CASES DETERMINED IN THE SUPREME COURT OF ARKANSAS

FIRST NATIONAL BANK of Izard County
v. ARKANSAS STATE BANK COMMISSIONER
and the Bank of North Arkansas

89-133 781 S.W.2d 744

Supreme Court of Arkansas
Opinion delivered December 18, 1989

1. STATUTES — FIRST RULE OF CONSTRUCTION. — The first rule of construction as to a piece of legislation is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language.
2. STATUTES — PRESUMED NOT TO BE UNCONSTITUTIONAL. — Statutes are presumed not to be unconstitutional.
3. ADMINISTRATIVE LAW & PROCEDURE — AGENCIES ARE BETTER EQUIPPED THAN COURTS TO DETERMINE LEGAL ISSUES AFFECTING THEIR AGENCIES. — Administrative agencies are better equipped, by specialization, insight through experience, and more flexible procedures, than courts to determine and analyze underlying legal issues affecting their agencies, which accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency.
4. CONSTITUTIONAL LAW — NOTICE AND REASONABLE OPPORTUNITY TO BE HEARD ARE PREREQUISITES TO DIVEST PROPERTY OWNER OF HIS INTERESTS. — Generally, the basic constitutional due process requirements of notice and a reasonable opportunity to be heard are mandatory prerequisites to divest a property owner of his interests.
5. BANKS & BANKING — BANK HAD PROTECTED PROPERTY INTEREST VESTED IN ITS FRANCHISE — HAD STANDING TO CHALLENGE UNLAWFUL COMPETITION. — The appellant bank had a constitu-

tionally protected right to exercise the property interest vested in its franchise free from unlawful competition and therefore had standing to challenge unlawful competition.

6. BANKS & BANKING — PROCEDURAL SAFEGUARDS PROVIDED BY ARK. CODE ANN. § 23-32-1203 WERE SUFFICIENT TO PROTECT APPELLANT BANK'S INTERESTS. — Where the appellant bank was only indirectly affected because it did not have an exclusive license to operate in the area where the appellee bank requested to establish a branch; approval of the branch application did not exclude the appellant bank from operating in that area; and the statute required that notice of the filing of the application be given to every other bank in the city or town in which the branch applicant bank was located, provided for the protest of a branch bank application, stated that the commissioner's decision on a branch bank application will be in the form of final findings of fact, conclusions of law, and that the order be given by the commissioner within a reasonable time period, and allowed an applicant or official protestant thirty calendar days in which to appeal the commissioner's order to the appropriate circuit court, the procedural safeguards provided were sufficient to protect the appellant bank's interest, and the value of additional safeguards requested by the appellant, in the form of discovery and a hearing, was outweighed by the resultant increase in administrative burdens.

7. BANKS & BANKING — IN THIS CASE, ADMINISTRATIVE PROCEDURE ACT DID NOT APPLY TO ACTIVITIES OF BANK COMMISSIONER. — The discretionary authority for an adjudicatory or administrative hearing contained in Ark. Code Ann. § 23-32-1203(e) precludes the application of Ark. Code Ann. § 25-15-208(a)(3) by virtue of § 25-15-211; in this case, the Administrative Procedure Act did not apply to the activities of the Bank Commissioner.

8. BANKS & BANKING — DISCRETIONARY HEARING PROVISION DID NOT VIOLATE MANDATES OF DUE PROCESS. — Where the appellant bank was affected only to the extent that the Commissioner's order allowed regulated competition in a regulated industry, the bank did not have a property interest that is recognized as being entitled to the degree of protection it claimed, and the mandates of due process were not violated by the discretionary hearing provision of the statute.

9. BANKS & BANKING — FORMAL HEARING IS DISCRETIONARY IN BRANCH BANK APPLICATION — COMMISSIONER'S FINDINGS OF FACT WERE SUFFICIENT. — Because a formal hearing is discretionary in a branch bank application and the application of Ark. Code Ann. § 25-15-210(b)(2) is therefore precluded, the Commissioner's findings of fact were sufficient to satisfy the requirements of Ark. Code

Ann. § 23-32-1203(f).

Appeal from Pulaski Circuit Court; *Jack Lessenberry*, Judge; affirmed.

Ivester, Skinner & Camp, P.A., by: *Hermann Ivester* and *Valerie F. Boyce*, for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee Arkansas State Bank Commissioner.

Highsmith, Gregg, Hart, Farris & Rutledge, by: *John C. Gregg*; and *Wilson, Engstrom, Corum & Dudley*, by: *Wm. R. Wilson, Jr.* and *Gary D. Corum*, for appellee The Bank of North Arkansas.

JACK HOLT, JR., Chief Justice. On September 27, 1988, the appellee, The Bank of North Arkansas (BNA), which has its principal bank located in Melbourne, Arkansas, filed an application with the appellee, Arkansas State Bank Commissioner (Commissioner), requesting permission to establish a branch bank in Calico Rock, Arkansas, where the appellant, First National Bank of Izard County (FNB), has its principal bank located. FNB objected to BNA's application, although it had recently opened a branch bank in Melbourne, and filed a formal protest, pursuant to Ark. Code Ann. § 23-32-1203(d) (1987), and requested interrogatories from BNA on October 13, 1988. Calico Rock is located in Izard County, and both BNA and FNB have their main offices in Izard County.

On October 20, 1988, the Commissioner responded by letter to FNB's interrogatory request and stated that BNA would not be required to answer the interrogatories until he had determined if a hearing would be necessary. FNB protested this decision on October 24, 1988. The next day, a state bank examiner filed a report recommending approval of BNA's application.

The Commissioner advised both parties on October 26, 1988, that an administrative hearing was not necessary and that, as a result, BNA was not required to answer FNB's interrogatories. Subsequently, on October 31, 1988, the Commissioner entered his order approving BNA's application.

FNB requested in writing, on November 28, 1988, a copy of the bank examiner's report, which was sent by the Commissioner

two days later. FNB then filed a petition for review in the Circuit Court of Pulaski County and obtained a stay of the Commissioner's order.

The Commissioner's order was affirmed by the circuit court on March 21, 1989. Thereafter, FNB filed a notice of appeal and obtained a stay from this court conditioned upon FNB's filing a proper supersedeas bond.

FNB appeals the Commissioner's order granting approval of BNA's application for a branch bank in Calico Rock based on three points of error: 1) that the order is in violation of constitutional and statutory provisions and made upon unlawful procedure, 2) the statute allowing discretionary hearings in protested cases is unconstitutional, and 3) the findings of fact in the order are in violation of statutory provisions and are not supported by substantial evidence. In addition, FNB requests that any remand to the Commissioner should specify procedures required to uphold statutory and constitutional provisions.

We find no merit in FNB's points on appeal and affirm.

VIOLATION OF CONSTITUTIONAL AND STATUTORY PROVISIONS

FNB initially contends that the Commissioner's order is in violation of constitutional and statutory provisions and made upon unlawful procedure. FNB bases this argument on the perception that its rights to due process have been denied due to the discretionary authority imbued in the Commissioner to grant or deny an application for a branch bank without an adjudicatory hearing. FNB claims that it has a franchise, by virtue of being a federally chartered bank, and that its due process rights can only be preserved and protected through a hearing at which all parties offer evidence.

The pertinent legislation regarding the procedure of establishing a full service branch office is contained in Ark. Code Ann. § 23-32-1203 (Supp. 1989), which provides in pertinent part as follows:

> (c) Notice of the filing of the application shall be given by the commissioner to every other bank in the city or town in which the branch applicant bank is located. This notice

shall be given by mail.

(d)(1) Any formal protest to a branch bank application must be received in writing detailing the reasons for protest within fifteen (15) calendar days of the date the commissioner's notice of an application was mailed.

* * * *

(e) An adjudicatory or administrative hearing shall not be required on a branch bank application.

[1] The first rule of construction as to a piece of legislation is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Eldridge* v. *Board of Correction*, 298 Ark. 467, 768 S.W.2d 534 (1989) (citing *Bolden* v. *Watt*, 290 Ark. 343, 719 S.W.2d 428 (1986)).

[2, 3] In addition to the principle that statutes are presumed not to be unconstitutional, *Craighead County Bd. of Educ.* v. *Henry*, 295 Ark. 242, 748 S.W.2d 132 (1988) (citing *HCA Medical Services of Midwest, Inc.* v. *Rodgers*, 292 Ark. 359, 730 S.W.2d 229 (1987)), we have also recognized that administrative agencies are better equipped, by specialization, insight through experience, and more flexible procedures, than courts to determine and analyze underlying legal issues affecting their agencies, which accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency. *Arkansas State Hwy. Comm'n* v. *White Advertising Int'l*, 273 Ark. 364, 620 S.W.2d 280 (1981) (citing *Gordon* v. *Cummings*, 262 Ark. 737, 561 S.W.2d 285 (1978)).

[4, 5] Generally, the basic constitutional due process requirements of notice and a reasonable opportunity to be heard are mandatory prerequisites to divest a property owner of his interest. *Wallace* v. *Missouri Improvement Co.*, 294 Ark. 99, 740 S.W.2d 920 (1987). Although we agree that FNB has a constitutionally protected right to exercise the property interest vested in its franchise free from unlawful competition and therefore has standing to challenge unlawful competition, *see Frost* v. *Corporation Comm'n*, 278 U.S. 515 (1929); *Webster Groves Trust Co.* v. *Saxon*, 370 F.2d 381 (8th Cir. 1966), the pivotal question is

whether due process gives FNB the right and standing to challenge lawful competition and, if so, how much due process must be afforded to this right and did FNB receive at least the minimum necessary to survive this constitutional challenge?

An illustrative discussion of this issue is presented in C. Koch, *Administrative Law and Practice* 564-67 (1985):

> Indeed, over the years, the Supreme Court often has rejected the argument that trial-type procedures always are required by the Due Process Clause. ['Once it is determined that due process applies, the question remains what process is due.'] The procedural components that will satisfy the Due Process Clause's requirements will vary from situation to situation. The proper combination of procedures must reflect a practical solution sensitive to both the individual's rights and the purpose of the administrative program.
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> * * * *
>
> Perhaps the most influential effort to develop a technique for analysis is Justice Powell's opinion in *Mathews* v. *Eldridge* [424 U.S. 319 (1976). Eldridge had been receiving social security disability benefits, but a state agency terminated his eligibility. Eldridge submitted a written protest to the agency, but otherwise had no opportunity, prior to termination, to participate in the decisionmaking.]. The only issue before the Court was whether the agency had accomplished the termination of Eldridge's benefits according to due process requirements.
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> In answering this question, Justice Powell focused on three factors critical to this analysis:
>
> > First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Using this analysis, we conclude that FNB's due process rights were not violated. Under the first factor, FNB is only indirectly affected because it does not have an exclusive license to operate in the area where BNA requested to establish a branch, and approval of the branch application does not exclude FNB from operating in that area. The aspect of resulting competition was specifically addressed in the bank examiner's report:

> The protest lodged by FNB contends that the approval of the proposed branch will have a detrimental effect on the competition in Calico Rock. FNB has consistently reported earnings in the 90th percentile of its peer group. Capitalization is in the upper 90th percentile of its peer group. The cost of funds is well below 4.50%. The contention is perhaps well founded due to the fact that the bank [FNB] will have to meet the challenge of competition. However, there is no evidence submitted to support irreparable harm will be committed due to the introduction of competition.
>
> The approval of the applicant's request will afford the populace of the trade area a choice of banking institutions, therefore promoting public convenience.

The second factor, addressing the risk of an erroneous deprivation of FNB's interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, also favors upholding the constitutionality of the statutory provisions.

Although section 23-32-1203(e) does not require a formal hearing, other provisions included in that section adequately protect FNB's rights under these circumstances. Specifically, 1) subsection (c) requires that notice of the filing of the application be given to every other bank in the city or town in which the branch applicant bank is located, 2) subsection (d) provides for the protest of a branch bank application, (3) subsection (f) states that the commissioner's decision on a branch bank application will be in the form of final findings of fact, conclusions of law, and that the order be given by the commissioner within a reasonable time period, and 4) subsection (g) allows an applicant or official protestant thirty calendar days in which to appeal the commissioner's order to the appropriate circuit court.

In this case, the commissioner clearly gave FNB notice of BNA's branch bank application, which FNB protested. The commissioner issued findings of fact and conclusions of law in its order dated October 31, 1988, and FNB exercised its right to appeal the order to the Pulaski County Circuit Court.

[6] These procedural safeguards are sufficient to protect FNB's interest. The value of additional safeguards requested by FNB, in the form of discovery and a hearing, is outweighed by the resultant increase in administrative burdens, addressed in Justice Powell's third factor to be considered.

Finally, FNB argues that section 25-15-208(a)(3) of the Administrative Procedure Act, providing that in "every case of adjudication . . . [o]pportunity shall be afforded all parties to respond and present evidence and argument on all issues involved," conflicts with section 23-32-1203(e) in the branch banking subchapter, which unequivocaly states that an "adjudicatory or administrative hearing shall not be required on a branch bank application."

Section 25-15-211, addressing licenses in administrative adjudications, provides as follows: "(a) When the grant, denial, or renewal of a license is required by law to be preceded by notice and an opportunity for hearing, the provisions of this subchapter concerning cases of adjudication apply."

[7] Thus, the discretionary authority for an adjudicatory or administrative hearing contained in section 23-32-1203(e) precludes the application of section 25-15-208(a)(3) by virtue of section 25-15-211. Simply stated, in this case the Administrative Procedure Act does not apply to the activities of the Commissioner.

In summary, the Commissioner's action does not affect FNB's authority or right to conduct its banking operations. The establishment of a branch bank by BNA does not constitute unlawful competition. The Commissioner complied with the statutory requirement of notice and a reasonable opportunity to be heard. Finally, neither the language nor the meaning of Ark. Code Ann. § 23-32-1201 (1987 and Supp. 1989) et seq. is ambiguous, and the Commissioner's decision not to have a hearing is within his discretion.

Thus, we find the statute is not in violation of constitutional prerequisites.

DISCRETIONARY HEARING UNCONSTITUTIONAL IN PROTESTED CASES

FNB contends that the statute allowing discretionary hearings in protested cases is unconstitutional unless it is interpreted to allow a discretionary waiver of a hearing in non-protested cases.

As noted previously, statutes are presumed not to be unconstitutional, *Craighead County Bd. of Educ., supra*, and all doubts must be resolved in favor of upholding its constitutionality. *Holland* v. *Willis*, 293 Ark. 518, 739 S.W.2d 529 (1987).

Additionally, a rational basis for the discretionary hearings can be found in the analogous case of *Webster Groves Trust Co., supra*, where the Eighth Circuit Court of Appeals discussed the rationale for not requiring the Comptroller of Currency to hold a formal hearing at which commercial banks could present objections relative to issuance of new national bank charters:

> The very nature of the decision required by the Comptroller indicates that a formal adversary type hearing would be of little benefit to him in the discharge of his discretionary powers. There is the further factor present that if bank applicants were subjected to severe public cross-examination, public presentation of unfavorable evidence and were forced to disclose their future plans and programs to competitors, public confidence in the banking system could be adversely affected.

In discussing the discretionary nature of the Comptroller's underlying actions, the court in *Webster Groves Trust Co., supra*, stated:

> We believe that competing banks, as interested parties, have a right to challenge illegal acts of the Comptroller and that the Comptroller's discretionary actions are not immunized from judicial review, but we also believe that neither the National Banking Act, 12 U.S.C. § 21 et seq., the Administrative Procedure Act, nor procedural due process requires a formal hearing of the type sought by

appellant.

Also, FNB's sole reliance on *Pulaski County* v. *Commercial Nat'l Bank*, 210 Ark. 124, 194 S.W.2d 883 (1946), is misplaced.

In that case, we noted that where notice to a party to be affected and opportunity for him to be heard were not provided for in the law under which an assessment of taxes was made, the law was unconstitutional and void and the assessment was illegal. However, the statute at issue was held to be void insofar as it authorized an appeal by one property owner from the action of the Board of Equalization in refusing to raise the assessment of another property owner without requiring any kind of notice to the property owner whose assessment was being questioned.

[8] As we noted in FNB's first argument, FNB does not have a property interest that is recognized as being entitled to the degree of protection it claims. FNB's rights are not directly affected; in fact, FNB is affected only to the extent that the Commissioner's order allows regulated competition in a regulated industry. Consequently, the mandates of due process are not violated, and we hold the statute to be constitutional.

FINDINGS OF FACT

Finally, FNB argues that the findings of fact in the Commissioner's order are in violation of the Administrative Procedure Act (Ark. Code Ann. § 25-15-210 (1987)) and not supported by substantial evidence. Here again, the Administrative Procedure Act does not apply to the extent that it is superceded by the branch banking provisions contained in section 23-32-1201 et seq.

Section 25-15-210(b)(2) provides in pertinent part that "[a] final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings . . . ."

Again, section 25-15-211 provides that the provisions of the subchapter concerning cases of adjudication in the Administrative Procedure Act do not apply unless "the grant . . . of a license is required to be preceded by notice and an opportunity for hearing." Section 23-32-1203(e) specifically states that a formal

hearing is discretionary in a branch bank application and would therefore preclude the application of section 25-15-210(b)(2).

Section 23-32-1203(f) of the branch banking subchapter provides that in the establishment of a full service branch office:

> The commissioner's decision on a branch bank application will be in the form of final findings of fact, conclusions of law, and an order given by the commissioner within a reasonable time period following the expiration of the fifteen (15) calendar day formal protest period.

[9] Thus, the case law strictly interpreting section 25-15-210(b)(2) would only be applicable to those cases where notice and a hearing were both required. In contrast, given the informal nature of the branch bank application procedure, the Commissioner's findings of fact are sufficient to satisfy the requirements of section 23-32-1203(f).

We note that the Commissioner incorporated the following facts and information in his order:

> (1) Reliance on the written evidence submitted on behalf of both BNA and FNB, as well as an on-site investigation by state bank examiners.
>
> (2) BNA is a banking corporation organized under a charter issued by the State of Arkansas with its principal place of business in Melbourne, Izard County, Arkansas.
>
> (3) BNA provided evidence that suitable physical facilities would be provided for the full service branch.
>
> (4) BNA maintained a good capital structure and a good financial condition. At the time of the Examiner's Investigation for the proposed branch, BNA had 8.5% total capital to asset ratio.
>
> (5) BNA maintained good future earnings prospects, good management, and was in conformity with Arkansas law and State Bank Department Rules and Regulations, according to the Examiner's Investigation Report.
>
> (6) Evidence provided in the branch application indicated that BNA maintained adequate fidelity coverage.

(7) The proposed service area for the proposed branch was in the towns of Calico Rock and Pineville and in the communities of Wideman and Dolph, Arkansas.

(8) Local conditions assured a reasonable promise of successful operation of the proposed full service branch. The Examiner's Investigation Report provided evidence that there were four financial institutions in Izard County, but only two in the proposed trade area.

(9) Public convenience and necessity would be promoted by the establishment of the proposed branch. Evidence provided by BNA and cited in the Examiner's Investigation Report indicated that BNA planned to offer all the products of a full service branch.

(10) The Examiner's Investigation Report indicated that FNB was the only bank in Calico Rock and that it maintained a capital to asset ratio in the top 95 percentile of its peer group. The investigation also indicated that FNB had maintained an extraordinary earnings record, due in part to its below peer costs of funds. There was no indication that the establishment of BNA's branch would have a significant adverse effect on competition or lead to destructive competition.

We find sufficient compliance with section 23-32-1203(f) and conclude that the Commissioner's order was based on substantial evidence.

Affirmed.

HICKMAN, J., dissents.

DARRELL HICKMAN, Justice, dissenting. I would not reach the constitutional questions in this case. Instead, I would reverse due to the fundamental failure of the commissioner to enter any findings of fact sufficient to support his order.

When we have reviewed administrative decisions, we have required strict compliance with a statute that requires underlying findings of fact. *See First Federal Savings & Loan Assoc. of Malvern* v. *Arkansas Savings & Loan Assoc. Bd.*, 257 Ark. 985, 521 S.W.2d 542 (1975); *First State Bldg. & Loan Assoc.* v. *Arkansas Savings & Loan Bd.*, 257 Ark. 599, 518 S.W.2d 507

(1975). The requirement that the underlying facts be stated is primarily for the benefit of the reviewing court and the failure to comply with this requirement is not a minor and inconsequential matter. *Arkansas Savings & Loan Assoc. Bd.* v. *Central Ark. Savings & Loan Assoc.*, 256 Ark. 846, 510 S.W.2d 872 (1974). The reason we must have sufficient findings of fact is to have an effective appellate review. If there are no facts, or insufficient findings of fact, we cannot say what the basis of the order is.

A comparison of some of the commissioner's findings of fact with the statutory language shows that the commissioner has recited legal conclusions rather than explicit facts:

> *Statutory language*: Public convenience and necessity will be promoted by the establishment of the proposed full service branch.
>
> *Findings of fact*: Public convenience and necessity will be promoted by the establishment of the proposed branch. Evidence provided by applicant and cited in the Examiner's Investigation indicate that applicant plans to offer all the products of a full service branch.
>
> *Statutory language*: Local conditions assure reasonable promise of successful operation of the proposed full service branch.
>
> *Findings of fact*: Local conditions assure a reasonable promise of successful operation of the proposed full service branch. The Examiner's Investigation for the proposed branch provides evidence that there are presently four financial institutions in Izard County but only two in the proposed trade area.
>
> *Statutory language*: Suitable physical facilities will be provided for the full service branch.
>
> *Findings of fact*: The Bank of North Arkansas has provided evidence that suitable physical facilities will be provided for the full service branch.

These are not "findings of fact" and are clearly inadequate to assist this court in reviewing the case. This involves an order allowing two banks to operate in a small community of eleven hundred people. Was it a political decision? We will never know.

It certainly does not have a sound factual basis to justify it. The majority sets a bad precedent in approving such a baseless order.

The statute which provides no hearing will be necessary on a branch bank application, Ark. Code Ann. § 23-32-1203(e) (Supp. 1987), radically alters the power of the commissioner to decide the economic well-being of banks and communities. But it was surely not intended to result in unbridled, unchecked, and unaccountable use of power by one person.

The legislature, no doubt, intended for us to see that this power is not arbitrarily used. We have failed at the first opportunity.

I might point out that, while this law only allows branch banks to be established in the bank's own county, that will soon be changed. After December 31, 1993, a branch may be established in a county contiguous to the county where the bank's principal office is located. After December 31, 1998, the branches may be established anywhere in the state. Ark. Code Ann. § 23-32-1202(b)(3) and (4) (Supp. 1989).

Marilyn FULLER, Administratrix of the Estate of Gary Don Jones, Deceased, and Ernest M. Jones, Deceased *v.* David Manuel JOHNSON and Carmen Johnson

89-66 781 S.W.2d 463

Supreme Court of Arkansas
Opinion delivered December 18, 1989
[Supplemental Opinion on Denial of Rehearing February 20, 1990.]

1. APPEAL & ERROR — REVIEW OF TRIAL COURT'S ACTION IN DIRECTING VERDICT — EVIDENCE VIEWED MOST FAVORABLY TO PARTY AGAINST WHOM VERDICT IS DIRECTED — WHERE THERE IS ANY EVIDENCE TENDING TO ESTABLISH AN ISSUE, IT IS ERROR TO TAKE THE CASE FROM THE JURY. — In determining on appeal the correctness of the trial court's action in directing a verdict for either party, evidence is viewed most favorably to the party against whom the verdict is directed; where there is any evidence tending to establish an issue in favor of the party against whom the verdict is

directed, it is error to take the case from the jury.

2. APPEAL & ERROR — REVIEW OF TRIAL COURT'S ACTION IN DIRECTING VERDICT — MEANING OF "ANY EVIDENCE" TO ESTABLISH ISSUE. — In determining whether there was any evidence tending to establish an issue in favor of the party against whom the verdict is directed, the term "any evidence" is recognized to mean "evidence legally sufficient to warrant a verdict" and to be legally sufficient it must be substantial; substantiality is a question of law.
3. NEGLIGENCE — DIRECTED VERDICT — WHEN PARTY WHO HAS BURDEN OF ESTABLISHING NEGLIGENCE IS ENTITLED TO HAVE FACTS DECLARED TO HAVE REALITY AS A MATTER OF LAW. — No matter how strong the evidence of a party who has the burden of establishing negligence and proximate cause as facts may comparatively seem to be, he is not entitled to have those facts declared to have reality as a matter of law, unless there is utterly no rational basis in the situation, testimonially, circumstantially, or inferentially, for a jury to believe otherwise.
4. TRIAL — DIRECTED VERDICT — WHEN ALLEGATIONS OF PETITION ARE DENIED BY THE ANSWER AND THE PLAINTIFF OFFERS ORAL EVIDENCE TENDING TO SUPPORT THE ALLEGATIONS, THE DEFENDANT IS ENTITLED TO HAVE JURY PASS UPON CREDIBILITY OF EVIDENCE. — Where the allegations of the petition are denied by the answer, and the plaintiff offers oral evidence tending to support the allegations of the petition, the defendant is entitled to have the jury pass upon the credibility of such evidence even though he should offer no evidence.
5. TRIAL — DIRECTED VERDICT — VERDICT UPON ISSUES OF FACT SHOULD NOT BE DIRECTED IN FAVOR OF PARTY HAVING BURDEN OF PROOF UNLESS FACT IS ADMITTED OR ESTABLISHED BY UNDISPUTED TESTIMONY — JURY IS SOLE JUDGE OF CREDIBILITY OF WITNESSES. — A verdict upon issues of fact should not be directed in favor of the party having the burden of proof unless such fact is admitted, or is established by undisputed testimony of disinterested witnesses from which different minds cannot reasonably draw different conclusions; the jury is the sole judge of the credibility of the witnesses and of the weight and value of their evidence, and may believe or disbelieve the testimony of any one or all of the witnesses, though such evidence is uncontradicted and unimpeached.
6. TRIAL — DIRECTED VERDICT — WHERE DEFENDANT HAD DENIED PLAINTIFF'S ALLEGATIONS AND WHERE THE PLAINTIFF HAD TESTIFIED AT TRIAL, THE DEFENDANT WAS ENTITLED TO HAVE JURY PASS ON CREDIBILITY OF THE EVIDENCE. — Although the defendant had died of illness prior to the trial, he had specifically denied, through his pleadings, the plaintiff's allegations as to the circumstances

surrounding the collision of their vehicles contained in the plaintiff's complaint, and at trial, the plaintiff and the investigating police officer testified; consequently, the defendant was entitled to have the jury pass upon the credibility of the evidence.

7. TRIAL — EXAMINATION OF JURORS WITH RESPECT TO INSURANCE CONNECTIONS — PROPER FOUNDATION MUST BE ESTABLISHED. — If a party's counsel acts in good faith, he may, in one form or another, question prospective jurors during the voir dire with respect to their interest in, or connection with, liability insurance companies; however, questions of the nature of those found in *King* v. *Westlake*, 264 Ark. 555, 572 S.W.2d 841 (1978), must be supported by a proper foundation.

8. APPEAL & ERROR — ARGUMENTS WILL NOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL. — Where there was no objection to the statement at the time of trial, the appellate court would not consider the point for the first time on appeal.

Appeal from Greene Circuit Court; *Gerald Pearson*, Judge; reversed and remanded.

Matthews, Sanders, Liles & Sayes, by: *Marci Talbot Liles*, for appellant.

McDaniel & Wells, P.A., by: *Bobby McDaniel* and *John Barttlet*, for appellees.

JACK HOLT, JR., Chief Justice. On May 6, 1986, the vehicle driven by Earnest M. Jones struck the rear of the vehicle driven by Manuel Johnson. Johnson was stopped to make a left turn and had his left turn signal on. The weather was clear, the road was dry, and the collision occurred during daylight. Johnson suffered back and neck injuries for which he and his wife sued to recover damages. The trial court directed a verdict in favor of Johnson on the issue of Jones' liability, and the jury awarded $50,000.00 to Johnson and $13,000.00 to his wife. Jones died of illness prior to trial, and the administratix of his estate appeals the judgment on three points of error. We reverse and remand to the trial court.

I. DIRECTED VERDICT

Jones contends that the trial court erred in directing a verdict in favor of Johnson as to Jones' liability. We agree and rely on *Spink* v. *Mourton*, 235 Ark. 919, 362 S.W.2d 665 (1962), to reverse and remand to the trial court.

[1, 2] We have held that in determining on appeal the correctness of the trial court's action in directing a verdict for either party, evidence is viewed most favorably to the party against whom the verdict is directed; where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. *Hardeman* v. *Hass Co.*, 246 Ark. 559, 439 S.W.2d 281 (1969) (citing *Barrentine* v. *The Henry Wrape Co.*, 120 Ark. 206, 179 S.W. 328 (1915)). The term "any evidence" has long been recognized to mean "evidence legally sufficient to warrant a verdict," *Hardeman, supra* (citing *Catlett* v. *Railway Co.*, 57 Ark. 461, 21 S.W. 1061 (1893)), and to be legally sufficient it must be substantial; substantiality is a question of law. *Hardeman, supra* (citing *St. Louis S.W. Ry. Co.* v. *Braswell*, 198 Ark. 143, 127 S.W.2d 637 (1939)).

[3] Our position on a directed verdict as to negligence has been in place for some time. We held in *Spink, supra*, that no matter how strong the evidence of a party who has the burden of establishing negligence and proximate cause as facts may comparatively seem to be, he is not entitled to have those facts declared to have reality as a matter of law, unless there is utterly no rational basis in the situation, testimonially, circumstantially, or inferentially, for a jury to believe otherwise.

[4] More recently, we affirmed this position in *Barger* v. *Farrell*, 289 Ark. 252, 711 S.W.2d 773 (1986), when we stated that where the allegations of the petition are denied by the answer, and the plaintiff offers oral evidence tending to support the allegations of the petition, the defendant is entitled to have the jury pass upon the credibility of such evidence even though he should offer no evidence. *Barger, supra* (citing *Clark* v. *Abe*, 328 Mo. 81, 40 S.W.2d 558 (1931)).

In this case, the burden was on Johnson, not on Jones, to prove the case stated in the petition. Johnson must show that he sustained an injury, that Jones was negligent, and that Jones' negligence was the proximate cause of his injuries. *Schaeffer* v. *McGhee*, 286 Ark. 113, 689 S.W.2d 537 (1985) (citing AMI 203). Also, the fact that Jones' vehicle struck Johnson's vehicle does not create a presumption of negligence. *Schaeffer, supra* (citing *St. Louis-San Francisco Ry. Co.* v. *Ward*, 197 Ark. 520,

124 S.W.2d 975 (1939)).

[5] Furthermore, a verdict upon issues of fact should not be directed in favor of the party having the burden of proof unless such fact is admitted, or is established by undisputed testimony of disinterested witnesses from which different minds cannot reasonably draw different conclusions. *Spink, supra* (citing *Woodmen of the World Life Ins. Soc.* v. *Reese*, 206 Ark. 530, 176 S.W.2d 708 (1944)). The jury is the sole judge of the credibility of the witnesses and of the weight and value of their evidence, and may believe or disbelieve the testimony of any one or all of the witnesses, though such evidence is uncontradicted and unimpeached. *Barger, supra* (citing *Clark, supra*).

[6] Although Jones had died of illness prior to the trial of this case, he specifically denied, through his pleadings, Johnson's allegations as to the circumstances surrounding the collision of their vehicles contained in Johnson's complaint. At trial, Johnson and the investigating police officer testified; consequently, Jones was entitled to have the jury pass upon the credibility of this evidence. Applying the principles of *Spink* and *Barger*, we must reverse and remand.

II. VOIR DIRE ON INSURANCE

Jones next contends that the trial court erred in allowing Johnson to voir dire prospective jurors as to whether they believed jury verdicts affected their insurance premiums. It is well settled Arkansas law that if a party's counsel acts in good faith, he may, in one form or another, question prospective jurors during the voir dire with respect to their interest in, or connection with, liability insurance companies. *Dedmon* v. *Thalheimer*, 226 Ark. 402, 290 S.W.2d 16 (1956).

In *Dedmon*, the trial court's ruling to prohibit plaintiff's counsel from questioning the jury panel with respect to insurance was reversed. The proposed question at issue was:

> Have you ever been in the employ of any liability insurance company, or do you own any stock in any liability insurance company at the present time, or are you insured with any mutual benefit liability company where your premiums are determined upon the size of judgments given in

personal injury actions for the previous year?

Id. at 403, 290 S.W.2d at 16.

Our rationale and standard for allowing this question was succinctly stated:

> In cases where the defendant is covered by liability insurance, the plaintiff might want to excuse any one that he suspects may be either biased or prejudiced where insurance is involved; and he would have a perfect right to exercise a peremptory challenge for that reason, if he so desired. The test of whether counsel may ask questions of veniremen in regard to insurance is whether the questions are propounded in good faith. If counsel, in good faith, thinks that liability insurance is involved, then he may ask questions calculated to bring to light any bias or prejudice a venireman may have for or against insurance companies.

Id. at 403-04, 290 S.W.2d at 17.

In *King* v. *Westlake*, 264 Ark. 555, 572 S.W.2d 841 (1978), we considered as proper the following questions asked by plaintiff's counsel:

> Q It is improper for either side to imply or suggest that the defendant does or does not have insurance, and the questions I will now direct to you have nothing to do with whether or not the defendant has insurance. The questions I will ask concern your insurance premiums, not insurance in this case. How many of you believe that jury verdicts affect insurance premiums?
>
> Q Your insurance premiums may not be affected greatly one way or the other, but will not the verdicts that you render have some effect on your insurance rates?
>
> Q The question I have been building up to is this: Assuming that the verdict you render could cost you a little more or a little less money on your insurance premium, can you listen to the testimony, the statements of counsel, and the instructions and then put aside the financial interest you have in this case because of your insurance premiums and render a verdict?

Id. at 559-60, 572 S.W.2d at 844.

Prior to these questions, a foundation had been laid by showing that for some time preceding the trial date a number of liability insurance companies had run advertisements in nationally published periodicals with the purpose of informing jurors in general that they were affected by the verdicts they rendered in that such verdicts resulted in increased premiums.

[7] In this case, Johnson's counsel, without laying any foundation, read the questions in issue directly from *King*. This was wrong and contrary to our holding in *King*. Questions of this nature must be supported by a proper foundation.

III. POLICE OFFICER'S TESTIMONY

Jones also alleges that the trial court erred in allowing the investigating police officer, who was not an eyewitness to the accident, to testify that a contributing factor to the accident was that Jones was "following too close."

[8] Jones did not object to this statement at the time of trial, and we will not consider this point for the first time on appeal. *Bonds* v. *State*, 296 Ark. 1, 751 S.W.2d 339 (1988).

As a result, we reverse and remand to the trial court in accordance with this opinion.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
FEBRUARY 20, 1990

784 S.W.2d 165

1. TRIAL — DIRECTED VERDICT — STANDARD. — A verdict upon an issue of fact should not be directed in favor of the party who has the burden of proof with respect thereto, unless such fact is admitted, or is established by the undisputed testimony of one or more disinterested witnesses and different minds cannot reasonably draw different conclusions from such testimony.
2. MOTIONS — DIRECTED VERDICT — PROPER ONLY WHEN NO ISSUE OF FACT EXISTS. — A motion for a directed verdict is a challenge to the sufficiency of the evidence and is proper only when no issue of fact exists.

3. MOTIONS — DIRECTED VERDICT — WHERE THERE WAS EVIDENCE UPON WHICH JURY COULD REASONABLY DRAW DIFFERENT CONCLUSIONS, MATTER SHOULD HAVE BEEN SUBMITTED TO A JURY. — Where there was evidence of record upon which a rational jury could reasonably draw different conclusions from the testimony of the various witnesses, the matter should have been submitted to a jury.
4. APPEAL & ERROR — REPETITIVE ARGUMENTS INAPPROPRIATE ON PETITION FOR REHEARING. — Arguments repetitive of the original argument on appeal are inappropriate subjects for a petition for rehearing.

Appeal from Greene Circuit Court; *Gerald Pearson*, Judge; supplemental opinion on denial of rehearing.

Matthews, Sanders, Liles & Sayes, by: *Marci Talbot Liles*, for appellants.

Bobby McDaniel, for appellees.

JACK HOLT, JR., Chief Justice. The appellees (Johnsons) request a rehearing for two reasons: 1) that the standard for a directed verdict has been changed by this opinion, and 2) that this court erred in finding that the Johnsons conducted an improper voir dire by holding that *King* v. *Westlake*, 264 Ark. 555, 572 S.W.2d 841 (1978), required them to establish an evidentiary foundation before asking the questions in issue concerning insurance.

The Johnsons initially contend that our decision essentially abolishes directed verdicts in favor of a plaintiff in negligence cases by holding that so long as a defendant files an answer denying liability, a directed verdict is not appropriate even though no evidence is presented by the defendant.

[1] In our majority opinion, we relied on *Spink* v. *Mourton*, 235 Ark. 919, 362 S.W.2d 665 (1962), and found that the trial court erred in directing a verdict in favor of the Johnsons as to Jones's liability. The Johnsons point to the rule in *Spink* and proceed to suggest that we did not follow it. That test is as follows:

> A verdict upon an issue of fact should not be directed in favor of the party who has the burden of proof with respect thereto, *unless* such fact is *admitted, or* is *established by the undisputed testimony of one or more disinterested*

witnesses and different minds cannot reasonably draw different conclusions from such testimony.

(Emphasis added.)

To the contrary, we followed the dictates of *Spink* and its progeny. Granted, we did not embellish on the evidentiary aspects of the case, perhaps giving the appearance that we ignored the testimony and merely relied on the fact that Jones filed an answer that contained a denial of the circumstances surrounding the collision as pleaded in Johnson's complaint.

Such is not the case. In our opinion, we did not mention that the officer, whom Johnson described as a disinterested witness, was not an eyewitness to the accident. Nor did we note that the officer's claim that Jones had been "following too close" was in conflict with Johnson's own testimony. Johnson testified that he had looked in his rearview mirror and had seen an eighteen-wheeler in the outside lane, but that he never saw Jones's car. However, all of these facts were considered in passing judgment.

Additionally, the officer's testimony, concerning Jones's remarks about failing to get over far enough, was far from an admission of negligence by Jones. Unquestionably, by Johnson's own testimony, an eighteen-wheeler was present at the scene immediately before the time of the accident and, had this matter been sent to the jury, the jury may well have surmised that the eighteen-wheeler may have contributed to the accident. In any event, the officer was not an eyewitness to the accident, nor did his testimony establish negligence on Jones's behalf as a matter of law.

[2] A motion for a directed verdict is a challenge to the sufficiency of the evidence and is proper only when no issue of fact exists. *Boren* v. *State*, 297 Ark. 220, 761 S.W.2d 885 (1988).

[3] In this case, there is evidence of record upon which a rational jury could "reasonably" draw different conclusions from the testimony of the various witnesses and, for this reason, the matter should have been submitted to a jury.

The Johnsons also argue that this court erred in finding that their voir dire, concerning the effect of jury verdicts upon insurance premiums, was not proper since it was not supported by

a proper foundation.

We resolved this point of error against the Johnsons and clearly stated that:

> In this case, Johnson's counsel, without laying any foundation, read the questions in issue directly from *King*. This was wrong and contrary to our holding in *King*. Questions of this nature must be supported by a proper foundation.

[4] The Johnsons' concerns are repetitive of their original argument on appeal, and we have held that such repetition is an inappropriate subject for a petition for rehearing. *Butler Mfg. Co.* v. *Hughes*, 292 Ark. 198, 729 S.W.2d 142 (1987).

The petition for rehearing is denied.