose to a defendant all statements made by the defendant of which the prosecuting attorney has knowledge. Ark. R. Crim. P. 17.1(a)(ii). However, the State need not disclose true rebuttal evidence. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993). In *Pyle*, the supreme court explained rebuttal evidence:

> The answer lies in whether Heflin was properly a rebuttal witness. If so, the state was not required to disclose him before trial. *Asher v. State*, 303 Ark. 202, 795 S.W.2d 350 (1990); *Weaver v. State*, 290 Ark. 556, 720 S.W.2d 905 (1986). Also, the scope of his testimony in that event is given wide latitude, and it will not be restricted merely because it could have been presented on direct. *Birchett v. State*, 289 Ark. 16, 708 S.W.2d 625 (1986).
>
> The definition of rebuttal evidence found in *Birchett v. State* is instructive. We wrote that genuine rebuttal evidence "consists of evidence offered in reply to new matters." *Id.* at 20. We said that evidence can still be categorized as genuine rebuttal evidence even if it overlaps with the evidence in chief. However, the evidence must be responsive to that which is presented by the defense. *Id.* at 19.

Id. at 178-79, 862 S.W.2d at 830.

Gary Wicke's testimony was offered to rebut the testimony of appellant that he had told the victim that he had tested positive for HIV. Gary Wicke's testimony went to the intent of appellant not to tell anyone that he had the virus in order to

expose them to it. It was proper rebuttal testimony and admissible.

Affirmed.

PITTMAN and ROGERS, JJ., agree.

[redacted]

Frankie HALL *v.* KINGSLAND SCHOOL DISTRICT

CA 96-499 938 S.W.2d 571

Court of Appeals of Arkansas
Division IV
Opinion delivered February 26, 1997

[redacted]

Mitchell, Blackstock & Barnes, by: *Marcia Barnes* and *L. Randolph Mano*, for appellant.

Laser, Wilson, Bufford & Watts, P.A., by: *Alfred Angulo, Jr.*, for appellee.

ANDREE LAYTON ROAF, Justice. This is an Arkansas Teacher Fair Dismissal Act ("TFDA") case. The appellant, Frankie Hall, was informed by the appellee, Kingsland School District ("School District"), that her contract as an elementary principal would not be renewed for the 1993-94 school year. Pursuant to the TFDA, Hall requested a hearing before the school board, in which the board upheld the decision not to renew her contract. Because the hearing was not scheduled within the time required by the TFDA, the trial court granted Hall's appeal and petition for writ of mandamus, and ordered reinstatement plus back pay and benefits. Hall appeals only from the trial court's failure to award attorneys' fees. We reverse and remand.

Because the School District does not appeal from the trial court's ruling in favor of Hall, we need not further recite the facts leading up to the nonrenewal of Hall's contract. In the notice of appeal and petition for writ of mandamus filed by Hall in the circuit court of Cleveland County, she asked that the trial court order the School District to issue her a contract for the 1993-94 school year, because the untimely scheduling of the review hearing violated the TFDA and the School District's personnel policies. Hall also asked for back pay, matching social security and teacher retirement benefits, and requested attorneys' fees pursuant to Ark. Code Ann. § 16-22-308 (Repl. 1994). Hall's motion for summary judgment was granted by the circuit judge, who ordered reinstatement, back pay, and benefits. Hall then filed a motion seeking attorneys' fees pursuant to § 16-22-308. The trial court found that because the proceeding was brought pursuant to the TFDA, which made no provision for attorneys' fees, the motion should be denied. Hall's sole point on appeal is that the trial court erred in finding that the TFDA's failure to mention attorneys' fees prohibits consideration of an award of fees to the prevailing party.

Hall concedes that the TFDA does not expressly provide for the award of attorneys' fees; however, she contends that

such an award is permissible under Ark. Code Ann. § 16-22-308, which provides in pertinent part:

> In any civil action to recover on . . . [a] contract . . . for labor or services, or for breach of contract . . . the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs.

This court has recently decided this issue in Hall's favor, in *Junction City School Dist. v. Alphin* 56 Ark. App. 61, 938 S.W.2d 239 (1997). In *Alphin*, we reversed the trial court's disallowance of attorneys' fees to a teacher who prevailed in an action brought pursuant to the TFDA, where the disallowance was based on the same reason articulated by the trial court in Hall's case. In so holding, we applied two cases decided by our supreme court, and stated that:

> [a]n action brought pursuant to the Fair Dismissal Act is both a civil action and "a claim for 'labor or services'" within the meaning of Ark. Code Ann. § 16-22-308, the general statute authorizing attorney's fees. *Sosebee v. County Line Sch. Dist.*, 320 Ark. 412, 897 S.W.2d 556 (1995); *City of Ft. Smith v. Driggers*, 305 Ark. 409, 808 S.W.2d 748 (1991). The supreme court held in *Driggers* that the subject matter of the underlying litigation is solely dispositive of whether Ark. Code Ann. § 16-22-308 may be invoked.

Id.

Although Hall concedes that the award of attorneys' fees is discretionary, *see, e.g., Chrisco v. Sun Indus. Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990), here, the trial court did not exercise its discretion when it declined to award Hall attorneys' fees. A clearly erroneous application of the law is a manifest abuse of discretion. *Little Rock Waste Water Util. v. Larry Moyer Trucking*, 321 Ark. 303, 902 S.W.2d 760 (1995). Because this court has determined that attorneys' fees are recoverable in a TFDA action, pursuant to Ark. Code Ann. § 16-22-308, we reverse and remand this case to the trial court to determine if an award of fees is warranted.

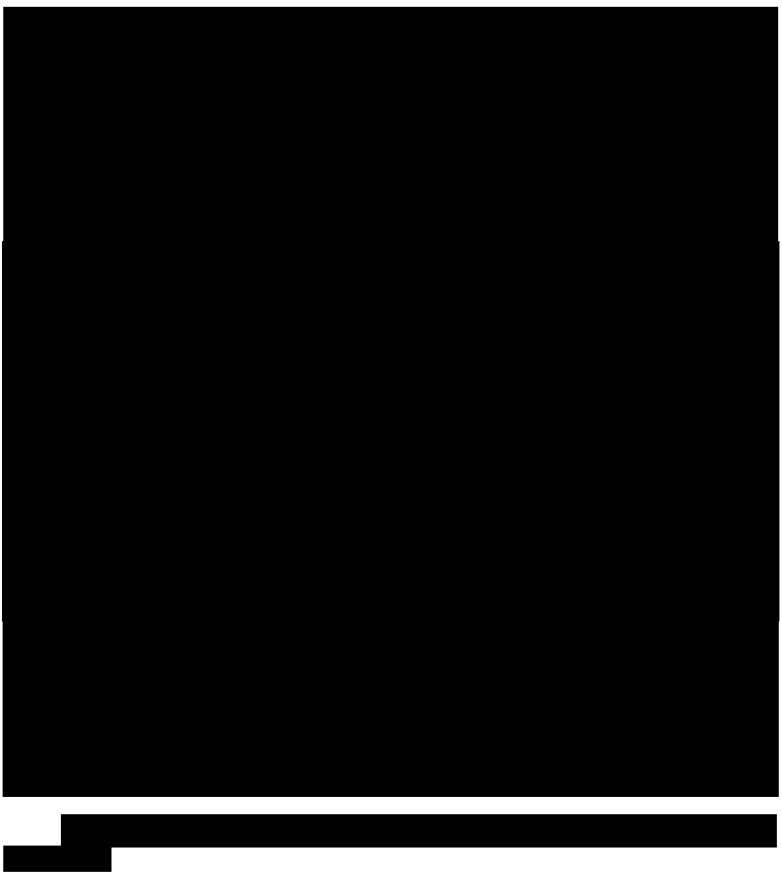
Reversed and remanded.

ROBBINS, C.J., and NEAL, J., agree.

Genevieve ELLIOTT, Personal Representative of the Estate of Diana Sue McGowen, Deceased *v.* BOONE COUNTY INDEPENDENT LIVING, INC.

CA 96-18 939 S.W.2d 844

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered March 5, 1997



Jerry D. Patterson, for appellant.

Davis & Goldie, by: *James E. Goldie*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant, Genevieve Elliott, appeals from an order staying the proceedings on her wrongful-death complaint against appellee, Boone County Independent Living, Inc., until appellant paid appellee's costs and attorney's fees in connection with a previously dismissed wrongful-death action. Appellant argues that the trial court was without authority to make payment of attorney's fees a condition to having the stay lifted. Because we conclude that appellant's point was not preserved for appeal, we do not address it on its merits, and we affirm.

Appellant first filed her wrongful-death lawsuit against appellee on May 7, 1993. On February 10, 1994, appellant took a voluntary nonsuit pursuant to Ark. R. Civ. P. 41. Appellant refiled the action on February 9, 1995. Appellee answered and, citing Ark. R. Civ. P. 41(d), moved for an order staying the proceedings until appellant paid appellee $105.68 in costs and $4,055.68 in attorney's fees associated with the first action. Appellant did not respond to the motion. Subsequently, the trial court entered an order reciting the above facts and giving appellant until July 14, 1995, to respond to appellee's motion. Again, appellant filed nothing. On September 7, 1995, the trial court, specifically noting the lack of any response by appellant to appellee's motion, entered an order staying the proceedings until appellant paid appellee $105.68 in costs and $3,000.00 in attorney's fees. This appeal followed.

Rule 41(d) of the Arkansas Rules of Civil Procedure provides as follows:

> *Costs of Previously Dismissed Action.* If a plaintiff who has once dismissed an action, or who has suffered an involuntary dismissal in any court, commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Appellant argues that this rule does not authorize trial courts to order the payment of attorney's fees as "costs." Appellant notes

that the supreme court has not decided this issue, *see Transit Homes, Inc. v. Bellamy*, 287 Ark. 487, 701 S.W.2d 126 (1985), but cites *Brady v. Alken*, 273 Ark. 147, 617 S.W.2d 358 (1981), for the general proposition that attorney's fees are not to be allowed as costs except as provided by statute or court rule. *See also Arkansas Dep't of Human Servs. v. Kistler*, 320 Ark. 501, 898 S.W.2d 32 (1995). We recognize that appellant's argument is a strong one and may well have merit. However, because appellant failed to raise the issue in any way before the trial court, we are unable to address it.

It has long been held that Arkansas courts have no plain-error rule. Subject to very limited exceptions, none of which are applicable here, the rule in this state is that an argument for reversal will not be considered on appeal in the absence of an appropriate objection in the trial court. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980); *see Lynch v. Blagg*, 312 Ark. 80, 847 S.W.2d 32 (1993); *Sturgis v. Lee Apparel Co., Inc.*, 304 Ark. 235, 800 S.W.2d 719 (1990). The rule requiring an objection below is no less applicable to questions regarding the award of attorney's fees. *See Farm Bureau Mut. Ins. Co. v. David*, 324 Ark. 387, 921 S.W.2d 930 (1996); *Benton v. Barnett*, 53 Ark. App. 146, 920 S.W.2d 30 (1996). Under the particular facts of this case, where the motion for fees was not acted upon for over six months, during which time the trial court specifically invited appellant to respond to the motion, application of the general rule is especially appropriate.

It was argued in our conference of this case that the trial court lacked "subject-matter jurisdiction" to award attorney's fees under Ark. R. Civ. P. 41(d), and that the issue may, therefore, be raised for the first time on appeal. We conclude, however, that the court did not lack subject-matter jurisdiction over the question of attorney's fees.

In *Banning v. State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987), we explained:

> The rule of almost universal application is that there is a distinction between want of jurisdiction to adjudicate a matter and a determination of whether the jurisdiction should be exer-

> cised. Jurisdiction of the subject matter is power lawfully conferred on a court to adjudge matters concerning the general question in controversy. It is power to act on the general cause of action alleged and to determine whether the particular facts call for the exercise of that power. Subject matter jurisdiction does not depend on a correct exercise of that power in any particular case. If the court errs in its decision or proceeds irregularly within its assigned jurisdiction, the remedy is by appeal or direct action in the erring court. If it was within the court's jurisdiction to act upon the subject matter, that action is binding until reversed or set aside. [Citations omitted.]

Id. at 149, 737 S.W.2d at 170; *see Leinen v. Arkansas Dep't of Human Servs.*, 47 Ark. App. 156, 886 S.W.2d 895 (1994); *In re: Adoption of D.J.M.*, 39 Ark. App. 116, 839 S.W.2d 535 (1992); *see also Birchett v. State*, 303 Ark. 220, 795 S.W.2d 53 (1990).

Clearly, subject-matter jurisdiction of wrongful death actions, such as are involved here, is vested in the circuit courts of this state. Just as clearly, the circuit court is also empowered with authority to hear and determine requests for costs and fees growing out of actions within its assigned jurisdiction. While the court here may have erred in its decision or proceeded irregularly in exercising its assigned jurisdiction, that is entirely different from the matter of its jurisdiction to determine whether to exercise that power or not.

Finally, we note the case of *Lewallen v. Bethune*, 267 Ark. 976, 593 S.W.2d 64 (Ark. App. 1980). There, among other things, this court reversed an award of attorney's fees despite the lack of an objection in the trial court. To the extent that *Lewallen* conflicts with this opinion, it is wrong and is overruled.

Affirmed.

ROBBINS, C.J., and ROGERS, STROUD, and NEAL, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting.

A good law is one that holds, whether you recognize it or not; a bad law is one that cannot, however much you ordain it. — JOHN RUSKIN

Today a majority of our Court has decided to disregard a good law, yet ordain one that stands 140 years of Arkansas precedent on its head; one that contravenes the overwhelming body of American jurisprudence regarding the shifting of attorney's fees, overrules a decision of this very court in a case directly on point, ignores an eighty-year-old decision by the Arkansas Supreme Court, and cannot be rationally justified alongside the rest of Arkansas law on shifting attorney's fees. Rather than recognize and follow the good law, the majority has decided to uphold a result that a trial court had neither the right nor the power to enter merely because the appellant failed to object to it, as if a trial court is somehow empowered to do a blatantly unauthorized act and an appellate court has no duty to reverse that fundamental error when a litigant has not objected to it below. I respectfully dissent from the unjust result reached today, the convoluted reasoning on which it rests, and the unsound rule of law that it unnecessarily inflicts upon our entire civil litigation process.

Appellant filed a wrongful-death suit in Searcy County that was later transferred to Boone County. She then took a voluntary nonsuit and later refiled the action in Boone County. The appellee answered and separately moved to stay the proceedings pursuant to Rule 41(d) of the Arkansas Rules of Civil Procedure, requesting that costs of $105.68 and attorney's fees of $3,950.00 be imposed to lift the stay. The trial court eventually entered an order granting the stay until appellant paid costs of $105, and attorney's fees of $3,000. Appellant did not submit a brief or objection to the trial court concerning the attorney's fee aspect of the order before it was entered, although the trial court entered an order that set a deadline for filing letter briefs regarding appellee's motion to stay proceedings and award of costs, stating that it would render an opinion after reviewing the file and briefs. Appellant has now appealed the attorney's fee aspect of the order, and the majority has decided to affirm the trial court despite the reality that neither Rule 41(d) nor any other Arkansas authority permits attorney's fees to be included within the meaning of "costs."

Ark. R. Civ. P. 41(d) states:

> *Costs of Previously Dismissed Action.* If a plaintiff who has once dismissed an action, or who has suffered an involuntary dismissal in any court, commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Rule 41(d) authorizes a trial court to order that "costs of the action previously dismissed" be paid. It does not authorize the trial court to order the payment of "attorney's fees" for the previously dismissed action. Arkansas law is clear that the term "costs" does not ordinarily include attorney's fees, whether the term is used in a statute (*see Arkansas Dep't. of Human Servs. v. Kistler*, 320 Ark. 501, 898 S.W.2d 32 (1995)), or when it appears in a rule of civil procedure (*see Clawson v. Rye*, 281 Ark. 8, 661 S.W.2d 354 (1983)).

Nevertheless, the majority has decided to affirm the trial court because appellant did not challenge its assessment of attorney's fees. I certainly agree that appellant had ample notice that this issue was before the trial court and adequate opportunity to object to the imposition of attorney's fees as a condition to lifting the stay. However, one need not condone appellant's inexplicable failure to file a brief or otherwise object to the imposition of attorney's fees in order to question the right and power of the trial court, in the first instance, to impose an order to pay the other side's legal fees under the notion of "costs" for purposes of Rule 41(d). Indeed, our court dealt with this very situation in *Lewallen v. Bethune*, 267 Ark. 976, 593 S.W.2d 64 (Ark. App. 1980).

In *Lewallen*, a chancellor assessed costs for lost wages and expenses of witnesses who had not been subpoenaed to testify as well as attorney's fees totaling $2,743.50 against a party for dilatory tactics in filing a motion to recuse two days before trial in an action that had been pending for years. The attorney's fee portion of that award was for $1,365.08, as payment for a Kentucky attorney who had traveled to attend the trial, and who had spent substantial time in trial preparation. Our opinion specifically noted that no objections were made by the appellants to the hearing or to any ruling or finding that the chancellor made, including his

findings and order allowing attorney's fees, lost wages and expenses of the witnesses who were present and ready to testify, but who had not been subpoenaed. Despite the absence of an objection by the appellants and despite the fact that no final judgment had been rendered on the merits of the case, we reached the merits of the appeal and reversed the chancellor's order granting the attorney's fee and costs associated with the unsubpoenaed witnesses, holding that the lower court's action in awarding judgment for the challenged items was appealable under the rule that a judgment granting or denying costs is appealable when the *power* of the court to assess certain items of cost is at issue. *Id.* 267 Ark. at 984, 593 S.W.2d at 68 (emphasis in original text).

Lewallen v. Bethune also contains a succinct and authoritative exposition of the Arkansas law that follows the general rule that extraordinary expenses such as attorney's fees are distinguishable from, and therefore not recoverable as, ordinary costs. This has been the law in Arkansas since before the Civil War. *See Temple v. Lawson*, 19 Ark. 148 (1857). As Judge Pilkinton wrote in *Lewallen*, the right to recover attorney's fees from one's opponent in litigation as a part of the litigation costs does not exist at common law and is not allowable without a statute, court rule, or some agreement expressly authorizing the taxing of attorney's fees in addition to the ordinary court costs. *Lewallen*, 267 Ark. at 985. Our legal respect for this proposition was so high and strong that the Arkansas Supreme Court for many years held that even a provision in a promissory note that permitted the holder to recover his attorney's fees was contrary to public policy. *Id.* at 986. That judicial position was not superseded until the enactment of Act 350 of 1951. *Id.* Even since that time, however, the appellate courts of this state have consistently held that recovery of attorney's fees as "costs" is not allowed except when expressly provided by statute or court rule. *City of Hot Springs v. Creviston*, 288 Ark. 286, 705 S.W.2d 415 (1986); *Damaron v. University Estates*, 295 Ark. 533, 750 S.W.2d 402 (1982); *Fausett Builders v. Globe Indemnity*, 220 Ark. 301, 247 S.W.2d 469 (1952); *Roberts v. Feltman*, 55 Ark. App. 142, 932 S.W.2d 781 (1996).

In *Labat v. Dugan Piano Co.*, 130 Ark. 572, 198 S.W. 125 (1917), the Arkansas Supreme Court addressed the very subject

about which the majority is mistaken, *i.e.*, whether a party is barred from obtaining appellate review of trial court judgments that are void on their face. *Labat* involved an appeal from the entry of summary judgment against the owner of a piano and her sureties after the owner had been sued for the purchase price of the piano. After an adverse decision before a justice of the peace, the owner appealed to circuit court and posted a surety bond that provided for her to deliver the piano to the sheriff upon demand in case of an adverse result at trial in circuit court. The circuit court trial resulted in a jury verdict against Labat for $220, plus interest. The circuit court then entered judgment against Labat for the amount of the verdict, declared that judgment to be a lien on the piano, and also entered personal judgment against Labat and the sureties on her bond. Although a motion for new trial was made and overruled, the motion did not challenge the trial court's action in rendering a personal judgment against the appellant and her sureties on the bond. When Labat challenged the trial court's summary judgment in her appeal to the supreme court, the appellee argued, as does the appellee before us, that the supreme court could not review the trial court ruling because no exception was saved when the judgment was entered. The supreme court rejected that argument by the following statement in its decision to reverse the summary judgment:

> It is urged by counsel for appellee that this ruling of court can not be reviewed here for the reason that no exception was saved at the time and embraced in the motion for new trial. The judgment is to that extent void on its face, because it is unwarranted. Therefore, no exceptions were necessary.
>
> It may be likened to a judgment by default upon pleadings which do not state a cause of action, and the error of the court, therefore, appears on the face of the record. The erroneous action of the court in rendering this judgment was not one of the things which occurred during the progress of the trial to which exceptions must have been saved in order to call for a review in this court. It was, therefore, unnecessary to note exceptions at the time or to embody the objections in a motion for new trial.

Id. at 575, 198 S.W. at 126.

As the supreme court decided and pronounced in *Labat* almost eighty years ago, when a trial court takes action that is void on its face, it is not necessary for a party to object in order to preserve the issue for appellate review. In the case before us, the trial court acted outside its power and right when it awarded an attorney's fee as court costs. Just as the trial court in *Labat* lacked the right or power to award summary judgment on the appellant's surety bond, the trial court in this case lacked the right or power to assess an attorney's fee against appellant as costs under Ark. R. Civ. P. 41(d). The attorney's fee award was void on its face, so that judicial review cannot be prevented by appellant's failure to object below. The only way to avoid that conclusion is to hold that trial courts may impose awards of attorney's fees as costs contrary to 140 years of Arkansas law.

The majority does not and cannot dispute the existence of the longstanding Arkansas rule. They must also acknowledge that the Arkansas rule is consistent with the American rule concerning attorney's fees that provides for each party to bear the cost of their own attorney. *Millsap v. Lane*, 286 Ark. 439, 706 S.W.2d 378 (1986) (citing *Trustees v. Greenough*, 15 Otto 527, 105 U.S. 527, 26 L.Ed. 1157 (1882)). The appellee has cited no authority for the novel notion that the general rule should be disregarded when litigation is refiled by a plaintiff following a voluntary nonsuit, and the majority has cited no Arkansas authority for that proposition either. Thus, the decision today must be seen as a new rule of law permitting attorney's fees to be imposed as costs as a condition to prosecuting a refiled action following a nonsuit if a trial court decides to impose them and nobody objects to it. However, nobody has explained how and why a trial court is somehow now empowered with the right and power to do what it has heretofore never been able to do in Arkansas, and without any statutory or other authorization shown. Instead, the majority opinion casually overrules *Lewallen* and ignores *Labat* without giving any justification for the radical new rule now announced.

Like Athena, who in Greek mythology was born fully grown and armed for battle from the brow of Zeus, the rule of law that the majority today delivers to Arkansas litigants is born doing battle, in this case against an unwitting plaintiff. Unlike Athena, this

new rule is neither beautiful nor wise. One need not be an alarmist to contemplate the mischief that it will produce. Ordinarily, attorney's fees are not recoverable from an opposing party in Arkansas unless a statute or court rule expressly permits it, and then they are only recovered by the *prevailing party* after something has been adjudicated, be it the merits of the litigation or some material aspect of it. However, the majority today introduces a new creature — the attorney's fee that is recovered without anything being adjudicated, before the merits of a lawsuit have been decided (the appellee merely filed its answer and followed it with a motion to stay the lawsuit pending payment of the attorney's fee incurred in the previously dismissed action), and without any legal basis for ordering the opposing party to pay it. The appellee in this wrongful-death action is now being awarded a $3,000 fee from appellant merely because appellant did what the Arkansas Rules of Civil Procedure permit, namely take a voluntary nonsuit. Of course, no one seriously thinks that if appellant ultimately recovers on the merits the trial court will have the authority to refund any part of the amount that it has now been upheld in taking. Moreover, neither the appellee nor the majority can explain how a trial court is somehow authorized and empowered to award an attorney's fee as costs merely because the adverse party fails to object to it.

One would also think that the fact that the rule announced today is manifestly incongruent with the rest of Arkansas' civil procedure concerning attorney's fees would militate against its promulgation. Before today, the only provisions of the Arkansas Rules of Civil Procedure that authorize the recovery of attorney's fees from an adverse litigant were punitive. Ark. R. Civ. P. 37 authorizes a trial court to award reasonable attorney's fees as a sanction against a party that fails to make discovery in violation of discovery rules after having been ordered to do so by the court. Ark. R. Civ. P. 11 authorizes a trial court to award attorney's fees as a disciplinary sanction against litigants and their attorneys who sign pleadings and other papers that have no proper purpose other than to harass other litigants, cause unnecessary delay, or cause needless increase in the cost of litigation. Both Rule 11 and Rule 37 require judicial findings that the party ordered to pay attorney's

fees has engaged in *prohibited conduct.* In fact, Rule 11 provides that the trial court *shall impose* an appropriate sanction, including attorney's fees, whenever it finds that a pleading, motion, or other paper has been signed in violation of the rule. Nowhere do the rules of civil procedure authorize trial courts to award attorney's fees against a litigant for doing something that our rules permit. If the appellant before us nonsuited her wrongful-death action in Searcy County and refiled it in Boone County to comply with some aspect of Arkansas law, then today's decision truly defies reason because she will now be penalized, not merely because she did what Arkansas law and civil procedure permit, but because she did what Arkansas law and civil procedure demand. I cannot imagine a more unreasonable result or rule.

The majority explains its decision to insulate the trial court's ruling from reversal by resorting to the truism that a party must make a timely challenge to trial court error in order to preserve the right to challenge that error on appeal. The general rule requiring that timely objections be raised to trial court rulings in order to preserve the right to appeal them is meant to protect trial courts from being ambushed concerning rulings that they may erroneously make, but which they have the right or power to make in the first instance. Put differently, the general rule means that trial courts will not be reversed for making *erroneous* rulings on matters that they have the right or power to decide when an adversely affected party has failed to protest. However, the *Labat* holding shows that there is a clear difference between an erroneous trial court ruling on a matter that the court has the right or power to decide (as in whether to receive a matter in evidence) and a ruling that is *unlawful* because the trial court had no right or power to make it (as in whether to award attorney's fees absent explicit statutory or rule authority). If this situation involved an erroneous application of a statute or court rule that permits attorney's fees to be paid to a defendant such as appellee when a previously nonsuited action has been refiled, then our time-honored practice of rejecting appeals based on alleged errors not raised in timely fashion before the trial court would be proper and reasonable even if the trial court had incorrectly applied the rule. To

view this case in that light, however, is plainly wrong given the mountain of authority to the contrary.

Moreover, because it is obvious that the trial court had no right or power to award attorney's fees as costs to appellee, either under Rule 41(d) or otherwise, the real issue before us is not whether appellant should have objected below, but whether we have a duty to correct trial court errors brought to our attention involving blatantly *ultra vires* conduct. The upshot of the decision reached today is that appellate courts have no duty to reverse rulings that are beyond the scope or which exceed the legal power of trial courts when they are presented to us in appeals brought by adversely affected parties. This radical philosophy deserves honest criticism, especially in light of the *Labat* and *Lewallen* holdings. In a constitutional democracy the judicial power — like every other governmental power — must come from somewhere. Judicial power is not self-existent. Courts are neither eternal nor omnipotent. Rather, it is a fundamental tenet of American government dating to the Declaration of Independence that governments and the courts within them derive their just powers from the consent of the governed. That truth is also stated in the preamble to the Arkansas Constitution, and in the judicial article of that document that specifically vests the supreme court, circuit courts, and other designated courts with judicial power in Arkansas. The supreme court is expressly vested with superintending power over circuit courts such as the trial court from which this appeal has been taken. The Arkansas Court of Appeals was created in 1979 by Amendment 58 to the Arkansas Constitution, and the supreme court has decided that the appellate jurisdiction of the Court of Appeals includes appeals such as the one before us. The people of Arkansas have emphatically and deliberately determined that no trial court ruling is automatically insulated from judicial review, and this certainly includes trial court rulings that exceed the legal right or power of trial courts. The idea that an appellate court has no duty to reverse trial court conduct that exceeds the legal power and rights vested in trial courts is so fundamentally contrary to everything upon which American jurisprudence and democracy is based that it is not surprising that neither the majority nor appellee can cite any rule of law for it. What is surprising about that

idea — nay, astounding — is that the majority fails to comprehend the flagrant folly in holding, in effect, that an appellate court has no duty to reverse a patently *unlawful* (as contrasted with a merely incorrect) trial court ruling simply because an appellant failed to object to the unlawful ruling below, thereby thumbing its nose at the fundamental principle of derived governmental power upon which American democracy, Arkansas government, and a recognized function of judicial review is founded.

I foresee that the decision today will increase the delays and expense involved with civil litigation. Defending parties will file motions to stay proceedings in refiled actions after nonsuits, and will seek attorney's fees. Even when the fee requests are met with timely and strenuous objections by plaintiffs, needless time and money will be wasted preparing, filing, and arguing objections to the fee requests. Trial courts that are already overworked and understaffed will be forced to consider the motions, fee requests, and objections (whether hearings are held or not). All of this will take time, and none of it will help resolve the merits of lawsuits. Of course, none of the fee requests can properly be granted under Arkansas law as it has existed for more than 140 years, and which the misguided decision rendered today cannot change; but thanks to the decision, defendants have everything to gain and nothing to lose by filing the requests.

In fact, defending parties will now insist that their attorneys seek to recover attorney's fees in refiled actions following nonsuits because doing so might produce the result reached by the trial court in this case. The idea of threatening a plaintiff with the prospect of paying the cost for defending a nonsuited case as a condition to prosecuting a refiled case will be immensely popular. If trial courts grant the fee requests (despite lacking any legal authority for doing so), then plaintiffs will properly appeal, and the already congested appellate docket will be affected. The irony is that virtually all of the motions and appeals will (or should be) decided based upon the same law that the majority has gone out of its way to avoid following in this case. The entire scenario will be a colossal waste of time, legal skills, judicial resources, and client funds, and a disservice to the cause of justice unlike any other known to recent memory of jurisprudence in Arkansas.

I unapologetically declare the rule announced today bad and wrong law, and will never condone it. In the meantime, I hope that this appellant will seek the relief she deserves from the Arkansas Supreme Court by a petition for review.

[redacted]

Marsha MIKEL *v.* ENGINEERED SPECIALTY PLASTICS

CA 96-758 938 S.W.2d 876

Court of Appeals of Arkansas
Division IV
Opinion delivered March 5, 1997

[redacted]

Lane, Muse, Arman & Pullen, by: *Donald C. Pullen*, for appellant.

Walter A. Murray, for appellee.

SAM BIRD, Judge. Marsha Mikel appeals from a decision by the Workers' Compensation Commission, which found that she did not suffer a compensable injury on January 29, 1994, while working for appellee, Engineered Specialty Plastics, as a machine operator. In September 1993, Mikel started working with Engineered Specialty Plastics on the assembly line snipping gates, which are pieces of plastic that are attached to parts when they come out of the machines. On January 29, 1994, she was moved to a different assembly line, where she clipped larger gates. To clip gates, appellant squeezed clippers, which she said sometimes caused soreness in the palm of her hand. When she changed to a different assembly line, clipping larger gates, she was required to use bigger clippers, which apparently caused her hand to become sore and bothersome. After working about five hours on the new assembly line, "something in her wrist snapped"; and she said the incident felt like a rubber band popping. Afterward she could not close the clippers. She testified that she reported the injury to her supervisor on January 29, and at the time, her hand appeared red, swollen, and had a bump on the top of her wrist. This was the first time she had complained to her supervisor about any pain that she experienced while snipping gates. However, contrary to her testimony, an accident report indicates that appellant did not

report the accident to her supervisor until January 31. The report also states that appellant informed her supervisor that she had been experiencing problems with her hand ever since she began working for appellee, but the report does not mention any swelling.

Appellant was sent to the company doctor who diagnosed her with right wrist strain, possible early carpal tunnel syndrome, and who prescribed medication and a wrist splint; however, the doctor's report also does not mention any swelling. In addition, the doctor also recommended work activity that did not involve Mikel's right hand.

Appellant returned to work and informed her supervisor that the doctor had recommended not using clippers, but the appellant's supervisor did not take her off the line, which caused her hand to get worse. On April 27, 1994, the doctor eventually recommended not using her right hand at all, and the appellee provided Mikel with light work duty.

Appellee had paid for all of appellant's medical expenses, up until the time that the company doctor referred appellant to an orthopaedic surgeon, Dr. Michael Moore. Instead of telling Dr. Moore of a specific incident that caused her pain, Mikel said the pain was a result of a gradual onset of problems. Dr. Moore diagnosed Mikel with carpal tunnel syndrome and performed surgery on June 30, 1994, and the appellee controverted the claim. Mikel was released to work on September 19, 1994.

Mikel filed a claim with the Commission for temporary total disability from June 30-September 19, 1994, and a hearing was held before an administrative law judge on October 21. Mikel did not call the supervisor as a witness to testify about the swelling, and she was the only witness at the hearing. At the hearing, the respondents asked the administrative law judge to take judicial notice that carpal tunnel syndrome could not result from a single incident under Ark. Code Ann. § 11-9-102(5)(A)(i) (Supp. 1993), as Mikel claims, because carpal tunnel syndrome is specifically provided for under Ark. Code Ann. § 11-9-102(5)(A)(ii)(a) (Supp. 1993). The judge declined to take judicial notice and found that Mikel had suffered a compensable injury. The Workers' Compensation Commission reviewed Mikel's claim and reversed, find-

ing that she had failed to prove by a preponderance of the evidence that she had sustained a compensable injury. We agree and affirm the Commission's order.

[redacted] When determining the sufficiency of the evidence, this court gives deference to the Commission's findings and affirms if those findings are supported by substantial evidence. *Crossett Sch. Dist. v. Gourley*, 50 Ark. App. 1, 899 S.W.2d 482 (1995). Substantial evidence is defined as evidence that a reasonable mind would accept as adequate to support a conclusion. *Id.* at 3, 899 S.W.2d at 483. A decision by the Commission is reversed only if this court is convinced that "fair-minded persons" using the same facts could not reach the same conclusion reached by the Commission. *Id.* (citing *Willmon v. Allen Canning, Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992)). The worker filing the claim with the Commission has the burden of proving by a preponderance of the evidence that the claim is a result of an injury arising from the course of employment. *Deffenbaugh Indus. v. Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992). This court will defer to the Commission in determining the weight of evidence and the credibility of the witnesses. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989); *Morrow v. Mulberry Lumber, Co.*, 5 Ark. App. 260, 635 S.W.2d 283 (1982).

[redacted] Mikel, who has the burden of proving her injury by a preponderance of the evidence, filed her claim with the Commission pursuant to Ark. Code Ann. § 11-9-102(5)(A)(i). The statute defines one type of compensable injury as, "[a]n accidental injury causing internal or external physical harm to the body or accidental injury . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence." The appellant must prove her injury by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(5)(D) (Supp. 1993).

[redacted] The issue before this court is whether any medical evidence exists to support the fact that appellant experienced an injury due to a specific incident, as opposed to her injuries being

gradual. Neither doctor mentioned any swelling of the wrist, as reported by appellant. Appellant claims that her supervisor witnessed the swelling. However, the supervisor did not testify to that nor was it stated in the accident report. Both doctors acknowledge that the appellant has carpal tunnel syndrome, but neither acknowledged that it was caused by a specific incident. Dr. Moore, in a medical report, wrote,

> [S]he developed symptoms shortly after she began work. . . . Therefore, she may have had an underlying carpal tunnel syndrome prior to work which was exacerbated with her new job. In other words, it is difficult for me to solely relate her carpal tunnel syndrome to her work which she performed for only a two month period before experiencing symptoms.

After reviewing the medical testimony by both doctors, this court agrees that the appellant did not prove her claim by a preponderance of the evidence.

An issue not relied upon by appellant, but brought up by appellee, concerns the interpretation of Ark. Code Ann. § 11-9-102(5)(A)(ii) (Supp. 1993), which provides compensation for injuries that cannot be identified by time and place of occurrence. Carpal tunnel syndrome, which may be caused by a rapid repetitive motion, is specifically categorized as falling into this definition. Ark. Code Ann. § 11-9-102(5)(A)(ii)(a). However, because it is not an issue before us and because we are not reversing the Commission's finding, we do not have to decide whether this part of the statute excludes carpal tunnel syndrome from falling under other statutes.

Because appellant has failed to meet her burden of proof, the Commission's decision should be affirmed.

COOPER and STROUD, JJ., agree.

Mark BARNETT *v.* CITY of DARDANELLE

CA CR 96-538 938 S.W.2d 572

Court of Appeals of Arkansas
Division II
Opinion delivered March 5, 1997

[redacted]

Young & Finley, by: *Dale W. Finley*, for appellant.

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

ANDREE LAYTON ROAF, Judge. Appellant Mark Barnett was convicted in municipal court of speeding and DWI. His *de novo* appeal to circuit court was dismissed for failure to proceed, when neither Barnett nor his attorney appeared at trial. On appeal, Barnett argues only that the circuit court erred in denying his motion to dismiss for failure to provide a speedy trial. The State contends that Barnett's case is not properly before this court because his appeal from municipal to circuit court was untimely filed. We agree with the State and hold that the circuit court lacked subject-matter jurisdiction because Barnett did not timely appeal his municipal court conviction, and for this reason affirm the trial court's dismissal of Barnett's appeal.

Mark Barnett was convicted in Yell County Municipal Court of speeding and DWI on August 10, 1994. His notice of appeal to Yell County Circuit Court was filed thirty-five days later on Wednesday, September 14, 1994. The State did not move to dismiss the appeal. Barnett's appeal was first dismissed for failure to appear for trial on August 15, 1995, but was reinstated by the trial court on October 3, 1995. Neither Barnett nor his attorney appeared when the case was next set for jury trial at 9:00 a.m. January 5, 1996. The trial court again dismissed Barnett's appeal for failure to prosecute and dismissed the jury. When Barnett's counsel later appeared approximately at 10:30 a.m., and sought a ruling on a speedy-trial motion filed the previous day, the trial court denied the motion, finding that it had not been timely presented because Barnett's appeal had already been dismissed.

Barnett's sole argument on appeal is that the trial court erred in calculating the time for speedy trial. He asserts, in essence, that the circuit court lacked jurisdiction to conduct trials and hearings after the time for speedy trial had run. However, we do not reach the merits of Barnett's argument for two reasons.

First, as the State has correctly noted in its argument, Barnett failed to file his notice of appeal from municipal court to circuit court within thirty days, as required by Arkansas Inferior Court Rule 9(a). The State further contends that the circuit court therefore lacked jurisdiction over Barnett's case. In his reply brief, Barnett argues that a notation entered by the municipal judge on his

municipal court docket sheet, which reads "To be paid or appealed by 9-14-94," extended his time to appeal beyond the thirty-day period allowed by Arkansas law. However, Barnett does not assert that he either sought or obtained an extension of time to file his notice of appeal, or otherwise explain why the docket entry is anything more than a deadline by which he was to pay his municipal court fine.

[redacted] Barnett provides no authority for his argument and we do not agree that his time to appeal is extended by the docket entry. In *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994), the supreme court affirmed the circuit court's dismissal of an appeal from municipal court for failure to file the record within thirty days of the municipal court judgment. Although Ottens argued that the State did not timely file its motion to dismiss, the court stated:

> [Appellant] asks us to excuse his failure to comply with Rule 9 because the State did not file the motion to dismiss until after the filing period had expired. He explains that because of the delay, he had begun preparation for trial. The argument overlooks the fact that when the time for filing an appeal is fixed by a rule or statute, the provision which limits the time is jurisdictional in nature. *See Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989); *Searcy County v. Holder*, 257 Ark. 435, 516 S.W.2d 901 (1974). Because jurisdiction is the power or authority of a court to hear a case on its merits, it may be raised at any time. *Head v. Caddo Hills School District*, 277 Ark. 482, 644 S.W.2d 246 (1982). Jurisdiction may even be raised for the first time on appeal. *Simpson v. State*, 310 Ark. 493, 837 S.W.2d 475 (1992). Consequently, the argument that preparation for trial had begun prior to the filing of the motion to dismiss on jurisdictional grounds is without merit.

Id. at 5, 871 S.W.2d at 331.

Moreover, Barnett's appeal must fail for a further reason. Although Barnett argues only the merits of his speedy-trial motion, the circuit court's dismissal of his *de novo* appeal was based on his failure to appear, and no trial was conducted. The trial court's ruling in this regard is clear from the record and from the

order entered that dismissed the appeal and remanded the case to municipal court.

[redacted] Barnett's brief and argument do not address, in any respect, the ruling made by the trial court to dismiss the appeal. Consequently, he does not argue that the dismissal, under the circumstances of his failure to appear, was an abuse of discretion or in any way erroneous. The appellant failed to demonstrate or even argue trial error regarding those findings; this court will not presume reversible error. *Phillips v. State*, 321 Ark. 160, 900 S.W.2d 526 (1995).

Affirmed.

ROBBINS, C.J., and GRIFFEN, J., agree.

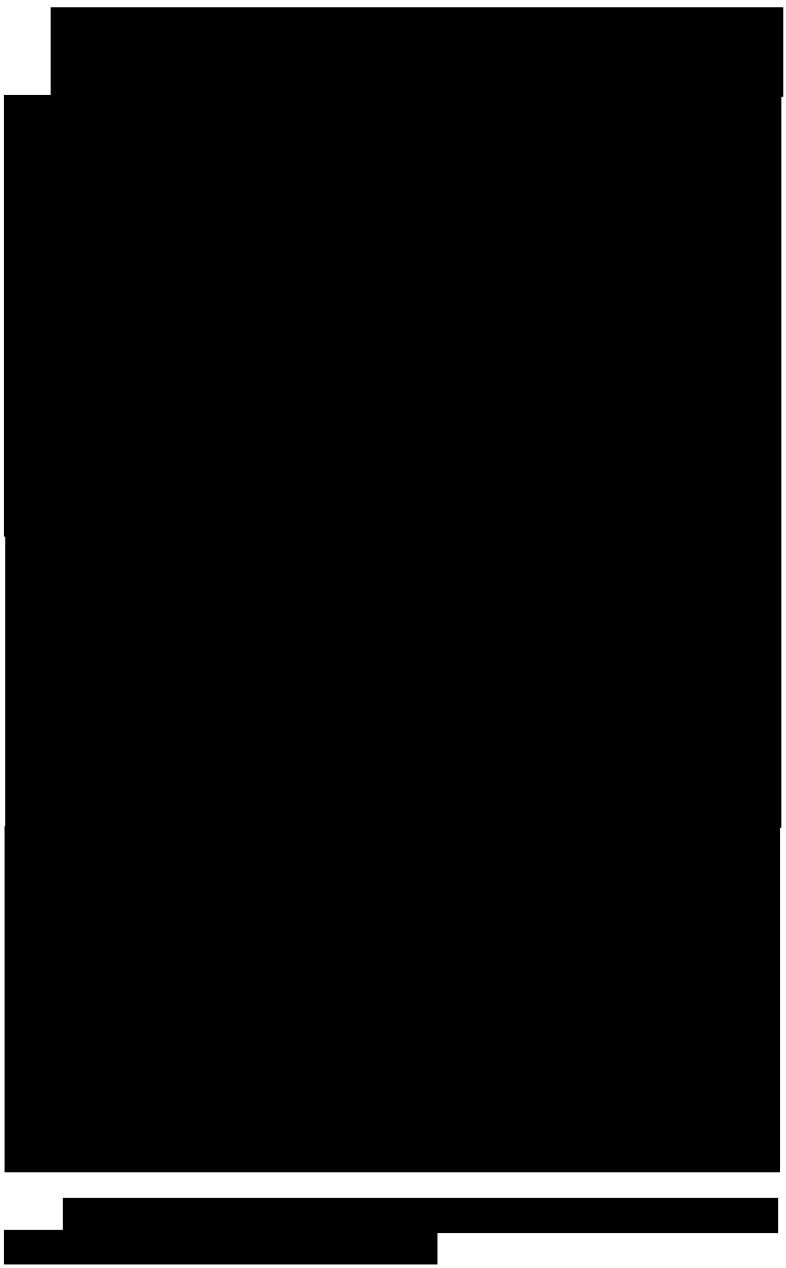
[redacted]

MARSHALL SCHOOL DISTRICT *v.* Ron HILL

CA 96-370 939 S.W.2d 319

Court of Appeals of Arkansas
Division II
Opinion delivered March 5, 1997

[redacted]



Brazil, Adlong, Murphy & Osment, by: *William Clay Brazil*, for appellant.

Martin Law Firm, P.A., by: *Thomas A. Martin*, and *Jerry D. Patterson*, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellee Ron Hill was hired by appellant Marshall School District as a football coach and teacher for the 1992-93 school year. His annual salary was set at $31,081.00. On January 21, 1993, he was notified in writing that the superintendent was going to recommend that his contract not be renewed for the following year. The superintendent's recommendation was based essentially on his opinion that the football program had deteriorated to an unacceptable level. Mr. Hill requested a hearing, which was conducted on March 1, 1993. After the hearing, Marshall School District's Board of Directors decided not to renew Mr. Hill's contract.

Mr. Hill appealed the decision of the Board of Directors to the Searcy County Circuit Court. In his complaint, Mr. Hill alleged that the refusal of Marshall School District to renew his contract constituted a breach of its contract with him. Specifically, Mr. Hill contended that, in making its decision, the appellant violated the terms of the Teacher Fair Dismissal Act. The circuit court agreed, finding that the school district did not comply with the Act in that it (1) failed to notify Mr. Hill, in writing, of problems that could lead to nonrenewal and (2) produced no documentation of efforts to assist Mr. Hill in correcting the deficiencies that could lead to nonrenewal. The circuit court awarded him damages and attorney's fees against Marshall School District.

On appeal, neither party asserts that the trial court's decision to award damages and attorney's fees was error. Rather, the issues on appeal pertain only to the amount of damages and attorney's fees awarded. The circuit court ordered Marshall School District to pay damages in the amount of $44,924.00 and attorney's fees in the amount of $14,975.00. On direct appeal, Marshall School District argues that the award of attorney's fees was excessive. On cross-appeal, Mr. Hill contends that the damages award should have been $93,234.00 instead of $44,924.00. We affirm the circuit court's decision in all respects.

We first address Marshall School District's argument pertaining to the issue of attorney's fees. The circuit court's order included the following statement:

> The court has considered the plaintiff's petition for attorney's fees pursuant to A.C.A §16-22-309 and upon consideration of the plaintiff's petition for attorney's fees and other matters within the knowledge of the court and which may have been brought to the attention of the court by the defendant, the court finds a reasonable attorney's fee to be in the amount of $14,975.00.

Arkansas Code Annotated section 16-22-309 (Repl. 1994) provides, in pertinent part:

> (a)(1) In any civil action in which the court having jurisdiction finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney, the court shall award an attorney's fee in an amount not to exceed five thousand dollars ($5,000), or ten percent (10%) of the amount in controversy, whichever is less, to the prevailing party unless a voluntary dismissal is filed or the pleadings are amended as to any nonjusticiable issue within a reasonable time after the attorney or party filing the dismissal or the amended pleadings knew, or reasonably should have known, that he would not prevail.

Marshall School District now asserts that, pursuant to the above statute, the circuit court was without authority to award more than $5,000.00 in attorney's fees. It submits that the circuit court lacked the discretionary power to award $14,975.00, and that this award should be reversed.

We affirm the amount of attorney's fees awarded by the circuit court. We agree that Ark. Code Ann. § 16-22-309 (1987) limits attorney's fees to a maximum of $5,000.00. However, as argued by the appellee before the trial court and now on appeal, Ark. Code Ann. § 16-22-308 (Repl. 1994) is applicable to this case. *See Junction City Sch. Dist. v. Alphin*, 56 Ark. App. 61, 938 S.W.2d 239 (1997). Arkansas Code Annotated section 16-22-308 provides:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods,

> wares, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs.

Mr. Hill's action against Marshall School District was for breach of contract, and pursuant to the above statute, the circuit court was authorized to award attorney's fees, which were not subject to a specified limit. Although the trial court referenced section 16-22-309 in its opinion, the court may have actually relied on section 16-22-308, inasmuch as it recited in its judgment that the damages awarded were for breach of contract. At any rate, it has been established that this court may affirm a ruling by the trial court if it reached the right result, even though it may have announced the wrong reason. *Summers Chevrolet, Inc. v. Yell County*, 310 Ark. 1, 832 S.W.2d 486 (1992). Under the facts of this case, we hold that an attorney's fee award of $14,975.00 was appropriate under Ark. Code Ann. § 16-22-308 (Repl. 1994).

The remaining issue is raised by Mr. Hill in his cross-appeal. It involves the measure of damages by which the trial court computed the $44,924.00 award to be paid by Marshall School District.

In assessing the damages suffered by Mr. Hill as a result of his dismissal, the circuit court first considered lost salary for the 1993-94, 1994-95, and 1995-96 school years, which amounted to $93,234.00. The court then reduced this amount by earnings that Mr. Hill received through other employment during the same time frame. He worked at a shirt factory for a brief period, during which he earned $10,317.00. Mr. Hill then worked as a teacher for Westside Schools for two years at an annual salary of about $27,103.00. Thus, his total earnings were approximately $64,523.00. The circuit court reduced this amount by $16,138.00, which represented the cost expended by Mr. Hill in seeking other employment. After subtracting the cost expended by Mr. Hill from his earnings, the court concluded that his damages had been mitigated by $48,313.00. The court subtracted this amount from the three years' salary that had been lost and arrived

at $44,924.00 as the amount of damages owed by Marshall School District.

Mr. Hill appeals this damages award, contending that he was entitled to judgment for the full $93,234.00. Specifically, he asserts that the court erred in reducing the award by the earnings he received through other employment. For his argument, Mr. Hill cites *Green Forest Public Schools v. Herrington*, 287 Ark. 43, 696 S.W.2d 714 (1985). In that case, the supreme court affirmed an award of back pay that had been sought pursuant to the Arkansas Teacher Fair Dismissal Act. In addition, the court specifically held that the award was not to be reduced by the unemployment compensation that the appellee had received subsequent to his wrongful dismissal. In doing so, the court announced:

> It is a general rule that "recoveries from collateral sources do not redound to the benefit of a tortfeasor, even though double recovery for the same damage by the injured party may result," *Amos, Adm's v. Stroud & Salmon*, 252 Ark. 1100, 482 S.W.2d 592 (1972); *Vermillion v. Peterson*, 275 Ark. 367, 630 S.W.2d 30 (1982). The question is whether the collateral source rule applies to employment situations and, specifically, whether unemployment compensation is a collateral source. This is an issue of first impression in Arkansas, but other courts have held that with regard to damages for breach of an employment contract, unemployment benefits received were not deductible by the employer in mitigation of damages. 22 AmJur2d *Damages* § 209, p. 293 (1965). Furthermore, an Arkansas federal district court has held that unemployment compensation benefits are a collateral source and cannot be used to offset a judgment against a tortfeasor. *Collins v. Robinson*, 568 F.Supp. 1464 (D.C. Ark. 1983). Accordingly, we adopt this application of the collateral source rule and hold that appellee's unemployment benefits should not be deducted from his award of back pay.

Id. at 49-50, 696 S.W.2d at 718. Mr. Hill acknowledges that the collateral-source rule has never been applied in Arkansas to employment breach-of-contract cases where the dismissed employee has subsequently earned income from other employment. He now urges this court to apply the collateral-source rule and find that the damages owed by Marshall School District should not have been reduced by his income from other sources.

Despite the argument being raised by Mr. Hill, we find that the disposition of this issue is dictated by *Western Grove Sch. Dist. v. Strain*, 288 Ark. 507, 707 S.W.2d 306 (1986). In that case, a teacher prevailed on a contract dispute under the Arkansas Teacher Fair Dismissal Act, and the supreme court discussed possible mitigation of damages through other employment. The court held that, in such cases, the aggrieved party must use reasonable care, effort, and expenditure to mitigate damages. The court also held that the proper measure of damages is the loss sustained by the teacher, less any mitigation earnings that may be realized through subsequent employment.

Mr. Hill contends that *Western Grove School District* and *Green Forest Public Schools* are inconsistent and that we should follow the precedent set in the *Green Forest Public Schools* opinion. We, however, find no inconsistency. *Western Grove School District* involved the duty to mitigate through subsequent employment, while *Green Forest Public Schools* involved the effect of unemployment benefits in breach-of-employment contract actions. In the instant case, the precedent set in *Western Grove School District* is controlling. Mr. Hill had a duty to take reasonable steps to mitigate the damages, and he did so by seeking and finding other employment. The court's decision to consider his subsequent earnings in mitigation of damages was not erroneous.

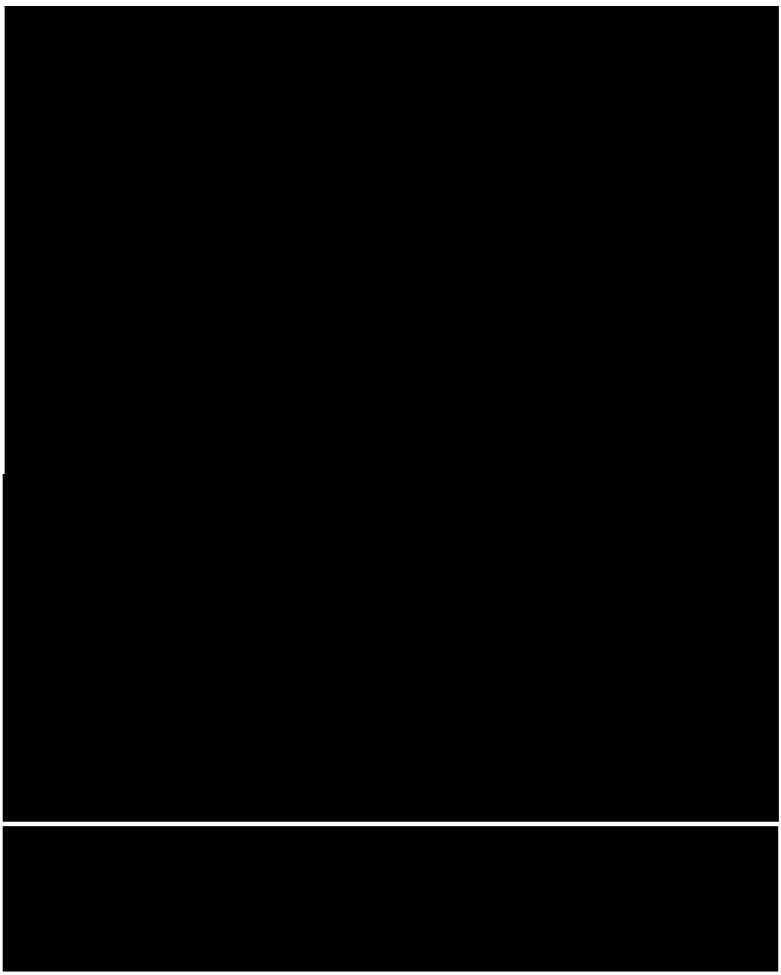
Affirmed on appeal; affirmed on cross-appeal.

GRIFFEN and ROAF, JJ., agree.

Grady MATTHEWS *v.* STATE of Arkansas

CA CR 96-637 940 S.W.2d 498

Court of Appeals of Arkansas
Division II
Opinion delivered March 12, 1997



[redacted]

Maxie G. Kizer, for appellant.

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

JOHN B. ROBBINS, Chief Judge. Appellant Grady Matthews was charged with capital felony murder in the shooting death of Don Wyrick. Appellant was convicted as an accomplice to first-degree murder and was sentenced to twenty years in the Arkansas Department of Correction. Appellant contends on appeal that the evidence is insufficient to support his conviction. We affirm.

[redacted] In reviewing the sufficiency of the evidence in criminal cases, we consider the evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the verdict. *Boyd v. State*, 54 Ark. App. 17, 922 S.W.2d 357 (1996). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty and precision, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996). Circumstantial evidence alone may constitute substantial evidence when every other reasonable hypothesis consistent with innocence is excluded. *Walker v. State*, 324 Ark. 106, 918 S.W.2d 172 (1996). Once the evidence is determined to be sufficient to go to the jury, the question of whether the circumstantial evidence excludes any other hypothesis consistent with innocence is for the jury to decide. *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996). On appellate review, it is permissible for this court to consider only that evidence that supports the guilty verdict. *Choate v. State*, 325 Ark. 251, 925 S.W.2d 409 (1996).

[redacted] Arkansas Code Annotated section 5-10-102 (Repl. 1993) defines murder in the first degree as follows:

> (a) A person commits murder in the first degree if:
>
> (1) Acting alone or with one (1) or more other persons, he commits or attempts to commit a felony, and in the course of and in the furtherance of the felony or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or
>
> (2) With a purpose of causing the death of another person, he causes the death of another person. . . .

Each conspirator or participant in the execution or attempted execution of a crime is responsible for everything done that follows directly as a probable and natural consequence. *Johnson v. State*, 252 Ark. 1113, 482 S.W.2d 600 (1972). An accomplice is one who, with the purpose of promoting or facilitating the commission of an offense, either solicits, advises, encourages, or coerces another person to commit the offense, aids, agrees to aid, or attempts to aid the other person in planning or committing the offense, or, having a legal duty to prevent the offense, fails to make a proper effort to prevent the commission of the offense. Ark. Code Ann. § 5-2-403 (Repl. 1993).

The evidence presented at trial showed that on May 19, 1995, Don Wyrick was shot and killed at a residence in Pine Bluff known as "The Hill." Several witnesses testified that the residence was a gambling house where people came to play cards and shoot dice. Several witnesses testified that, on the night in question, four young men entered the residence and put stocking caps over their faces. The young men displayed handguns, stated that it was a "stickup," and demanded that everyone get down on the floor. John Moore testified that he recognized the appellant as he entered the house and identified him in court as one of the young men involved in the robbery.

The evidence indicated that the young men entered the house through the living room and, while two of them guarded people in the living room, two of the suspects went into the dining room where a gaming table was set up. Several witnesses testi-

fied that the victim refused to get on the floor and began wrestling with the appellant for the gun the appellant was holding. The testimony indicated that after the victim fought for appellant's gun he was shot by Patrick Davis, one of the appellant's accomplices. The victim died as a result of two gunshot wounds.

Marcus James, one of the appellant's accomplices, was called on behalf of the State. James testified that he, the appellant, Patrick Davis, and Derrick Pridgeon planned to rob the gambling house and take everyone's money. James testified that he, the appellant, and the two others met on the night in question about 10:30 or 11:00 p.m. The young men organized their guns and later left to perform the robbery. James identified State's exhibit #5 as the .380 pistol that Derrick Pridgeon used during the robbery. James also identified State's exhibit #1 as the .25 pistol that the appellant had during the robbery, which was found after the robbery on the floor under the victim.

James testified that the four of them entered the house, and he and Pridgeon stopped in the living room while Davis and the appellant went on back into the dining room area. James testified that appellant and the victim began struggling over the gun that appellant was holding. James testified that Patrick Davis then shot his gun.

The appellant testified in his own defense at trial. He admitted that they had planned for more than a week to rob the gambling house. Appellant testified that State's exhibit #1 was the .25 pistol that he used during the robbery. He testified that he knew the victim because the victim was his girlfriend's stepfather, and when he entered the dining room he believed the victim recognized him. The appellant testified that the victim attempted to take his gun from him and a struggle ensued. Appellant testified that he fell to the floor during the fight and heard two shots. He did not see who fired the shots because he was trying to hide his face after his stocking cap had come off. The appellant, Davis, and Pridgeon then fled the house, while James remained in the home hiding under a bed.

The expert testimony in this case indicated that the victim was shot once in the left chest area. A second shot hit the victim

in the right shoulder area. Two bullets were recovered from the victim's body that expert testimony indicated were fired from a .38, the same type weapon Davis was carrying on the night in question. Dr. William Sturner, the chief medical examiner with the Arkansas State Crime Laboratory, testified that the victim in this case was killed as a result of the two gunshot wounds.

[redacted] The appellant specifically argues that the evidence was insufficient to show that he or one of his codefendants shot the victim on the night in question. However, Marcus James testified that Patrick Davis fired his weapon when the victim was killed. Both the appellant and James testified that Davis was carrying a .38-caliber handgun on the night in question, and it was .38-caliber bullets that were recovered from the victim's body. The testimony of the other witnesses also indicated that only the appellant and his codefendants had weapons drawn on the night in question. There was both direct testimony and circumstantial evidence to indicate that it was Davis, appellant's accomplice, who killed the victim. There is substantial evidence to support the appellant's conviction.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

[redacted]

Manuel VEGA *v.* STATE of Arkansas

CA CR 96-410 939 S.W.2d 322

Court of Appeals of Arkansas
Division I
Opinion delivered March 12, 1997

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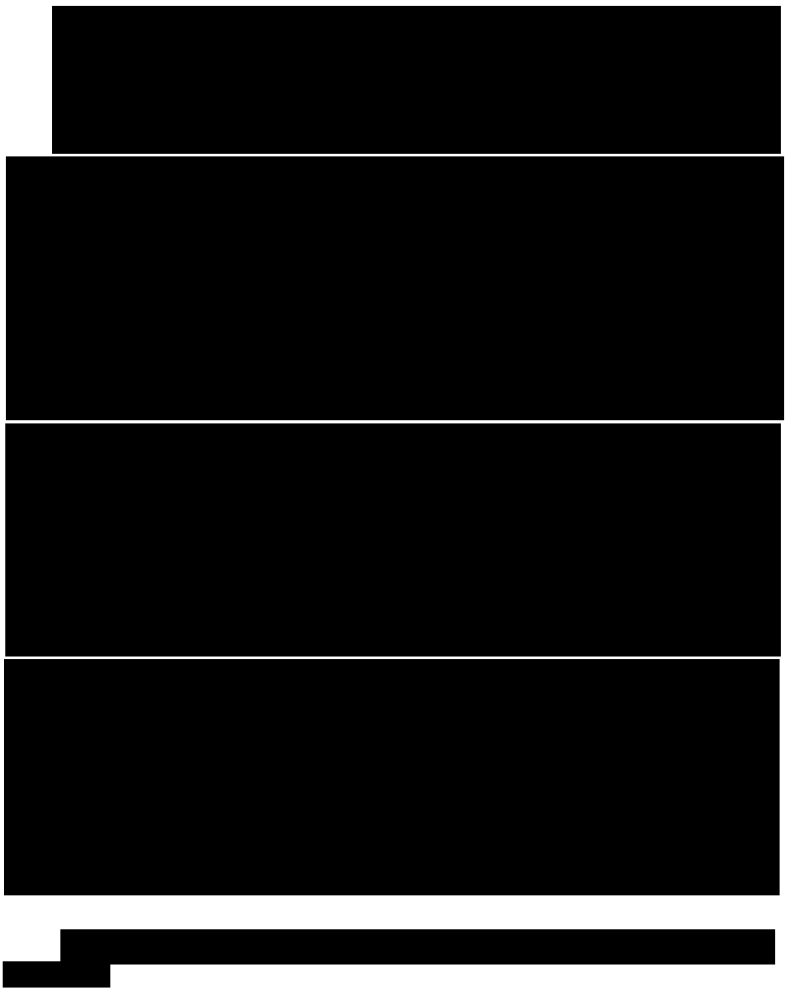

Paul Johnson, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., and *Stuart A. Clearly*, Law Student Admitted to Practice Pursuant to Rule XV(E)(1)(b) of the Rules Governing Admission to the Bar of the Arkansas Supreme Court under supervision of *Kelly K. Hill*, Deputy Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Manuel Vega was charged with possession of a controlled substance (marijuana) with intent to deliver. His pretrial motion to suppress evidence obtained as a result of a search of his pickup truck was denied. He then entered a conditional plea of guilty, reserving the right to appeal as provided in Ark. R. Crim. P. 24.3(b). He was sentenced to a term of ten years in the Arkansas Department of Correction, with imposition of an additional term suspended. *See* Ark. Code Ann. § 5-4-104(e)(3) (Supp. 1995). On appeal, he contends that the trial court erred in denying his motion to suppress. We affirm.

On April 4, 1995, Trooper Bill Glover of the Arkansas State Police stopped a pickup truck for speeding. Appellant was the driver and was accompanied by a passenger, Sherry Ford. The trooper discovered that the license plate on the truck belonged to a different vehicle and that appellant's driver's license had been suspended. Appellant was arrested for speeding and driving on a suspended license and was told that he would have to post bond before he could continue on his journey. Appellant and Ms. Ford, with Ms. Ford driving, followed the trooper to the Pope County Detention Center to post bond. Upon arriving at the detention center, a dog trained and certified in the detection of drugs was allowed to smell the outside of the truck. The dog aggressively "alerted" to the bed of the truck, indicating the presence of illegal drugs. The dog's reaction, together with the fictitious license plate and the trooper's visual observation of alterations to the bed of the truck, caused Trooper Glover and other officers to search the truck. The search uncovered 158 pounds of marijuana hidden under a false bed.

On appeal, appellant first contends that his truck was searched without reasonable cause to believe that it contained things subject to seizure. Appellant does not challenge the legality of the initial stop, his arrest, or how his truck came to be parked in the public parking lot of the detention center. Nor does he contend that the police lacked reasonable cause to search his truck after the dog alerted to it. Instead, appellant contends that the canine sniff was itself a search and that, at the time that the dog smelled the truck, the officers did not yet have the required reasonable cause. The view we take of the case does not require us to

decide whether the police had reasonable cause prior to the dog's reaction.

Appellant's argument flows from and depends upon the premise that the canine sniff was a search within the meaning of the Fourth Amendment. However, that premise is a false one. We hold, as many other courts have, that a canine sniff of the exterior of an automobile that is parked in a public area or is legitimately within the custody of the police is so limited an intrusion of protected privacy interests as to not amount to a Fourth Amendment search. *See, e.g., United States v. Friend*, 50 F.3d 548 (8th Cir. 1995), *vacated and remanded on other grounds*, 116 S.Ct. 1538 (1996); *United States v. Jeffus*, 22 F.3d 554 (4th Cir. 1994); *United States v. Ludwig*, 10 F.3d 1523 (10th Cir. 1993); *United States v. Seals*, 987 F.2d 1102 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 155 (1993); *United States v. Rodriguez-Morales*, 929 F.2d 780 (1st Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992); *United States v. Dicesare*, 765 F.2d 890, *amended on other grounds*, 777 F.2d 543 (9th Cir. 1985); *see also United States v. Place*, 462 U.S. 696 (1983); *United States v. Vasquez*, 909 F.2d 235 (7th Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991). Therefore, no reasonable cause was necessary to justify having the dog smell appellant's truck.

Appellant next contends that, after the dog alerted to the truck, the officers should not have searched it without first obtaining a warrant. He argues that, while the officers then had reasonable or probable cause to believe that the truck contained contraband, there were no exigent circumstances sufficient to justify a warrantless search because he was in the detention center and the truck was in the custody of the police. We cannot agree.

An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is on a public way or other area open to the public. Ark. R. Crim. P. 14.1(a); *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996). In reviewing the denial of a motion to suppress evidence obtained through a warrantless search, this court makes an independent determination

based on the totality of the circumstances, but will not reverse the trial court's decision unless its finding is clearly against the preponderance of the evidence. *Lopez v. State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989).

[redacted] Here, while appellant had been arrested and arguably was not free to leave until he posted bond, Ms. Ford, who had driven the truck to the detention center, was not under arrest and was free to leave. The truck was readily movable, and no further exigency is required to search a vehicle in an area open to the public. *See Bohanan v. State, supra.* We cannot conclude that the trial court clearly erred in denying appellant's motion to suppress.

Affirmed.

ROGERS and CRABTREE, JJ., agree.

[redacted]

CITY of BLYTHEVILLE *v.* Wendell McCORMICK

CA 96-644 939 S.W.2d 855

Court of Appeals of Arkansas
Division IV
Opinion delivered March 12, 1997

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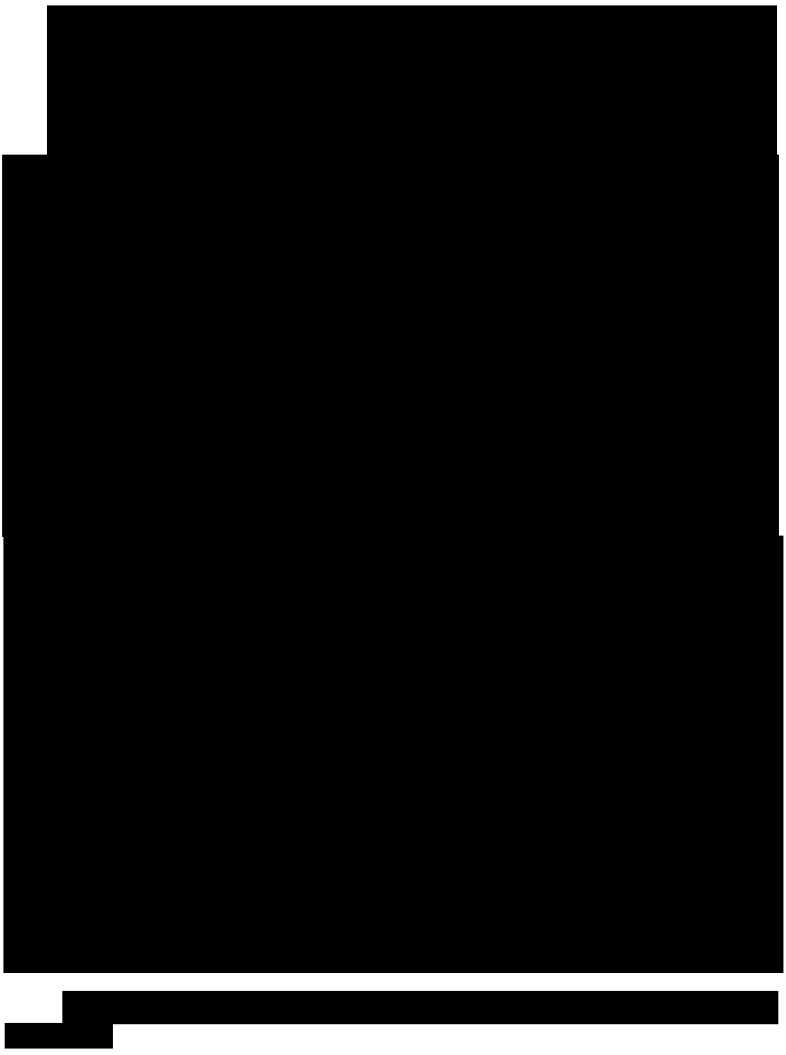

Thomas N. Kieklak, for appellant.

Daniel G. Ritchey, for appellee.

JAMES R. COOPER, Judge. The appellee in this workers' compensation case was employed as a fire fighter by the appellant on October 26, 1993, when he suffered a heart attack after venti-

lating smoke from a burning building. The appellee filed a workers' compensation claim and the Commission awarded benefits. From that decision, comes this appeal.

For reversal, the appellant contends that there was insufficient evidence to support the Commission's findings that an accident caused the appellee's heart attack; that the work performed by the appellee when he suffered the heart attack was unusual and extraordinary in comparison with his usual work; and that the work incident was the major cause of the appellee's heart attack. The appellant also contends that the Commission erred in allowing policy decisions to weigh in its decision to award benefits. We affirm.

We first address the appellant's arguments concerning the sufficiency of the evidence to support the Commission's findings.

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. *Weldon v. Pierce Brothers Construction*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). 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). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988). 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. *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995). 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. *Id.*

Viewed in the light most favorable to the Commission's findings, the record shows that the appellee was employed by the appellant as a fire fighter for approximately seven and one-half years. The appellee suffered his first heart attack in October 1992 and underwent bypass surgery. In January 1993, the appellee returned to his regular employment, which consisted of driving a fire truck when he was on duty, and doing whatever was assigned when he answered a call while off duty. The appellee had no physical limitations or health problems between his return to full-duty status in March 1993 and his second heart attack on October 26, 1993, which is the subject of the present claim. This second heart attack occurred while the appellee was venting the roof of a burning building, which involves cutting a hole in the roof and placing a pipe to allow smoke and gas to escape. In so doing the appellee was exposed to unusually heavy, dark, thick smoke. The appellee inhaled a good deal of smoke and was shaking as he climbed down from the roof. He sat down, felt sick to his stomach, and broke into a sweat. Although his chest was tight and his arm hurt, the appellee refused an ambulance and went home. However, his symptoms progressively worsened and his wife took him to the hospital. Dr. Charles Burnett, the cardiologist who treated the appellee during and following his first heart attack, opined that the appellee's second heart attack was primarily caused by his exposure to heavy smoke, which caused his blood to become hypercoagulable and resulted in the formation of a clot. Dr. Burnett testified that the risk factors contributing to the appellee's heart disease combined equalled less than ten percent as far as contributing to his second heart attack.

The appellant contends that the Commission erred in finding that an "accident" was the major cause of the appellee's heart attack. The appellant concedes that, in the context of workers' compensation law, Arkansas has long held that an injury is "accidental" if the result of the injury is unexpected, unforeseen, or unintended, but argues that this definition was the product of liberal statutory construction that may not appropriately be applied to our present workers' compensation law as promulgated in Act 796 of 1993.

It is true that, while the provisions of the Workers' Compensation Act were formerly construed liberally in accordance with the act's remedial purpose, Act 796 of 1993 changed former practice and mandated that both the Commission and the courts should henceforth construe the provisions of the act strictly. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1993); *cf* Ark. Code Ann. § 11-9-704(c)(3) (1987). It is likewise true that, under former law, the Arkansas Supreme Court employed liberal construction in holding that an injury is accidental when either the cause or the result is unexpected. *Bryant Stave & Heading Co. v. White*, 227 Ark. 147, 296 S.W.2d 436 (1956). Nevertheless, we do not rely on former law or construction thereof in determining the meaning of "accident" as employed in Ark. Code Ann. § 11-9-114(a) (Repl. 1996).

Arkansas Code Annotated Section 11-9-114(a) (Repl. 1996) provides that a heart or lung injury or illness can constitute a compensable injury only if the major cause of the physical harm is an accident. Although "accident" is not defined in this statute, the rules of statutory construction require us to place it beside other statutes relevant to the subject and give it a meaning and effect derived from the combined whole. *Hercules Inc. v. Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995). After so comparing the statute in question to other provisions of Act 796 of 1993, we find that the legislature employs the word "accident" in the sense of an event "caused by a specific incident and identifiable by time and place of occurrence." *See* Ark. Code Ann. § 11-9-102(5)(A)(i) (Repl. 1996). In light of this construction and the evidence that the appellee suffered a heart attack caused by and immediately following his exposure to smoke while ventilating the roof of the burning building, we hold that the Commission did not err in finding that an accident was the major cause of the appellee's heart attack.

Nor do we think that the Commission erred in finding that the work that precipitated the appellee's heart attack was unusual and extraordinary in comparison to the appellee's usual work duties. There was evidence that the appellee was normally assigned to drive a fire truck, and that he would perform other tasks only when he answered a call while off-duty. Furthermore,

there was evidence that the appellee inhaled a good deal of smoke that was unusually heavy, dark, and thick immediately prior to his heart attack.

The appellant also contends that the medical evidence was insufficient to support a finding that the appellee's work incident was the major cause of his heart attack. We do not agree. Dr. Burnett's testimony indicated that the appellee's exposure to smoke while ventilating the roof was by far the major cause of his heart attack, with all other factors combined amounting to less than ten percent by comparison. Although there was medical evidence to the contrary, the Commission chose to accept Dr. Burnett's testimony. The resolution of this conflict was a question of fact for the Commission and, in light of the substantial nature of Dr. Burnett's testimony, we are powerless to reverse the decision. *Henson v. Club Products*, 22 Ark. App. 136, 736 S.W.2d 290 (1987).

Finally, the appellant contends that the Commission erred in giving considerations of public policy weight in construing the provisions of the Workers' Compensation Act. Although the ALJ's opinion[1] did contain a discussion of public policy concerns bearing on the application of the "extraordinary and unusual" requirement of Ark. Code Ann. § 11-9-114(b)(1) (Repl. 1996) to public servants such as fire fighters and police officers, who are exposed to extraordinary and unusual events in the course of their work, these matters have not been considered by us in construing the relevant statutes. Consequently, the appellant has not been prejudiced, and the public policy issues raised by the administrative law judge need not be decided.

Affirmed.

BIRD and STROUD, JJ., agree.

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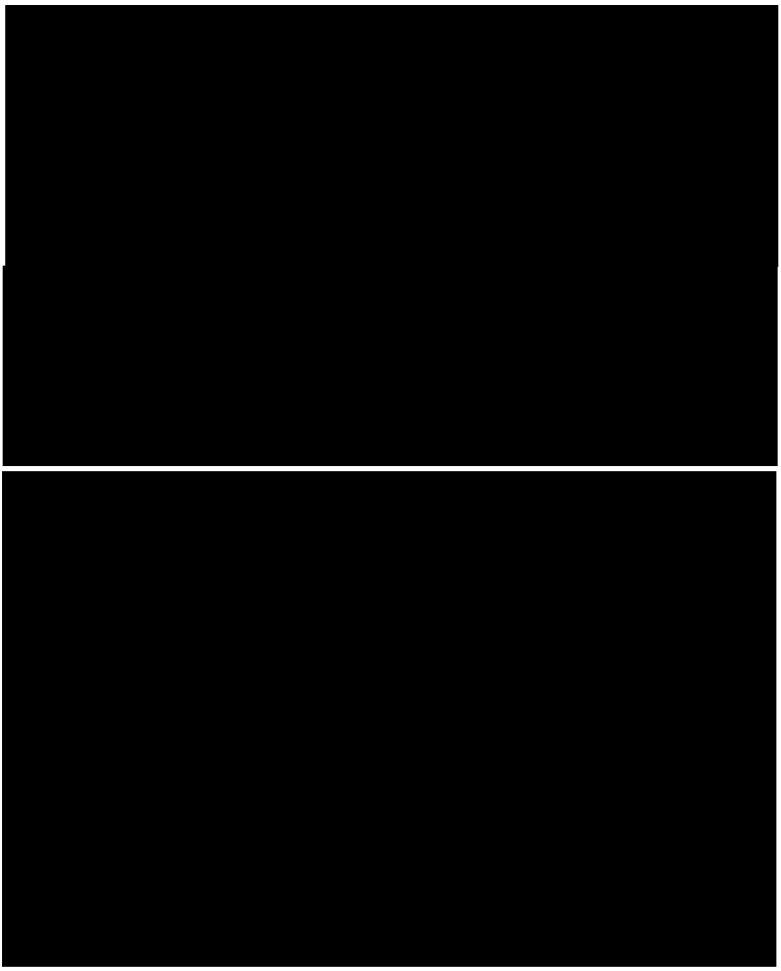
[1] The Commission adopted the ALJ's findings of fact and conclusions of law in the case at bar. However, it is not clear whether the ALJ's discussion of public policy was also adopted by the Commission.

David Lee WILLIAMS *v.* STATE of Arkansas

CA CR 96-198 940 S.W.2d 500

Court of Appeals of Arkansas
Division III
Opinion delivered March 12, 1997



Tim Buckley, for appellant.

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

SAM BIRD, Judge. David Lee Williams was convicted following a jury trial of the crime of murder in the second degree in connection with the shooting death of Debra Barnes at his Fayetteville, Arkansas, apartment on October 21, 1994. Appellant now contends that the trial court erred in denying his motion for directed verdict that was premised on his claim that the evidence was insufficient to show that he acted with a culpable mental state. Appellant also contends that the trial court erred when it denied his motion to suppress the statements that he made to the police during the course of custodial interrogations. We hold that appellant's challenge to the sufficiency of the evidence was not preserved for appellate review because he failed to renew his motion for directed verdict after the prosecution presented rebuttal evidence, pursuant to Rule 33.1 of the Arkansas Rules of Criminal

Procedure. We also hold that the trial court did not err when it denied his motion to suppress the custodial statements because appellant agreed to talk to the police before any deceptive police conduct occurred, and because the trial court's ruling that appellant knowingly and intelligently waived his right to remain silent was not clearly erroneous. Therefore, we affirm.

Debra Barnes died from loss of blood due to wounds inflicted by a bullet that, according to the testimony of an associate medical examiner during the trial, was fired from a black-powder pistol. That bullet first struck her leg, entered the left side of her body, and then exited the mid-breast area of her body. Appellant lived in the apartment where Barnes was shot, and he was arrested by the police shortly after they arrived at the shooting scene. Appellant claimed that the pistol fell from a piece of furniture and either struck the floor and discharged or discharged when he tried to grab it after it fell. However, he was charged with murder in the first degree, found guilty of murder in the second degree, and sentenced to twenty years imprisonment.

Appellant first challenges the sufficiency of the evidence to support his conviction and alleges that he lacked a culpable mental state because he had been drinking alcohol and taking Valium before the shooting. He moved for a directed verdict at the close of the State's case and renewed his motion for directed verdict at the close of his defense. Both motions were denied, and the State presented rebuttal evidence. Appellant failed to renew his motion for directed verdict after the State presented rebuttal.

Appellant's failure to renew his motion for directed verdict after the State presented rebuttal evidence constituted a waiver of his challenge to the sufficiency of the evidence. Rule 33.1 of the Arkansas Rules of Criminal Procedure (formerly Rule 36.21) expressly requires renewal of a directed verdict motion after rebuttal evidence has been presented, and the rule is strictly interpreted. *Christian v. State*, 318 Ark. 813, 889 S.W.2d 717 (1994); *Bradley v. State*, 41 Ark. App. 205, 849 S.W.2d 8 (1993). Consequently, appellant's challenge to the sufficiency of the evidence regarding his mental state was not preserved for appellate review.

Appellant also contends that the trial court erred by denying his motion to suppress the custodial statements that he made during several interrogations by the police, arguing that police deception rendered his statements involuntary. Officer David Corley testified that after appellant was arrested and placed in his patrol car, at approximately 5:00 a.m. on October 21, 1994, he informed appellant about his right to remain silent, right to speak with an attorney before and during any questioning, and right to stop answering questions at any time after he decided to answer. Two hours later, Detective Larry Norman of the Fayetteville Police Department interviewed appellant at the police department. Norman testified that he read appellant his rights, and that appellant signed a waiver-of-rights form before Norman conducted a tape-recorded interview. According to Norman's testimony during the hearing on appellant's motion to suppress his custodial statements, appellant was responsive to questions during the interview.

Detective Tracey Risley testified at the suppression hearing that he began interviewing appellant at approximately 9:20 a.m. on October 21, 1994, after Norman had already interviewed him for two hours. Risley did not have appellant sign another rights form, but testified that he reviewed the rights form that Norman had already covered. Risley testified that appellant agreed to talk and gave "a somewhat detailed statement" during that interview and indicated that he understood his rights. Risley also testified that appellant specifically asked about the welfare of the shooting victim. Although Risley knew that the victim had died, he testified that he told appellant that he did not know her welfare. Risley testified that he did so out of concern that appellant would have immediately stopped the interview if he learned that the victim had died, and Risley described his deception as "just one of my investigative techniques." Appellant was only informed of the victim's death after Risley interviewed him.

Detective Norman conducted a third interview at 4:34 p.m. on October 21, 1994, and appellant executed a second rights form in connection with that interview. Norman told appellant that there were discrepancies between his previous statements and the physical evidence, and appellant requested an attorney during that interview.

[redacted] Appellant contends that his Fifth Amendment right to be free from self-incrimination was violated when the police intentionally gave him false information in response to his repeated inquiries concerning the welfare of the shooting victim. His contention requires that we decide whether he made a free choice, uncoerced by the police, to waive his Fifth Amendment right to be free from self-incrimination; if so, we must also determine whether appellant's waiver of his right to be free from self-incrimination was made intelligently and knowingly. *Bryant v. State*, 314 Ark. 130, 862 S.W.2d 215 (1993). On appeal, an independent determination about the validity of custodial statements is made based on the totality of the circumstances, and there is no reversal unless the trial court's determination is against the preponderance of the evidence. Whether a defendant made a valid waiver under the circumstances is a question of fact for the trial court to resolve. *Drymon v. State*, 316 Ark. 799, 875 S.W.2d 73 (1994).

[redacted] Although appellant does not claim that his custodial statements resulted from intimidation or coercion by the police, he alleges that the police practiced deception by deliberately withholding information from him concerning the victim's welfare, and by consciously misrepresenting that they did not know her status when, in fact, they knew that she had died. However, appellant had already been advised of his rights, had agreed to talk with the police, and had signed a waiver-of-rights from before the police lied to him about the victim's welfare. When appellant agreed to talk with the police, he had already been told that the police could and would use anything that he said against him. Under the totality-of-the-evidence standard of review applied to challenges to trial court decisions that deny motions to suppress custodial statements, we hold that the trial judge's denial of appellant's suppression motion based on a finding that the statements were made voluntarily was not against the preponderance of the evidence.

Appellant also argues that the trial court erred when it held that he knowingly and intelligently waived his Fifth Amendment right to be free from self-incrimination. This argument is based on appellant's claim that he lacked full awareness of the nature of

that right, and because he was allegedly intoxicated due to having consumed alcohol and taken Valium. Appellant maintains that he was impaired on account of that intoxication when the police arrested him, when they spoke with him about his rights, and when they interrogated him.

However, Officer Corley, Detective Norman, and Detective Risley testified that appellant appeared to understand what was said to him and did not slur his speech. Appellant signed two rights forms in which he indicated that he understood his rights and did not request an attorney until Norman told him that there were discrepancies between his custodial statements and the physical evidence. Although there was proof that appellant smelled of intoxicants and had bloodshot eyes when he was arrested and when Corley interviewed him, it was the trial court's function to weigh the conflicting evidence, resolve credibility questions, and decide whether appellant made a knowing and intelligent waiver of his rights. Based on our review of the record under the totality-of-the-evidence standard, we hold that the trial court's decision on this question was not clearly erroneous.

Affirmed.

JENNINGS, J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I write separately to emphasize that our decision to affirm the trial court's ruling on appellant's suppression motion does not obligate us to condone the deceptive practices that Detective Risley casually termed "just one of my investigative techniques." The police have no greater justification for lying than anybody else. They owe a duty to society to be truthful and honest, especially when gathering and processing information that society will use in deciding whether to prosecute a person for criminal conduct. The criminal justice system is not served if deceit is the standard operating practice of the agency trusted to ferret out crime and present evidence of criminal activity at trials.

Our system of adversarial justice is built on the belief that the truthfulness of evidence is integrally related to the trustworthiness of the process by which evidence is obtained. As long as we con-

tinue to apply the "totality-of-the-circumstances" standard in reviewing trial court denials of motions to suppress evidence, judges must consider the trustworthiness of the evidence presented by the police and the circumstances related to the evidence. Currently, the law requires that in order for a defendant's incriminating statement to be declared involuntary due to police deception, the statement must be induced by the deceit. This, however, does not mean that police falsehoods within the context of custodial interrogations are otherwise meaningless.

Law enforcement agencies and the investigators who present testimony in criminal proceedings must realize that a reputation for distorting the truth, hiding the truth, and deliberately falsifying information gained from a criminal investigation and interrogation lowers public confidence in the integrity of the police and heightens distrust in the evidence they present. If lying to suspects is a common investigative practice of the Fayetteville Police Department or one of its detectives, then that practice and policy of deliberate deception is a factor that trial courts should consider. This is especially true when weighing the credibility of police witnesses on a wide variety of issues including whether the police have reasonable suspicion for making investigatory stops; whether they have actually informed persons of their right to remain silent, obtain counsel, and halt questioning; as well as whether the police have been truthful concerning the handling of physical evidence. Also, appellate judges ought to consider evidence of police deceit along with the rest of the circumstances when we review trial court decisions to deny motions to suppress evidence. Otherwise, the police will have a "free-lie zone" within which they may conduct interrogations in the hope of obtaining incriminating information.

Some may view my concern for police integrity and my disdain for police deceit during criminal investigations out of place; however, the impact of the revelations concerning Detective Mark Fuhrman of the Los Angeles Police Department during the criminal trial of O.J. Simpson proves my point. In this case, Detective Risley appears to believe that lying to suspects during the course of custodial interrogations is both appropriate and worthwhile. He acknowledged that he lied to appellant about the victim's welfare out of concern that appellant would exercise his constitutional

right to remain silent if he knew that the victim had died, as if appellant's freedom to remain silent under the Fifth Amendment somehow justified lying. Risley termed lying to suspects "one of my investigative techniques," thereby admitting that it is part of his investigative protocol. If Risley and the Fayetteville Police Department consider lying an acceptable investigative technique to produce incriminating information upon which to base charges, is there any reason to believe that they are truthful in other aspects of criminal investigation? Is Risley more likely to be truthful when testifying during trials based on the evidence he claims to have uncovered than he would be in investigating leads?

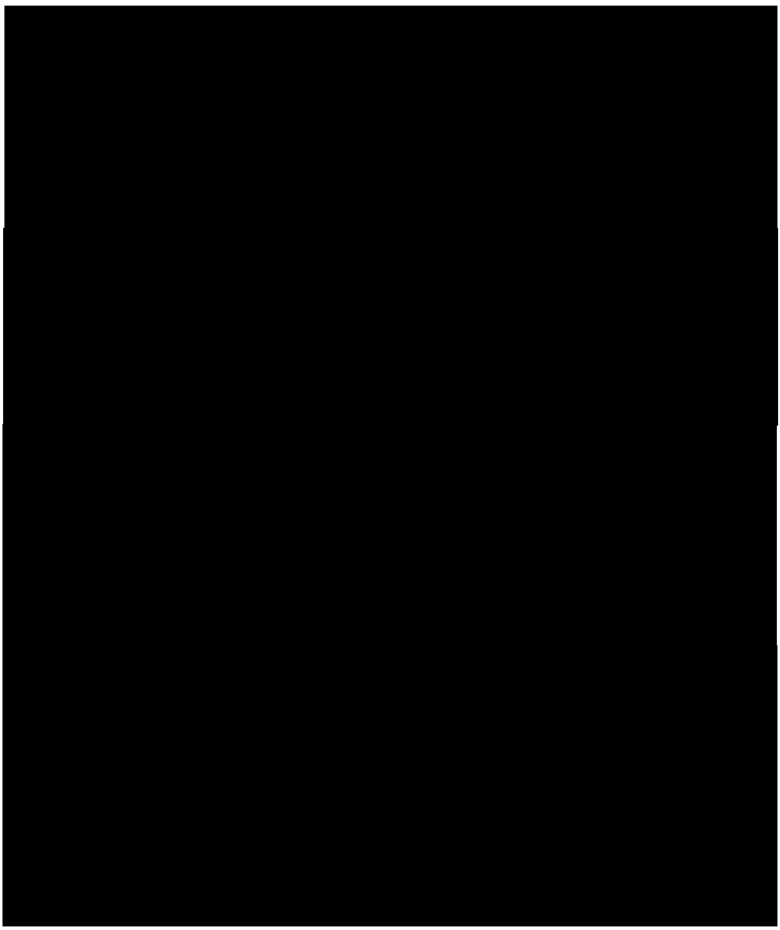
If the police want trial and appellate judges to trust their integrity and honesty when they testify about the voluntariness of custodial interrogations, then they must be truthful in their dealings with suspects and respect their constitutional rights during custodial interrogations. If they insist on lying as standard operating procedure, trial and appellate courts must consider that propensity when performing the judicial functions of weighing credibility and assessing the circumstances surrounding the voluntariness of custodial statements.

The virtue of our criminal justice system results from our conviction that dedication to truth does not require us to devalue fundamental liberties such as the freedom to remain silent. If we belittle that value, criminal prosecutions will deteriorate to mere legal games decided by the side most successful in deceit, rather than determinations about whether the proof that the prosecution offers on criminal charges is true.

Jerry Sam MACKEY *v.* STATE of Arkansas

CA CR 96-309 939 S.W.2d 851

Court of Appeals of Arkansas
Divisions III and II
Opinion delivered March 12, 1997



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

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

OLLY NEAL, Judge. After an August 14, 1995, bench trial, appellant Jerry Sam Mackey was found guilty of the offense of residential burglary in violation of Ark. Code Ann. § 5-39-201(a)(2) (Repl. 1993) and being an habitual offender under Ark. Code Ann. § 5-4-501 (Repl. 1995). Mr. Mackey now appeals from the September 12, 1995, judgment of the Pulaski County Circuit Court which reflected that he was sentenced as an habitual offender, pursuant to Ark. Code Ann. § 5-4-501. Mr. Mackey was sentenced to a 108-month term of imprisonment in the Arkansas Department of Correction. The evidence supporting appellant's conviction is not in dispute, and the sufficiency of the evidence to sustain the conviction is not challenged on appeal. Mr. Mackey challenges only his sentence on appeal, maintaining

that the State's evidence that he had been convicted of three prior felonies was insufficient to justify the court's decision to sentence him as an habitual offender.

The State, citing *Fellows v. State*, 309 Ark. 545, 828 S.W.2d 847 (1992), argues that appellant's sufficiency argument was not properly preserved for our review, and that as a result, we are precluded from addressing the merits of the issue on appeal. It is undisputed that appellant failed to object to the insufficiency of the evidence to prove his habitual status at trial.

The *Fellows* case is one of a line of cases following the supreme court's holding in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). In *Wicks*, an appeal from a jury verdict finding Wicks guilty of two counts of rape, the supreme court addressed two of Wicks's arguments, neither of which was supported by a contemporaneous objection at trial. In discussing the deficiency, the court first noted the general, well-established rule that failure to object to an alleged error at trial results in waiver of the argument on appeal. The court then noted four exclusive exceptions to the rule: 1) when the death penalty is sought by the State and the court fails to notify the jury of matters essential to consideration of the death penalty; 2) where the trial judge commits error of which defendant's counsel has no knowledge or opportunity to object; 3) possibly where the trial court is derelict in its duty to intervene without objection to correct a serious error by admonition or order of mistrial; and 4) possibly where the asserted error is one "affecting a substantial right."

[redacted] We note from the outset that while *Wicks* and its progeny all were appeals from jury verdicts, the current appeal is from a bench trial; the procedural requirements are different. One such difference was clarified recently in *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995). The supreme court held in *Strickland* that at bench trials, no directed-verdict motion based on the sufficiency of the evidence need be made, as such would be "superfluous"; "the judge would only be directing his own verdict." The court stated:

> Our supposition in the *Igwe* case was that a Trial Court, sitting as a trier of fact, would be sufficiently aware of the evidence and the

> elements of the crime that no such motion would be necessary, and that is why our rules do not require the motion to dismiss in non-jury-trial cases. We adhere to that supposition today.

Id. at 318.

[redacted] Because the supreme court has essentially relieved trial counsel of the duty to apprise the trial court of deficiencies in the evidence, including missing elements of proof, it has concomitantly placed the burden upon trial judges to "step in" and order dismissal or other appropriate remedy where the evidence is insufficient. Here the court should have directed the State to produce evidence beyond a reasonable doubt that appellant had been convicted of three prior felonies as such was an element of the allegations contained in the information.

[redacted] The argument has been made that appellant has misclassified his argument as one of the insufficiency of the evidence when it should really be countenanced as a challenge to an illegal sentence. That argument has no merit. First of all, our bifurcation system created two separate and distinct phases of a criminal trial: guilt and punishment. Here, the only evidence of appellant's priors was presented during the State's case in chief, in an attempt to prove the habitual element; no certification of priors was entered or discussed at sentencing. Secondly, while being an habitual offender is not a separate offense, it is an enhancement provision that requires specific elements of proof that the record does not reflect were introduced in this case. Both the information by which he was charged and the judgment and commitment order refer to appellant's habitual status under § 5-4-501, *not* § 16-90-803 (Supp. 1995). The only "proof" that appellant had prior convictions was the State's contention "we have certification of defendant's priors." Because a prosecutor's statements are not evidence, there is nothing in the record that justifies the court's finding that appellant should be sentenced as an habitual. *See Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992); *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991). Although it was enacted at a later date, § 16-90-803 contains no repealing clause, and does not conflict with § 5-4-501; the range of sentencing is essentially the same under both statutes. Accordingly, the State has the option of alleging specific habitual status in the information or

simply charging the underlying offense. Under the grid, a convicted felon's criminal history is automatically considered and applied in compiling a sentence. The record here contains neither a copy nor the original presentence report and reflects that the State's only attempt to prove prior felony convictions was made during the *guilt phase* of trial. Accordingly, the State's failure to provide proof of appellant's priors during the sentencing phase requires reversal of the court's finding that appellant was an habitual offender, and remand for resentencing.

Reversed and remanded for resentencing.

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

ROGERS and PITTMAN, JJ., dissent.

JUDITH ROGERS, Judge, dissenting. The appellant in this case was found guilty in a bench trial of residential burglary. The trial court passed the case for sentencing, and after a subsequent hearing appellant was sentenced by the trial court to a term of 108 months in the Arkansas Department of Correction. In this appeal, appellant does not challenge his conviction. Instead, he claims error only with regard to the sentence he received, arguing that the trial court erred in concluding that a prior conviction for theft by receiving was a felony and not a misdemeanor conviction. I must respectfully dissent from this court's reversal on this point primarily because the majority erroneously concludes that this issue is preserved for appeal.

Although not fully understood by the majority, the trial court in this instance sentenced appellant, utilizing a presentence report, pursuant to the sentencing guidelines which are found at Ark. Code Ann. §§ 16-90-801—16-90-804 (Supp. 1995) and the sentencing grid adopted by the Arkansas Sentencing Commission. Arkansas Code Annotated § 16-90-803(a)(1) (Supp. 1995) provides in relevant part that:

> When a person charged with a felony . . . is found guilty in a trial before the judge . . . sentencing shall follow the procedures provided in this chapter.

Arkansas Code Annotated § 5-4-102 (Repl. 1993) provides:

> (a) If punishment is fixed by the court, the court may order a presentence investigation before imposing sentence.
>
> (d) Before imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. Sources of Confidential information need not be disclosed.

At the sentencing hearing, the following discussion occurred among the court, defense counsel, and the prosecuting attorney concerning the information contained in the presentence investigative report and its application to presumptive standards and the grid:

> Defense Counsel: The only mistake we really saw with the presentence is that Miss Byrd counted the misdemeanors that were more than ten years old. So, I think the State will agree with me that it should be three point two five as opposed to a four.
>
> Prosecuting Attorney: I would have to agree with that, your Honor. He does have numerous misdemeanors but some of those were from, you know, the very late Sixties, mid-Seventies. Under the law, those cannot be counted against the sentencing grid.
>
> Defense Counsel: So, that's going to make it, if you follow the grid, seriousness level six, score of three. Going to make it a hundred and eight months in the Arkansas Department of Correction. I surely understand Miss Wells and the neighborhood watch and their concern. All I'd ask is that it was a property crime, nothing actually taken. I believe a window was going to have to be replaced in the door. I don't believe the door was busted. I believe it was the window that was actually busted. No injuries to anyone. It did happen a year six months, year seven months ago. He has gotten some rehab treatment. I'd ask the court to depart down from the hundred and eight months.
>
> The Court: The Court's going to stick to the grid. That's a hundred and eight months.

As is shown by this discussion, appellant failed to raise any objection to a theft by receiving conviction being considered by the court in any capacity. In fact, appellant's counsel himself agreed

that the presumptive sentence amounted to 108 months after excluding certain outdated misdemeanor convictions. Appellant was thus afforded the opportunity to controvert the information contained in the presentence report and should not now be heard to complain for the first time on appeal. *Noland v. State*, 265 Ark. 764, 580 S.W.2d 953 (1979); *see also Nash v. State*, 267 Ark. 870, 591 S.W.2d 670 (1979).

The majority, however, concludes that error can be found even in the absence of an appropriate objection in the trial court based on the supreme court's decision in *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995). In *Strickland*, the court made a distinction between the method of preserving the issue of the sufficiency of the evidence in bench and jury trials. The court held that, unlike a jury trial, it is not necessary to move for a directed verdict in a bench trial in order to challenge on appeal the sufficiency of the evidence "to convict." The majority in this case reasons that, because appellant was tried by the court, he is excused from the contemporaneous objection rule. The decision in *Strickland*, however, was based on the court's interpretation of Rule 36.21, now numbered as Rule 33.1, of the Rules of Criminal Procedure, which by its very terms applies only to the question of the sufficiency of the evidence during the guilt phase of trial. The issue in this case, of course, involves the sentencing phase of trial. Therefore, any reliance on the decision in *Strickland* is utterly and completely misplaced, and for this court to interpret Rule 33.1 so as to apply to the sentencing phase of trial is actually beyond this court's jurisdiction. Ark. R. Sup. Ct. 1-2(17)(vi). But more to the point, the supreme court has expressly held in two cases, both of which were appeals from bench trials, that a contemporaneous objection is required in order to preserve for appeal questions concerning evidence of prior convictions. *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993); *Withers v. State*, 308 Ark. 507, 825 S.W.2d 819 (1992). In so holding, the court overruled our decision in *Addington v. State*, 2 Ark. App. 7, 616 S.W.2d 742 (1981), where we had determined that the absence of an objection was no impediment to our review of the issue. Here, this court falls into the same error as was made in *Addington*, despite clear precedent established by the supreme court.

Moreover, the presentence report is not included in the record, and thus this court cannot say with any degree of certainty that such a conviction was even utilized by the court in making its determination. It is well settled that the appellant bears the burden to bring up a record sufficient to demonstrate error. *Irvin v. State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989).

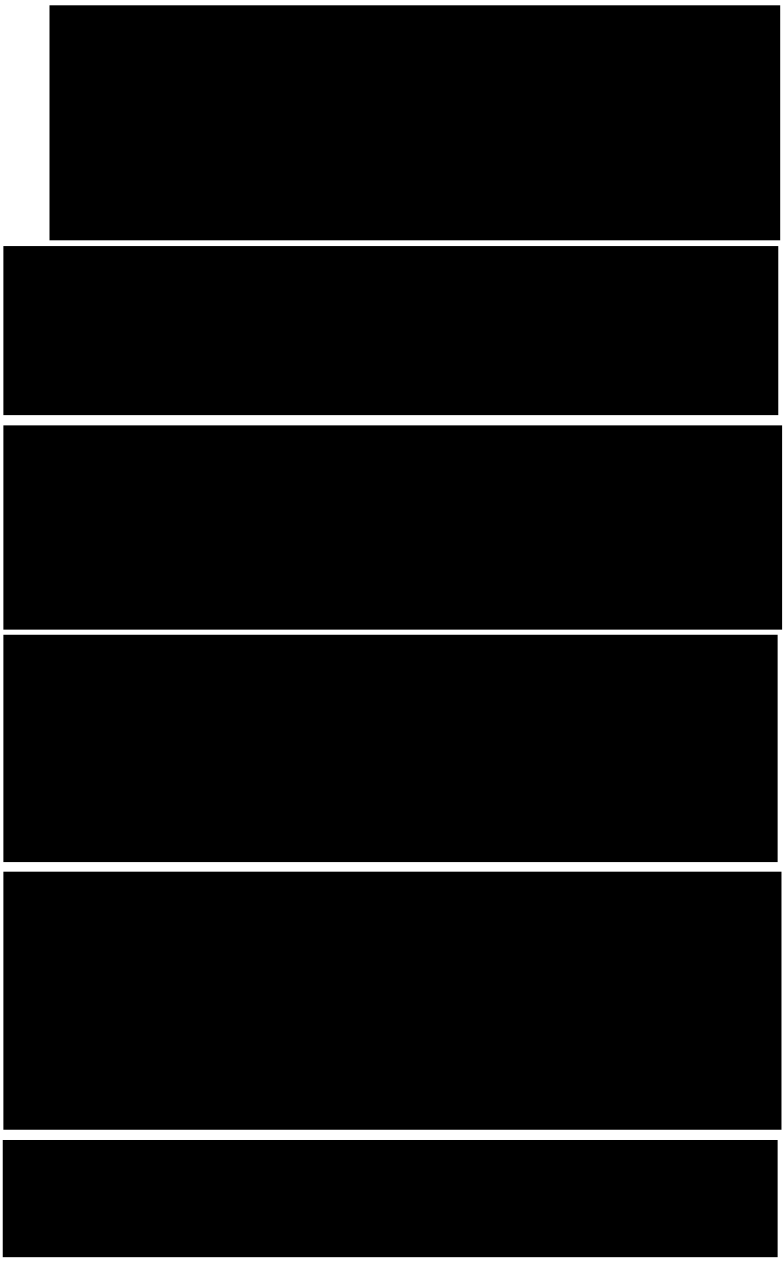
Since appellant did not call this matter to the attention of the trial court and since there is nothing in this record to suggest that any error occurred, I cannot say that the trial court erred in calculating the appellant's sentence.

I am authorized to state that Judge Pittman joins in this dissent.

Lillian HOWARD *v.* Willow CRAMLET

CA 96-445 939 S.W.2d 858

Court of Appeals of Arkansas
Division I
Opinion delivered March 19, 1997



[redacted]

Billy J. Allred, for appellant.

William P. Anderson, for appellee.

JOHN MAUZY PITTMAN, Judge. This is a quiet-title action. Appellant, Lillian Howard, appeals from an order of the Madison County Chancery Court finding that she failed to establish an easement or right-of-way across appellee's, Willow Cramlet's, property. Appellant argues on appeal that this ruling was error. We agree and reverse and remand for further proceedings consistent with this opinion.

Wayne and Marlene Keck owned 320 acres of land. On April 20, 1992, they conveyed 199.57 of the 320 acres to appellee by warranty deed with the following reservation: "Less and except a right of way 30 feet in width, for the purposes of ingress and egress over the above described property for access to the adjacent property to the west. . . ." The reservation across appellee's servient estate provided ingress and egress to the Kecks' remaining lands.

On May 15, 1992, the Kecks conveyed a portion of their lands to appellant. On July 27, 1992, Marlene Keck, the surviving spouse of Wayne Keck, conveyed her right-of-way across appellee's 199.57 acre tract to appellant. That instrument stated, "This right of way is more specifically described as being 30 feet in width proceeding across the above described property [appellee's lands] to the property of the grantee [appellant] described below."

In 1993, a dispute arose when appellee blocked the roadway appellant was using to access appellant's property. Thereafter, appellee brought suit to quiet title contending that appellant did not have an easement or right-of-way across appellee's property.

The court held that appellant's deed did not contain a metes and bounds description and was too vague for enforcement. It found that there was no easement retained by the Kecks in their conveyance to appellee or by Marlene Keck's conveyance of the easement or right-of-way to appellant.

In *Hatfield v. Arkansas Western Gas Co.*, 5 Ark. App. 26, 28-29, 632 S.W.2d 238, 240 (1982), we held:

> An easement or right-of-way is an interest in land and is conveyed by deed the same as land is conveyed. However, it is not essential to the validity of the grant of an easement that it be described by metes and bounds or by figures giving definite dimensions of the easement. The grant of an easement is valid when it designates the easement or right-of-way as such and describes the lands which are made servient to the easement. While the owner of the servient estate has the right to limit the location of an easement, where he fails to do so it may be selected by the grantee so long as his selection is a reasonable one taking into consideration the interest and convenience of both estates. Where the grant of a right-of-way is not bounded in the deed it is to be bounded by lines of reasonable enjoyment. *Fulcher v. Dierks Lumber & Coal Co.*, 164 Ark. 261, 261 S.W.2d 645 (1924). The court in reaching such determination will consider the interest and convenience of both estates, and the grantor will have the right to the use of the easement, except insofar as the limitation of that use is essential to the reasonable enjoyment of the easement. *Drainage District No. 16, Mississippi County v. Holly*, 213 Ark. 889, 214 S.W.2d 224 (1948), 25 Am. Jur. 2d *Easements and Licenses* § 78.

A primary characteristic of an easement is that its burdens fall upon the possessor of the land from which it issues. This characteristic is expressed in the statement that the land constitutes a servient tenement and the easement a dominant tenement. RESTATEMENT OF PROPERTY § 450 comment a (1944).

The rule in this state is that the owner of an easement may make use of the easement compatible with the authorized use so long as the use is reasonable in light of all facts and circumstances of the case. The owner of the servient tenement may make any use thereof that is consistent with, or not calculated to interfere with, the exercise of the easement granted. 3 Tiffany,

LAW OF REAL PROPERTY, § 811 (3rd ed. 1939); *see Natural Gas Pipeline Company of America v. Cox*, 490 F.Supp. 452 (E.D. Ark. 1980).

The location of the undefined right-of-way must be reasonable to both the dominant and servient estates, considering the condition of the place, the purposes for which it was intended, and the acts of the grantee. *Carroll Electric Coop. Corp. v. Benson*, 312 Ark. 183, 848 S.W.2d 413 (1993); *Massee v. Schiller*, 243 Ark. 572, 420 S.W.2d 839 (1967). The owner of the servient estate has the right to delimit the right-of-way, but if he or she fails to do so, the holder of the dominant estate may exercise this right, but in either case the location must be reasonable. *Bradley v. Arkansas-Louisiana Gas Co.*, 280 Ark. 492, 659 S.W.2d 180 (1983); *Hatfield, supra*; *see Carroll Electric, supra.*

The findings of a chancellor will not be disturbed on appeal unless they are found to be clearly erroneous or clearly against the preponderance of the evidence. *Fields v. Ginger*, 54 Ark. App. 216, 925 S.W.2d 794 (1996). From our *de novo* review, we conclude that the chancellor's finding that appellant failed to establish an easement over the lands of appellee is clearly erroneous. In this case, the grant of the easement is valid since it designates the right-of-way and describes the lands that are made servient to the easement. *Hatfield, supra*; *see Bradley, supra*; *Fulcher v. Dierks Lumber & Coal Co.*, 164 Ark. 261, 261 S.W.2d 645 (1924).

Appellant filed a counterclaim seeking an injunction and damages for appellee's obstruction of the road that appellant was using to access her property. Appellant testified that she incurred $560.00 for the cost of bulldozing appellee's obstructions. The owner of a servient estate may not erect a barrier that unreasonably interferes with the right of passage by the easement owner. *Wilson v. Brown*, 320 Ark. 240, 897 S.W.2d 546 (1995). Because the court found no easement, the issue of damages was not reached. The decree is reversed, and the case is remanded for the court to consider the issue of damages and to enter an order consistent with this opinion. The order should locate the easement by description.

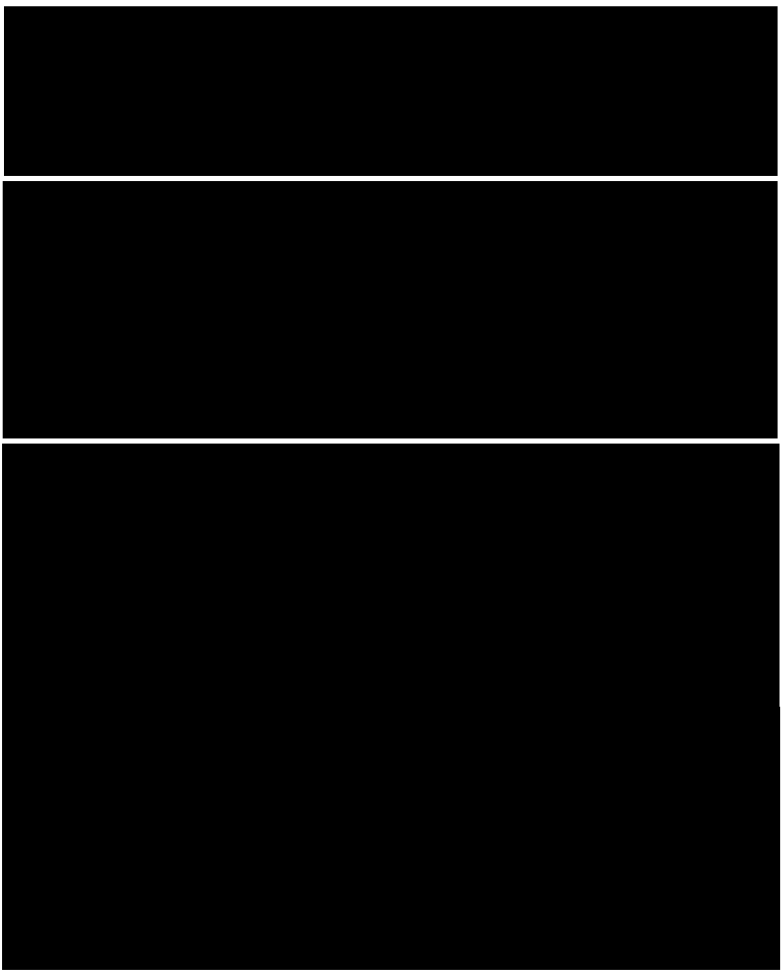
Reversed and remanded.

ROGERS and CRABTREE, JJ., agree.

Garry Wayne YELL *v.* Elizabeth Faye YELL

CA 96-515 939 S.W.2d 860

Court of Appeals of Arkansas
Division II
Opinion delivered March 19, 1997



[redacted]

Xollie Duncan, for appellant.

No response.

ANDREE LAYTON ROAF, Judge. Garry Wayne Yell appeals from an order of the chancery court which awarded Elizabeth Faye Yell child support retroactive to 1991, pursuant to a petition to modify support which she filed in 1994. The chancellor based his award of back support upon a common-law duty to support. We agree that the chancellor abused his discretion in imposing retroactive support, and reverse.

Garry Wayne Yell and Elizabeth Faye Yell were divorced in 1982. The decree awarded Elizabeth custody of the Yells' only child, Ty Logan Yell, and ordered Garry to pay $100 per month for child support. On August 10, 1988, the court modified the divorce decree, pursuant to an agreement between the Yells made with benefit of counsel, whereby Elizabeth would retain primary custody, but Garry's visitation was significantly expanded to the extent that a shared-custody arrangement effectively existed. The order also terminated Garry's support obligation.

In March of 1991, Ty began living with Elizabeth full time, but continued to spend time with Garry on a regular basis. Garry contributed toward his son's support, albeit on an informal basis. On June 14, 1994, Elizabeth filed a petition to modify the August 10, 1988, order to again start receiving child support. In July 1994, Garry estimated the chart amount of support he would be liable for and began to voluntarily pay $250 per month. Elizabeth later amended her petition to also seek retroactive support back to the time that she resumed full custody in 1991.

After a hearing, the chancellor entered an order on July 12, 1995, finding that a private agreement between the Yells ended the shared-custody arrangement approximately four years prior to

Elizabeth's June 14, 1994, filing of a petition to modify the August 10, 1988, order. Pursuant to this finding, the court charged Garry with a common-law duty of support and assessed him $172 per month for the years 1991, 1992, and 1993, for a total of $6,192.00, less a credit of $4,031.52 based on various receipts and records provided by Garry. Finally, the court ordered Garry to continue to pay the $250 per month in regular support that he began paying voluntarily in July 1994. Garry appeals from the order granting a judgment for support prior to the June 14, 1994, filing of the petition to modify.

Garry raises a single issue: that the trial court erred in retroactively imposing a financial obligation for support prior to the date of filing of the petition for modification. Garry contends that Arkansas law does not allow a chancery court to make retroactive changes in a person's child-support obligation. He relies upon *Reigler v. Reigler*, 246 Ark. 434, 438 S.W.2d 468 (1969), as support for this proposition. He further contends that any change to an existing order must be made by a court, and that the agreement to end the shared-custody arrangement was not effective in modifying the 1988 order. Garry submits *Sheffield v. Strickland*, 268 Ark. 1148, 599 S.W.2d 422 (1980), as his authority. We agree with both contentions.

It is well settled that a parent has a legal duty to support a minor child regardless of the existence of a support order. *Pender v. McKee*, 266 Ark. 18, 582 S.W.2d 924 (1979); *Nason v. State*, 55 Ark. App. 164, 934 S.W.2d 228 (1996); *Dangelo v. Neil*, 10 Ark. App. 119, 661 S.W.2d 448 (1983). Moreover, retroactive support is not illegal, and is often awarded when an initial support order is entered. *See, e.g., Nason, supra*; *Pardon v. Pardon*, 30 Ark. App. 91, 782 S.W.2d 379 (1990). *See also Wilder v. Garner*, 235 Ark. 400, 360 S.W. 2d 192 (1962) (mother awarded back child support where divorce decree granting custody made no provision for support).

However, retroactive modification of a court-ordered child-support obligation may only be assessed from the time that a petition for modification is filed. Ark. Code Ann. § 9-14-234 (Supp. 1995); *Grable v. Grable*, 307 Ark. 410, 821 S.W.2d 21

(1991); *Heflin v. Bell*, 52 Ark. App. 201, 916 S.W.2d 769 (1996). Additionally, it is well settled that a support order by a court of competent jurisdiction remains in force until modified by a subsequent decree, or in limited situations by operation of law. *Burnett v. Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993); *Laroe v. Laroe*, 48 Ark. App. 192, 893 S.W.2d 344 (1995).

A chancellor has discretion to set the amount of child support, and his findings in this area will not be disturbed absent an abuse of discretion. *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996); *Irvin v. Irvin*, 47 Ark. App. 48, 883 S.W.2d 862 (1994). Absent a specific finding of fraud in procuring an existing support decree, however, it is an abuse of discretion to impose a retroactive modification of a support order beyond the filing date of a petition to modify. *Beavers v. Vaughn*, 41 Ark. App. 96, 849 S.W.2d 6 (1993).

In this case, Elizabeth sought modification of an existing court-ordered support provision, i.e., that neither party pay support because of a shared-custody arrangement. Consequently, the cases in which an award of retroactive support has been upheld are inapplicable to the facts of this case, and we hold that the chancellor abused his discretion in retroactively modifying Garry's support obligation to embrace a period of time before Elizabeth filed her petition to modify. Because this Court reviews chancery cases de novo on the record, we accordingly find that Garry's support obligation applies only from the filing date of the petition to modify. Because the chancellor allowed a credit in excess of the arrearage which would result, that part of the July 12, 1991, order granting judgment against Garry in the amount of $2,160.48 is reversed.

Reversed.

ROBBINS, C.J., and GRIFFEN, J., agree.