IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
FIFTH DIVISION

ROSEY PERKINS and RHONDA COPPAK,
Individually and as Co-Administratrixes
And Personal Representatives of the
Estate of Martha Bull, Deceased **PLAINTIFFS**

vs. **Case No. 23CV-14-862**

MICHAEL MAGGIO, Individually and
In His Official Capacity; MICHAEL MORTON;
GILBERT BAKER; And JOHN DOES 1-5 **DEFENDANTS**

REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Comes now separate defendant, Michael Morton ("Morton"), and respectfully submits his Reply Brief in Support of Motion for Summary Judgment pursuant to Rule 56 of the Arkansas Rules of Civil Procedure.

I. INTRODUCTION

Plaintiff's response to Morton's motion for summary judgment reads more like a sensationalized short story than a legal brief and is only loosely-based on the facts. As set forth in detail below, plaintiffs' response is a combination of speculation and half-truths that misrepresents testimony and relies on documents that would be inadmissible at trial. "Perhaps it was written for a wider audience."[1]

II. THE UNDISPUTED FACTS SUPPORT SUMMARY JUDGMENT

Plaintiffs have attempted to create a genuine issue of material fact by mischaracterizing testimony and citing to evidence that would be inadmissible at trial. Because plaintiffs have not

---

[1] *Gilmer v. The Walt Disney Co.*, 915 F. Supp. 1001, fn. 8 (W.D. Ark. 1996) (H. Franklin Waters).

created a genuine issue of material fact sufficient to avoid summary judgment, Morton's motion should be granted and plaintiffs' complaint should be dismissed as against him. Specifically, there is no genuine issue of material fact as to the following:

There is no evidence that Morton bribed Maggio.

Plaintiffs assert throughout their response that Morton conspired to bribe Maggio, but their assertion is based on speculation and conjecture. Plaintiffs have not, and cannot, cite to a single piece of admissible evidence that could establish that Morton ever spoke to or communicated with Maggio in any way. The only "evidence" that plaintiffs cite to as proof that Morton was involved in the alleged bribery of Maggio is Maggio's plea agreement.[2]

Maggio's plea agreement is inadmissible hearsay. The law permits the introduction of a statement by a co-conspirator as non-hearsay if the statement was made during the course of, and in furtherance of, the conspiracy. *See* A.R.E. 801(d)(2)(v).

Maggio's statements made in the plea hearing satisfy neither prong of this requirement even if a conspiracy existed, which it did not. Rather, his statements made in his plea agreement, and during his plea hearing, were made on January 9, 2015, which was almost eighteen (18) months after the alleged conspiracy took place. The Arkansas Supreme Court has held that such admissions are too far removed to be admissible as admissions by a co-conspirator. *See Brazel v. State*, 296 Ark. 563, 567, 759 S.W.28 (1988) (attached). Specifically, the Arkansas Supreme

---

[2] "[A] plea, later withdrawn, of guilty or admission to the charge, . . . or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer." *See* Ark. R. Evid. 410. As plaintiffs know, Maggio has attempted to withdraw his plea and, although the district court rejected his request, he is appealing that decision to the United States Court of Appeals for the Eighth Circuit. Thus, the plea agreement would likely not be admissible as against Maggio under Rule 410 and, therefore, should not be admitted as evidence as against Morton.

Court held in *Brazel* that a co-conspirator's statement made almost four (4) weeks after the crime was committed was too far removed and "should not have been admitted." *Id.*, 296 Ark. at 567.

Therefore, under *Brazel*, Maggio's statements in his plea agreement and at the plea hearing are too far removed from the alleged conspiracy to be admissible as admissions by a co-conspirator. If Maggio's plea agreement is inadmissible hearsay, then the statements contained therein cannot be considered in determining whether a genuine issue of material fact exists for trial as such statements would not be admissible at trial to prove plaintiffs' case. *See Mercy Health Sys. of NWA v. Bicak*, 2011 Ark. App. 341, 383 S.W. 3d 869, 875 (2011).[3] Therefore, the Court should hold that Maggio's plea agreement and the statements made at his plea hearing are inadmissible hearsay and cannot be considered as evidence to create a genuine issue of material fact sufficient to withstand summary judgment.

Without Maggio's plea agreement, plaintiffs have offered no evidence that Morton bribed Maggio -- other than speculation based on the coincidence of the timing of Morton's checks to the PACs and the remittitur in the *Bull* case. As courts have recognized, however, "[p]arallel action is not, by itself, sufficient to prove the existence of a conspiracy, such behavior could be the result of 'coincidence, independent responses to common stimuli, or mere interdependence unaided by an advanced understanding among the parties.'" *U.S. v. Apple, Inc.* 791 F.3d 290, 315 (2nd Cir. 2015) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 n. 4 (2007) (internal quotation marks and citation omitted)).

In addition to relying on inadmissible evidence, plaintiffs have mischaracterized Morton's testimony in an effort to create a genuine issue of material fact, *see infra.*

---

[3] There are also other documents that plaintiffs have relied upon to support summary judgment that are clearly inadmissible hearsay, *e.g.*, The Ethics Commission Report (Exhibit O) and the content of articles published by Arkansas Online (Exhibit Y).

Morton did not know about the 180-day judicial window.

Prior to 2013, Morton had been giving to judicial campaigns for many years. (*See* Morton's Depo. at 67-68). Plaintiffs assert, as fact, that Morton acknowledged in his deposition that one of the reasons that Morton wrote checks to the PACs, as opposed to Maggio directly, was to avoid the judicial window for solicitations. To support such fact, plaintiffs cite to Morton's deposition testimony where he stated, "if he had it in the PACs, we could sit there and wait until the judicial window opened." (Plaintiffs' Response at 3-4 (*citing* Morton's Depo at 147)).

The truth is, as Morton testified in his deposition, he had no idea that there was a 180-day judicial window at the time he was meeting with Baker and did not know why Baker wanted him to make his contributions into the PACs. (*See* Morton's Depo. at 68-69). Morton only speculated at his deposition (based on what he has learned since that time) that perhaps Baker wanted the contributions made to PACs so Baker could wait until the judicial window opened. (*See* Morton's Depo. at 147). For plaintiffs to assert as fact that Morton was attempting to avoid the 180-day judicial window is disingenuous and directly contrary to Morton's cited deposition testimony.

Morton did not agree to contribute to Maggio's campaign during the *Bull* trial.

Plaintiffs assert, as fact, that Baker *solicited money* from Morton for Maggio's benefit during the *Bull* trial and on the night the verdict was handed down. (*See* Plainiffs' Response at 5 (*citing* Morton's Depo. at 38-39) (emphasis added)). Specifically, plaintiffs assert that on the night of the *Bull* verdict (May 16, 2013), Morton called Baker to discuss tort reform, which is true. Plaintiffs go on to state, however, that after Baker's discussions with Morton, "Baker informed Maggio that the contributions were secured." (*See* Plaintiff's Response at 6 (*citing* Maggio's Plea Agreement)).

The truth is, as Morton testified, that during the *Bull* trial Morton saw Baker at Brave New Restaurant during a meeting for the Arkansas Hospital Association and, during a chance encounter, Baker asked Morton if Morton would "support Judge Maggio for appeals court judge." (*See* Morton's Depo. at 38-42, 48-57). While the parties might have understood that "support" for a candidate generally included financial support, there was no discussion of, much less agreement to, any specific campaign contribution. Morton also testified that Baker called him the night of the verdict, but when Morton was asked if Baker mentioned talking to Maggio, Morton said "Not – not that I can recall." (*See id.*). Thus, the deposition testimony that plaintiffs cite refutes, not supports, the notion that Baker was soliciting money from Morton during the *Bull* trial and on the night the verdict came down.

Morton never knew Baker told Maggio that "your first 50K is on the way."

Plaintiffs allege that Baker told Maggio via text on June 29, 2013, that "your first 50K is on the way" and that Maggio "understood this to mean the money from Morton." Plaintiffs cite to Morton's deposition to support such facts. (*See* Plaintiff's Response at 6) (*citing* Morton's Depo. at 101-03)).

This citation is particularly misleading because Morton actually testified that he had no idea why Baker would make such a statement to Maggio. Specifically, Morton was shown a page from Maggio's plea agreement at his deposition where a text message is referenced in which "Individual B" sent Maggio a text stating "your first 50K is on the way." Morton was asked at his deposition if he knew why Baker would send such a text and he said "No." (Morton's Depo. at 101-03).

Thus, Morton never testified that he authorized or knew of such a statement to Maggio, and the only evidence of such statement is the Maggio plea agreement, which as set forth above is

inadmissible. Baker also stated that he did not recall sending a message to Maggio that said "your first 50K is on the way." (*See* Baker's Depo. at 129-30). Further, Morton testified that he had agreed to make the contributions to the PACs approximately one month before he wrote the checks, or early June 2013. (*See* Morton's Depo. at 64-65). Thus, it makes sense that Morton would have no idea why Baker would send such a text on June 29, 2013, if such a text was sent.

Morton's donation to UCA was not a payback to Baker.

Plaintiffs assert, as fact, that in addition to making contributions to the PACs, Morton also made a contribution to UCA "as a gesture of good-will to Baker for his part in getting Morton's money to Maggio." (*See* Plaintiffs' Response at 6) (*citing* Morton's Depo. at 119-20)). Plaintiffs' citation to Morton's deposition for this citation is dishonest, again, as Morton specifically denied this fact at his deposition. Specifically, Morton was asked the following question at his deposition "can you at least see how some people might think that the check to UCA was Gilbert's payoff for doing this – for being the intermediary to- between you and Maggio?" To which Morton stated "No. . . ."

III. PLAINTIFFS CANNOT PROVE A CLAIM AGAINST MORTON

A. Plaintiffs cannot prove a claim against Morton for abuse of public trust.

Plaintiffs assert that they can prove a claim for abuse of public trust under Arkansas Code Ann. § 5-52-101(a) by showing that "Morton agreed to confer a benefit, *i.e.*, $30,000 in campaign contributions, upon Maggio . . . the receipt of which was compensation or consideration for Maggio's decision . . . to reduce the *Bull* verdict." (*See* Response at 10). In other words, plaintiffs allege a *quid pro quo, i.e.,* $30,000 for a remitttur. The undisputed facts contradict any possible finding of a *quid pro quo.* Specifically:

- On July 8, 2013, Morton wrote checks totaling $30,000 to ten PACs. (*See* Amended Compl. at §§ 26-28; Morton's Depo. at 82, 106-07). Once Morton delivered the contributions to the PACs he could not control when or to whom the funds were disbursed. Although Morton intended for the funds to be disbursed in some part to Maggio at some point in the future, Baker controlled the PACs. (*See* Morton Depo. at 107; Baker Depo. at 147-48). **There is no evidence that Morton made these contributions to the PACs as compensation or consideration for Maggio's decision to remit the *Bull verdict.*** Indeed, the only evidence that plaintiffs cite as evidence of this fact is Maggio's plea agreement, which as set forth above is inadmissible.

- On July 10, 2013, Maggio entered an order in which he reduced the *Bull* judgment from $5.2 million to $1 million and such order was filed on July 11, 2013. (*See* Amended Compl. at §§ 32-33). No money was transferred from Morton to Maggio before or after July 10, 2013. **There is no evidence that Morton offered any benefit to Maggio in return for the remittitur or that Maggio solicited any benefit.** Again, "[p]arallel action is not, by itself, sufficient to prove the existence of a conspiracy. . . ." *U.S. v. Apple, supra.* Plaintiffs must come forward with some admissible evidence that Morton participated in the alleged bribery of Maggio other than the coincidental timing of events.

- In December 2013 and January 2014, the PACs made contributions to Maggio's campaign in the amount of $12,700. (*See* Amended Compl. at ¶ 38). These legal contributions were made months after Maggio's decision to remit the *Bull* judgment and the these contributions cannot, by themselves, be sufficient proof of Morton's agreement to confer a benefit upon Maggio as alleged by plaintiffs.

Thus, the undisputed facts show that Morton relinquished his interest in the $30,000 on July 8, 2013, before Maggio made the decision to grant the remittitur. Further, Maggio made the decision to grant the remittitur and, in fact, granted the remittitur and entered an amended judgment months before any contributions or benefits were conferred to him and/or his campaign. Therefore, there was no *quid pro quo*. Morton did not confer a benefit onto Maggio in return for a decision to remit the *Bull* judgment; and Maggio did not receive a benefit from Morton in return for remitting the *Bull* judgment.

B. Plaintiffs cannot prove a claim under the Arkansas Civil Right Act.

Plaintiffs assert that Morton violated the Arkansas Civil Rights Act, Ark. Code Ann. § 16-123-105, by depriving plaintiffs of their constitutional rights to due process, a fair and impartial tribunal, a jury trial and to obtain redress from wrongs. (*See* Amended Complaint at ¶ 69).

Specifically, plaintiffs allege that Morton conspired with Maggio, who was a state actor, to deprive them of their constitutional rights. To establish this claim, plaintiffs must prove that Morton "willfully participated with [Maggio] and reached a mutual understanding concerning the unlawful objective of a conspiracy." *Dossett v. First State Bank*, 399 F.3d 940, 951 (8th Cir. 2005) (internal citation omitted). Plaintiffs have put forward no evidence that Morton "willfully participated with" or conspired with Maggio. Rather, plaintiffs simply rely on Maggio's plea agreement to prove that a conspiracy existed, which, as set forth above, is inadmissible hearsay.

Indeed, in the only sworn statement that Maggio has ever given (before the Arkansas Ethics Commission), where he actually answered questions about the relevant events, he stated that he never solicited any money for his campaign, he never talked to Baker about receiving any money from any PACs, he never discussed the *Bull* verdict with Baker and he never met with or talked to Morton. (*See* Maggio's Stmt. at 9-18) (attached as Exhibit F to Morton's motion).

Therefore, because plaintiffs cannot prove that Morton willfully participated with Maggio and/or reached a mutual understanding concerning the unlawful objective of a conspiracy, summary judgment must be entered in Morton's favor.

C. Plaintiffs cannot state a claim for civil conspiracy or acting in concert.

First, to prove a claim against Morton for civil conspiracy or acting in concert, plaintiffs must prove that Morton "knowingly entered into a conspiracy" or entered into "a conscious agreement to pursue a common plan or design to commit" an intentional tort. AMI 713 and 714 (2015) (attached). As set forth above, there is no admissible evidence that Morton knowingly entered into a conspiracy with Baker or Maggio or a conscious plan to commit an intentional tort. There is only plaintiffs' speculation and conjecture about the events that transpired. The Arkansas Supreme Court has affirmed a trial court's grant of summary judgment on a civil conspiracy claim when the claim was based on pure conjecture and no proof. *See Chambers v. Stern*, 347 Ark. 395, 406, 64 S.W.3d 737, 744 (2002).

Second, to prove a claim for civil conspiracy or acting in concert plaintiffs must also prove "all of the essential elements necessary to obtain a verdict against [Morton] on the underlying claim of [an intentional tort]." AMI 714; s*ee also* AMI 713 and *Faulkner v. Arkansas Children's Hospital,* 357 Ark. 941,961, 69 S.W.3d 393, 406 (2002). Plaintiffs' response completely ignores this basic premise.

Specifically, to prove a claim for acting in concert, plaintiffs must prove the following:

> First, that (plaintiff) has proved all the essential propositions necessary for a verdict on the claim for ***(state the underlying intentional tort)***;
>
> Second, that (defendant) and (other tortfeasor) entered into a conscious agreement to pursue a common plan or design to commit ***(state the underlying intentional tort)***;

Third, that (defendant) actively took part in the ***(state the underlying intentional tort).***

AMI 713 (2015) (emphasis added).

To prove a claim for civil conspiracy, plaintiffs have the burden of proving the following:

First, that (defendant) and (co-conspirator(s)) knowingly entered into a conspiracy;

Second, that plaintiffs proved all of the essential elements necessary to obtain a verdict against (party/person against whom the underlying intentional tort is asserted) on the underlying claim of ***(state the underlying intentional tort)***;

Third, that one or more of the co-conspirators committed one or more overt acts in furtherance of the alleged conspiracy;

Fourth, that (defendant), in entering in to the conspiracy, had the specific intent to harm (plaintiff);

And fifth, that the conspiracy proximately caused damages to (plaintiff).

AMI 714 (2015) (emphasis added).

Plaintiffs concede that AMI 714 is the proper jury instruction and cite to it in their brief, but rather than cite to the actual elements of AMI 714, plaintiffs have inserted "Arkansas Civil Rights Act" into the second element of the jury instruction where "the underlying intentional tort" is supposed to be stated. A violation of the Arkansas Civil Rights Act is a statutory violation, not an intentional tort, and cannot be used as a basis to bring a civil conspiracy claim or a claim for acting in concert. Indeed, there is no "intent" element in the Arkansas Civil Rights Act and, thus, by definition it cannot be an intentional tort.

Therefore, because plaintiffs cannot state a claim against Morton for civil conspiracy or acting in concert, Morton is entitled to summary judgment on those claims.

D. Plaintiffs cannot collaterally attack the Judgment in *Bull*.

The Arkansas Supreme Court has held that "[j]udgments may not be collaterally attacked unless the judgment is void on the face of the record or the issuing court did not have proper jurisdiction." *Council of Co-Owners for Lakeshore Resort and Yacht Club Horizontal Property Regime v. Glyneu, LLC,* 367 Ark. 397, 405, 240 S.W.3d 600, 607 (2006). Clearly, Maggio had jurisdiction to remit the *Bull* judgment and such remitttur was proper under the facts and circumstances of the case. If there is a question, however, as to whether the remittitur was proper, then the proper course of action for the plaintiffs is pursuant to Rule 60(c) of the Arkansas Rules of Civil Procedure, which sets forth the grounds on which a judgment, other than a default judgment, may be set aside by virtue of a direct attack on the judgment. Specifically, Rule 60(c)(4) provides that a court may set aside a judgment "[f]or misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party." Rule 60(c)(4) has no time limitation. Thus, a motion to set aside a judgment for fraud may be filed at any time.

As set forth above, plaintiffs allege that defendants conspired to corrupt the judicial process by making campaign contributions to Maggio with the intent that Maggio rule favorably on the motion for remittitur in the *Bull* case. In other words, plaintiffs allege that the defendants bribed Maggio and, as a result, the remittitur and resulting judgment entered in *Bull* were obtained through fraud.

The Arkansas Supreme Court has recognized that "there is an adequate legal remedy for a judgment obtained by fraud . . . Arkansas Rules of Civil Procedure 60(b) and (c)(4)." *Wilson v. Wilson*, 939 S.W.2d 287, 289, 327 Ark. 386, 390 (1997) (holding that chancery court had no jurisdiction to vacate an order entered by a probate court and the sole remedy for the plaintiff's was to ask the probate court to set aside the judgment under Rule 60). Thus, even if plaintiffs'

allegations are viewed as true and in the light most favorable to them, their only remedy is a Rule 60 motion to set aside the verdict.

IV. CONCLUSION

For the reasons set forth above, Morton respectfully requests that the Court enter summary judgment in his favor and dismiss plaintiffs' amended complaint as against him.

RESPECTFULLY SUBMITTED BY:

BY: John C. Everett /By Amy Martin

John C. Everett
Arkansas Bar No. 70022
EVERETT, WALES & COMSTOCK
Attorneys at Law
P. O. Box 8370
Fayetteville, AR 72703
(479) 443-0292

And

Kirkman T. Dougherty
Arkansas Bar No. 91133
HARDIN, JESSON & TERRY, PLC
P. O. Box 10127
Fort Smith, AR 72917-0127
(479) 452-2200

Attorneys for Separate Defendant
Michael Morton

CERTIFICATE OF SERVICE

I, John C. Everett, do hereby certify that the foregoing pleading has been sent via electronic mail and U.S. Mail on this 26TH day of July, 2016, to the following:

Mr. R. Brannon Sloan, Jr.
Dodds, Kidd & Ryan
313 West Second Street
Little Rock, AR 72201

Mr. Thomas G. Buchanan
Law Offices of Thomas G. Buchanan
217 West 2nd Street, Suite 115
Little Rock, AR 72201

Richard N. Watts
Watts, Donovan & Tilley, P.A.
200 River Market Avenue, Suite 200
Little Rock, AR 72201-1769

Lauren Hamilton
Hilburn, Calhoon, Harper,
Pruniski & Calhoun, Ltd.
P. O. Box 5551
North Little Rock, AR 72119

Bud Cummins
Attorney at Law
1818 N Taylor Street, Suite 301
Little Rock, AR 72207-4625

Kirkman T. Dougherty
HARDIN, JESSON & TERRY, PLC
P. O. Box 10127
Fort Smith, AR 72917-0127

John C. Everett / By Amy Martin
John C. Everett

296 Ark. 563
Supreme Court of Arkansas.

Gary BRAZEL, Appellant,
v.
STATE of Arkansas, Appellee.

No. CR 88–82.
|
Oct. 24, 1988.

Defendant was convicted in the Circuit Court, Scott County, Charles H. Eddy, J., of murder in first degree, and defendant appealed. The Supreme Court, Hays, J., held that: (1) defendant was not prejudiced by State's premature objection to reference to burden of proof on voir dire; (2) improper statements by prosecutor and State's witnesses were cured by prompt and proper admonitions by court; (3) admission of defendant's confession was not abuse of discretion; and (4) admission of coconspirator's confession was harmless error.

Affirmed.

Purtle, J., dissented and filed opinion.

West Headnotes (12)

[1] **Jury**
⇐Trial and determination

State's objection to defense counsel's mention during voir dire that State's burden of proof was beyond reasonable doubt was premature objection; presumably counsel intended by follow-up questions to ask the juror if she were capable of holding the State to that requirement, had objection not been sustained.

Cases that cite this headnote

[2] **Jury**
⇐Extent of examination

Mere fact that some inquiry on voir dire may touch on instructions later to be given does not per se render such questions beyond scope of voir dire.

2 Cases that cite this headnote

[3] **Criminal Law**
⇐Impaneling jury in general

Court's alleged error in restricting scope of questioning of one juror necessitating peremptory challenge by defense did not prejudice defendant where defendant did not exhaust peremptory challenges and was not required to take juror he might otherwise have excused.

1 Cases that cite this headnote

[4] **Sentencing and Punishment**
⇐Arguments and conduct of counsel

Prosecutor's improper remark comparing defendant to two notorious murderers previously sentenced to death in State was cured by court's prompt and proper admonition to jury to disregard remarks.

1 Cases that cite this headnote

[5] **Criminal Law**
⇐Discretion of court

Determination of whether mistrial is called for is within sound discretion of trial court.

1 Cases that cite this headnote

[6] **Criminal Law**
Cumulative evidence in general

Court has power to exclude evidence, even though relevant and material, if it is cumulative or impedes progress of trial. Rules of Evid., Rule 403.

Cases that cite this headnote

[7] **Criminal Law**
Cumulative evidence in general

Trial judge had discretion to admit evidence notwithstanding defense's objection that it was repetitive and cumulative. Rules of Evid., Rule 403.

Cases that cite this headnote

[8] **Criminal Law**
Furtherance or Execution of Common Purpose

Statement made by coconspirator during course of, and in furtherance of, conspiracy is admissible. Rules of Evid., Rule 801(d)(2)(v).

Cases that cite this headnote

[9] **Criminal Law**
Confessions

Confession of coconspirator given almost four weeks after crime did not occur during course of conspiracy or in furtherance of conspiracy and was not admissible. Rules of Evid., Rule 801(d)(2)(v).

1 Cases that cite this headnote

[10] **Criminal Law**
Curing error by facts admitted by defendant

Capital murder defendant was not harmed by admission of coconspirator's statement where defendant gave full and detailed account of actions including admission that he shot victim in back of head with .12 gauge shotgun, defendant confessed and testified to evidence that would have supported verdict of guilty to charge of capital murder, and defendant was convicted only of first-degree murder.

Cases that cite this headnote

[11] **Criminal Law**
Other offenses and character of accused

Improper testimony of police officer reporting rumor that defendant tried to influence witnesses was cured by court's immediate instruction to jury to disregard statement.

Cases that cite this headnote

[12] **Criminal Law**
Prejudice to Defendant in General

Defendant was not prejudiced by court's restricting scope of voir dire on one juror, admission of his confession, admission of coconspirator's confession, or improper remarks of prosecutor and witness where evidence that defendant planned and executed murder with which he was charged was overwhelming and jury which could have sentenced defendant to death sentenced him instead to 40 years.

Cases that cite this headnote

Attorneys and Law Firms

****29 *565** Ernie Witt, Paris, for appellant.

Joseph V. Svoboda, Asst. Atty. Gen., Little Rock, for appellee.

Opinion

HAYS, Justice.

Appellant was charged with the capital felony murder of Steve Alexander. The jury found him guilty of murder in the first degree, recommending a sentence of forty years in the Department of Correction. Appellant alleges a number of errors in the proceedings below but none requires reversal.

The first contention is that the defendant was unduly restricted in the voir dire of a prospective juror, necessitating the use of a peremptory challenge by the defense. When counsel said to a member of the panel, "The burden of proof in this case is with the State of Arkansas, to prove him guilty beyond a reasonable doubt," the state objected on the grounds that the question was "getting into instructions." The court sustained the objection noting that the jury had not yet been instructed on the burden of proof. The court then refused a defense request to read the instruction to the jury.

[1] [2] [3] While the trial court has broad discretion in the management of the voir dire examination, *Sanders v. State,* 278 Ark. 420, 646 S.W.2d 14 (1983), and *Fauna v. State,* 265 Ark. 934, 582 S.W.2d 18 (1979), we think an objection was premature when counsel simply stated preliminarily that the state's burden ***566** of proof was ****30** beyond a reasonable doubt. Presumably counsel intended by follow-up questions to ask the juror if she were capable of holding the state to that requirement. The mere fact some inquiry on voir dire may touch on the instructions later to be given does not per se render such questions beyond the scope of voir dire. However, as the state points out, the peremptory challenges were not exhausted by the defense and, hence, the appellant was not required to take a juror he might otherwise have excused. *Scherrer v. State,* 294 Ark. 227, 742 S.W.2d 877 (1988).

[4] [5] Second, appellant urges that it was highly prejudicial for the prosecutor to compare the appellant and an accomplice, John Heinzel, to Paul Ruiz and Earl Van Denton. The specific remark, made during opening statement was, "... They told everybody in the country about it, but instead of being sorry for what they did, and feeling remorse, all they have done is bragged about it, thinking what big men they are. They are celebrities now. Almost on the plane of Ruiz and Denton." The trial court promptly and properly admonished the jury to disregard the remarks and we cannot say the occurrence so manifestly undermined the fairness of the trial that it could not continue. *Ronning v. State,* 295 Ark. 228, 748 S.W.2d 633 (1988). The determination of whether a mistrial is called for is within the sound discretion of the trial court and we cannot say that discretion was clearly abused in this instance.

[6] [7] Third, after appellant's confession was read to the jury by the officer to whom it was given, the statement was introduced in its entirety over the objection of the defense that it was repetitive and cumulative. A.R.E. Rule 403. We readily agree that the court has the power to exclude evidence, even though relevant and material, if it is cumulative or impedes the progress of the trial. However, the trial judge deemed this evidence admissible and that decision was discretionary. *Beed v. State,* 271 Ark. 526, 609 S.W.2d 898 (1980).

Fourth, appellant maintains that it was error for the trial court to admit, over a hearsay objection, the confession of a co-conspirator, John Heinzel, whose trial had been severed from the appellant. The confession, given some three weeks after the crime, admitted Heinzel's participation in a plot with appellant to ***567** lure the victim into a wooded area, on the pretext of finding marijuana, where he was shot by the appellant.

[8] [9] The law permits the introduction of a statement by a co-conspirator made during the course of, and in furtherance of, the conspiracy. *Spears v. State,* 280 Ark. 577, 660 S.W.2d 913 (1983); A.R.E. Rule 801(d)(2)(v). We agree with the appellant, that this statement did not occur during the course of the conspiracy or in furtherance of it. It was given almost four weeks after the crime and was patently a confession of the declarant's role in the crime. It should not have been admitted.

[10] However, we agree with the state that the statement could not have prejudiced the appellant. The appellant gave a full and detailed account of his actions, including the admission that he shot the victim in the back of the head with a .12 gauge shotgun. We have examined the Heinzel statement carefully and we find few areas, and none material, where the two statements conflict. In fact, the Heinzel statement tends to support the two theories argued most strongly by the defense—i.e. that the victim was shot only once, rather than twice as the state contended, and appellant's motivation for the killing was at the urging of appellant's stepfather. The appellant's own confession and testimony would have fully supported a verdict of guilty to the charge of capital murder, yet the

jury found the appellant guilty only of first degree murder and recommended a sentence of forty years. We cannot conclude that the defense was harmed by the admission of this evidence.

[11] Finally, we do not believe the trial court was obliged to declare a mistrial when Officer Eisenhower was asked if he had seen or heard the defendant try to "concoct some story" about the crime. The witness answered that he had heard through other people that the defendant ****31** had tried to get them to testify to what he wanted them to say. The trial court immediately instructed the jury to disregard the question and the answer. A mistrial is an extreme remedy and we regard the timely admonition as adequate.

[12] While we do not suggest the trial was error free, we do conclude that the proof that appellant planned and executed the crime with which he was charged was overwhelming and the jury's verdict was in no sense disproportionate. ***568** *Berna v. State,* 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied,* 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 145 (1985).

AFFIRMED.

PURTLE, J., dissents.

PURTLE, Justice, dissenting.

It was clearly prejudicial error for the trial court to have admitted into evidence during the trial-in-chief the statement of a codefendant whose trial had been severed from that of the appellant. It is axiomatic that the statement of a co-conspirator, made during the course of and in furtherance of the conspiracy, may be introduced by the state, under certain circumstances. See ARE 801(d)(2)(v). Moreover, I wholeheartedly agree with the majority that the statement at issue here "was not in any sense [made] during the course of the conspiracy nor in furtherance of it." Indeed, this "statement" was taken at police headquarters some three and one-half weeks after the commission of the murder and implicated the appellant as well as the declarant. However, to hold that the introduction of a codefendant's signed "confession" was "harmless error" is almost beyond belief.

At trial the state attempted to justify the introduction of the codefendant's hearsay statement under ARE 801(d)(2). On appeal the state also argues it was admissible under ARE 803(24). The state switched horses in the middle of the stream. We do not allow defendants to do that. I am of the opinion that the codefendant's statement was not admissible under any rule or precedent. If we are to give ARE 801(d)(2) a practical and literal interpretation, this codefendant's "confession" is simply not admissible against this appellant. The majority is unable to cite any precedent to support this holding. Conceding that the admission of the codefendant's statement was error, the majority then sweeps this error under the rug with that catch-all phrase "harmless error."

The appellant had no choice but to take the stand after the state was allowed to introduce the codefendant's statement. He was deprived of his right to remain silent as provided by the Fifth Amendment, and completely denied any opportunity for confrontation as provided by the Sixth Amendment. Harmless error? Absolutely not.

***569** Acts and declarations of a co-conspirator are inadmissible against a codefendant, when such acts or declarations were made in the latter's absence and after the consummation of the conspiratorial act. *McCabe v. State,* 149 Ark. 585, 233 S.W. 771 (1921). The practice approved by the majority today cannot stand without weakening many of the rights long thought to have been guaranteed to the citizens of this Republic. The chief constitutional infirmity is quite simply that there was absolutely no opportunity for confrontation.

The admission at a joint trial of a codefendant's statement, implicating another defendant, even though the jury is instructed to disregard the parts implicating the defendant, was ruled unconstitutional *and* prejudicial in *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The court there stated:

> We, of course, acknowledge the impossibility of determining whether in fact the jury did or did not ignore Evans' statement inculpating petitioner in determining petitioner's guilt.

Thereafter, only "Brutonized" statements of codefendants were admitted into evidence against a defendant at a joint trial. The decision in *Bruton* was recently reaffirmed in *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), where the court stated:

> Our cases recognize that this truthfinding function of the Confrontation Clause ****32** is uniquely threatened when an accomplice's confession is sought to be

> introduced against a criminal defendant without the benefit of cross-examination.
> "Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Bruton v. United States,* supra.
>
> Thus, in *Douglas v. Alabama,* 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965), we reversed a conviction because a confession purportedly made by the defendant's accomplice was read to the jury by the prosecutor.
>
> Over the years since Douglas, the Court has spoken with ***570** one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants.
>
> Our ruling in Bruton illustrates the extent of the Court's concern that the admission of this type of evidence will distort the truthfinding process. In Bruton, we held that the Confrontation Clause rights of the petitioner were violated when his codefendant's confession was admitted at their joint trial, despite the fact that the judge in that case had carefully instructed the jury that the confession was admissible only against the codefendant.

Even more recently, the fundamental requirements of the Confrontation Clause were again examined in *Cruz v. United States,* 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), where Justice Scalia, speaking for the court, stated:

> In *Bruton v. United States,* 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), we held that a defendant is deprived of his rights under the Confrontation Clause when his codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. In *Parker v. Randolph,* 442 U.S. 62, 60 L.Ed.2d 713, 99 S.Ct. 2132 (1979), we considered, but were unable authoritatively to resolve, the question whether Bruton applies where the defendant's own confession, corroborating that of his codefendant, is introduced against him. We resolve that question today.
>
> The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." We have held that that guarantee, extended against the States by the Fourteenth Amendment, includes the right to cross-examine witnesses. See *Pointer v. Texas,* 380 U.S. 400, 404, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965). Where two or more defendants are tried jointly, therefore, the pretrial confession of one of them that implicates the others is not admissible against the others unless the confessing defendant waives his Fifth Amendment rights so as to permit cross-examination.

Needless to say, if a codefendant's "confession" is not ***571** admissible against a defendant *at their joint trial,* there is simply no justification for admitting a codefendant's statement at a separate trial. If the United States Supreme Court's rulings are not binding on this court, then I need write no more.

All Citations

296 Ark. 563, 759 S.W.2d 28

End of Document

Arkansas Model Jury Instructions--Civil
Database updated November 2015

AMI713Issues—Acting in Concert
Arkansas Supreme Court Committee On Jury Instructions—Civil

Arkansas Supreme Court Committee On Jury Instructions—Civil

Chapter 7. Agency—Employment—Partnership—Joint Enterprise—Imputed Liability

AMI 713 Issues—Acting in Concert

(Plaintiff)*[also]* claims damages from (defendant) on the basis that (defendant) acted in concert with (other tortfeasor), and has the burden of proving each of three essential propositions:

First, that (plaintiff) has proved all the essential propositions necessary for a verdict on the claim for (state the underlying intentional tort);

Second, that (defendant) and (other tortfeasor) entered into a conscious agreement to pursue a common plan or design to commit (state the underlying intentional tort);

Third, that (defendant) actively took part in the (state the underlying intentional tort).

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict on this claim should be for (plaintiff); but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict on this claim should be for (defendant).]

NOTE ON USE

This instruction should be used in cases governed by the Civil Justice Reform Act of 2003, Ark. Code Ann. § 16-55-205. In cases not governed by the Civil Justice Reform Act of 2003, use AMI 714.

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

Identify each person or entity claimed to have liability in the first paragraph; identify each of the tortfeasors in the second proposition.

Insert the underlying intentional tort (e.g., fraud, breach of fiduciary duty, interference with contract, etc.) in the first, second and third essential elements. This instruction must be accompanied by a separate instruction which states the essential elements of the underlying tort. For example, if the underlying tort is deceit, use AMI 402 with this instruction.

COMMENT

This instruction incorporates the standards for shared liability prescribed by the Civil Justice Reform Act of 2003, Ark. Code Ann. § 16-55-205. These standards may not be the same as recognized in the doctrine of the civil conspiracy. *See, e.g.*, Dodson v. Allstate Ins. Co., 345 Ark. 430, 47 S.W.3d 866 (2001), *appeal after remand*, 365 Ark. 458, 231 S.W.3d 711 (2006), *subsequent appeal after remand* 2011 Ark. 19 (a corporate agent cannot be held liable for civil conspiracy in the absence of evidence showing that he was acting for his own personal benefit rather than for the benefit of the corporation); Mason v. Funderburk, 247 Ark. 521, 446 S.W.2d 543 (1969) (a civil conspiracy is a combination of two or more persons to accomplish a purpose that is unlawful or oppressive or immoral, by unlawful, oppressive or immoral means, to the detriment of another); Wilson v. Davis, 138 Ark. 111, 211 S.W. 152 (1919) (a conspiracy may be inferred, although no actual meeting of the parties is proved, if the testimony shows that two or more people pursued by their acts the same unlawful object, each doing a part, so that their apparently independent acts were in fact connected).

West's Key Number Digest

West's Key Number Digest, Conspiracy ⚖21

Legal Encyclopedias

C.J.S., Conspiracy § 24
C.J.S., Conspiracy §§ 38 to 42

End of Document

Kabushiki Kaisha, Respondents.
Supreme Court of the United States
Mar. 15, 2010

...FN* Counsel of Record The parties to the proceedings below included petitioner, Alberto-Culver Company, and respondents, Sunstar, Inc. and Kaneda, Kosan, Kabushiki Kaisha. Additionally, Bank One, Natio...

Petitioners' Reply Brief

1977 WL 247476
CHRYSLER MOTORS CORPORATION, Chrysler Credit Corporation, Petitioners, v. Marvin H. GREENFIELD, Superior Dodge, Inc., Respondents.
Supreme Court of the United States
Jan. 03, 1977

...Respondents' argument in their Brief in Opposition about the effect of the revival of a corporation's charter under Maryland law (although incorrect) is not the federal question raised on this Petition...

See More Briefs

Trial Court Documents

Johnson v. The Cincinnati Ins. Co.

2006 WL 6272533
Kyle B. JOHNSON, Plaintiff, v. THE CINCINNATI INSURANCE COMPANY, Defendant.
Circuit Court of Arkansas, Pulaski Division.
Jan. 05, 2006

...Now on this 5 day of January, 2006, there came on for hearing by telephonic conference the Plaintiff's Motion for Judgment Notwithstanding the Verdict (J.N.O.V.), and in the Alternative, Motion for New...

State v. Norwood

2007 WL 6468953
State of Arkansas, Plaintiff, v. Bryan R. NORWOOD, Defendant.
Circuit Court of Arkansas, Pulaski Division.
Apr. 23, 2007

...Now on the 10th day of April, 2007, the above-captioned matter comes on for hearing concerning the Defendant's Motion for New Trial and Amended Motion for New Trial. The State appears by and through De...

Measel v. Guideone Elite Ins. Co.

2007 WL 6453656
Jerry MEASEL, v. GUIDEONE ELITE INSURANCE COMPANY, Defendant.
Circuit Court of Arkansas, Pulaski Division.
Oct. 09, 2007

...Before the Court is plaintiff's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The Court, having reviewed plaintiff's motion and supporting brief along with de...

See More Trial Court Documents

Arkansas Model Jury Instructions--Civil
Database updated November 2015

AMI714Issues—Civil Conspiracy
Arkansas Supreme Court Committee On Jury Instructions—Civil

Arkansas Supreme Court Committee On Jury Instructions—Civil

Chapter 7. Agency—Employment—Partnership—Joint Enterprise—Imputed Liability

AMI 714 Issues—Civil Conspiracy

(Plaintiff) claims damages from (defendant) for conspiracy. A "conspiracy" is an agreement to accomplish a purpose that is unlawful or oppressive or to accomplish, by unlawful or oppressive means, a purpose that is not in itself unlawful or oppressive.

In order to recover damages from (defendant) for conspiracy, (plaintiff) has the burden of proving each of five essential propositions:

First, that (defendant) and (co-conspirator(s)) knowingly entered into a conspiracy.

Second, that (plaintiff) has proved all of the essential elements necessary to obtain a verdict against (party/person against whom the underlying intentional tort is asserted) on the underlying claim of (state the underlying intentional tort);

Third, that one or more of the co-conspirators committed one or more overt acts in furtherance of the alleged conspiracy;

Fourth, that (defendant), in entering in to the conspiracy, had the specific intent to harm (plaintiff);

And fifth, that the conspiracy proximately caused damages to (plaintiff).

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for (plaintiff); but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for (defendant).]

NOTE ON USE

This instruction should be used only in cases that are not governed by the Civil Justice Reform Act of 2003, Ark. Code Ann. § 16-55-205. In cases governed by the Civil Justice Reform Act of 2003, use AMI 713.

Insert the underlying intentional tort (e.g., fraud, breach of fiduciary duty, interference with contract, etc.) in the second essential element. This instruction must be accompanied by a separate instruction which states the essential elements of the underlying tort. For example, if the underlying tort is deceit, use AMI 402 with this instruction.

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

COMMENT

This instruction is based upon the elements of civil conspiracy stated in Wilson v. Davis, 138 Ark. 111, 211 S.W. 152 (1919); Mason v. Funderburk, 247 Ark. 521, 446 S.W.2d 543 (1969); and Dodson v. Allstate Insurance Co., 345 Ark. 430, 47 S.W.3d 866 (2001), *appeal after remand*, 365 Ark. 458, 231 S.W.3d 711 (2006), *subsequent appeal after remand*, 2011 Ark. 19. Pending further clarification by the courts, the Committee has omitted the word "immoral" from the blackletter phrase "by unlawful, oppressive, or immoral means" in defining the term "conspiracy" because the Committee determined that the term would be unworkable.

While it is clear that civil conspiracy is a derivative tort that is not actionable in and of itself, the Committee believes there are at least four questions left unanswered by Arkansas case

law. First, the Texas Supreme Court has held in at least one case that a claim for civil conspiracy cannot be asserted unless the plaintiff is also seeking judgment against another party in the suit for the underlying tort. Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996). A federal district court in Pennsylvania has reached the same conclusion. Wolk v. Teledyne Indus., Inc., 475 F.Supp.2d 491 (E.D.Pa. 2007). The Committee has not found any reported Arkansas case that addresses that issue expressly. However, the instruction, as drafted, is not intended to preclude such a legal argument to the trial court.

Second, related to the foregoing issue is the question whether, in a case where the alleged tortfeasor is also a defendant, the jury must return a verdict on the underlying tort before an alleged conspirator can be found liable for the derivative tort of civil conspiracy. Again, the Committee has not discovered a reported Arkansas case expressly on point. The Committee notes, however, that the Eighth Circuit Court of Appeals affirmed the dismissal of a claim for conspiracy in Lane v. Chowning, 610 F.2d 1385, 1391 (8th Cir. 1979), with the following statement:

> We have already determined that Lane has failed to establish either a factual or a legal basis for recovery on any of his several allegations. It follows, then, that no overt act has been established which is a necessary element in establishing the existence of a civil conspiracy.

Therefore, the Committee believes that, at a minimum, the elements of the underlying tort must be established before there can be liability for conspiracy, but it remains unclear whether an actual verdict on the underlying claim is required. If the trial court believes that is a legal requirement, the second element of this instruction should be modified. As with the first question noted in the preceding paragraph, the Committee does not intend to preclude that argument by its statement of the second element in the instruction, but, without more specific authority, has drafted the instruction to require only that there be proof of the elements of the underlying tort.

Third, it is not clear from Arkansas case law whether the conspiracy must proximately cause the damages to the plaintiff for which a conspirator is liable or whether the damages must be proximately caused by the commission of the underlying tort. While this distinction may not make a difference in most cases, there could be a substantial issue related to causation of damages. The Committee has drafted the element of causation to comport with the following language in Wilson v. Davis, *supra*: "If such an unlawful agreement exists, the parties thereto become liable as joint tortfeasors and to the extent of the damage done as a result of the conspiracy ...." 211 S.W. at 154.

Fourth, even though a person may not be liable as a direct actor in interfering with a contract, he may be liable as a participant in a conspiracy which results in one or more overt acts constituting actionable interference. *Lane v. Chowning*, 610 F.2d at 1390. However, while there is no Arkansas case determining whether a person whose acts are privileged and therefore cannot constitute interference with contract can nevertheless be liable for conspiracy to interfere with the contract, cases in other states have so held when there was no issue regarding the application of the privilege. *See, e.g.*, Watson's Carpet & Floor Covering, Inc. v. McCormick, 2007 Tenn. App. LEXIS 27 (January 18, 2007) (competitor's privilege precluded interference claim and conspiracy claim); Gott v. First Midwest Bank of Dexter, 963 S.W.2d 432 (Mo. App. 1998) (justification of bank and board member to protect economic interest also precluded conspiracy claim); Scanlon v. Gordon F. Stofer & Bro. Co., 1989 Ohio App. LEXIS 2528 (1989) (corporate officer entitled to privilege and therefore no conspiracy liability where there was no evidence he acted beyond the scope of his authority); Langer v. Becker, 176 Ill. App. 3d 745, 531 N.E.2d 830 (Ill. App. 1988) (plaintiff did not sufficiently plead malice to overcome qualified privilege and, therefore, claims for interference and conspiracy dismissed).

Since a corporate entity cannot conspire with itself, a civil conspiracy is not legally possible where a corporation and its alleged coconspirators are not separate entities, but, rather, stand in either a principal-agent or employer-employee relationship. Dodson v. Allstate Ins. Co., *supra*. Corporate agents may not be held liable for civil conspiracy in the absence of evidence showing that they were acting for their own personal benefit rather than for the benefit of the corporation. *Id.* If a claim of civil conspiracy is asserted against a corporate agent, this instruction should be modified to add an element related to the agent's acting for his personal benefit.

The Arkansas Supreme Court has held that there can generally be no civil conspiracy between an attorney and his client for actions undertaken in the furtherance of the legal representation. Born v. Hosto & Buchan, PLLC, 2010 Ark. 292.

End of Document