

Anne Lynn HENRY *v.* Marvin CLINE and Richard  
CLINE, a minor

81-184

626 S.W. 2d 958

Supreme Court of Arkansas  
Opinion delivered February 1, 1982

[Amendment to Opinion on Denial of Rehearing March 22, 1982.]

1. **WORDS OR PHRASES — HABIT — DEFINITION.** — Habit is an acquired or developed mode of behavior or function that has become nearly or completely involuntary; it is a regular response to a repeated specific situation which may become semi-automatic.

2. EVIDENCE — EVIDENCE OF HABIT — FAILURE OF PROFFERED TESTIMONY TO MEET DEFINITION OF HABIT. — The proffered testimony of a witness that she had seen appellee driving fast on a particular road six out of 12 times is not admissible under Rule 406, Uniform Rules of Evidence, as evidence of a habit or routine practice.
3. APPEAL & ERROR — ARGUMENT RAISED FIRST TIME ON APPEAL — EFFECT. — An argument raised for the first time on appeal will not be considered.

Appeal from Craighead Circuit Court, Jonesboro District, *Gerald Brown*, Judge; affirmed.

*Henry & Walden*, by: *Anne Lynn Henry*, for appellant.

*Frierson, Walker, Snellgrove & Laser*, for appellees.

RICHARD B. ADKISSON, Chief Justice. On July 13, 1979, appellee, a minor, was driving a car owned by his father, also an appellee, on a gravel road east of Bono, Arkansas. Appellee rounded a turn in the road and collided head on with a vehicle driven by appellant, Anne Lynn Henry.

On appeal appellant argues the trial court erred in excluding the proffered testimony of a witness concerning appellee's driving habits on the road where the collision occurred. Appellant's witness would have testified that she had seen appellee drive on this road a dozen times and that he was speeding half of those times. Appellant argues that this testimony was admissible under Rule 406, Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1977) which provides:

Rule 406. Habit — Routine practice. — (a) Admissibility. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Habit is an acquired or developed mode of behavior or

function that has become nearly or completely involuntary; it is a regular response to a repeated specific situation which may become semi-automatic. *Ritchey v. Murray*, 274 Ark. 388, 625 S.W. 2d 476 (1981); *McCormick, Evidence* § 195 (2d Ed. 1972).

The proffered testimony is not admissible to show appellee's habit of driving fast because it does not meet our definition of "habit." The fact that a witness saw appellee driving fast on this particular road half the time is not sufficient to establish a mode of behavior that has become nearly or completely involuntary.

Appellant also argues that this testimony should have been admitted to prove negligent entrustment by the appellee, father. However, appellant did not ask the trial court to admit the evidence for this purpose. An argument raised for the first time on appeal will not be considered. Rule 46, Ark. Rules Civ. Proc., Vol. 3A (Repl. 1979), *Faught v. Ligon Specialized Hauler*, 273 Ark. 259, 619 S.W. 2d 627 (1981).

Affirmed.

---