ADVANCE ARKANSAS INSTITUTE

# Arkansas Issues: 2016

## Appellate Judicial Candidates on the Issues

# Contents

# Arkansas Issues: 2016

In November of 2015, the Advance Arkansas Institute sent questionnaires to all nine candidates for appellate judgeships in Arkansas. In Arkansas, judges are elected, but the vision and the values that judicial candidates bring to the bench is rarely the subject of public discussion. In an effort to bring more information to the voters, we invited all nine candidates to answer a few questions about their legal and judicial philosophies.

Out of the nine candidates, three answered AAI's questionnaire. I commend James McMenis, Judge Mike Murphy, and Judge Shawn Womack not simply for taking the time to respond to our questionnaire, but for the thoughtful quality of their answers. I very much appreciate the respect that they have shown for voters and for the state's democratic process.

Of course, I cannot commend the six judicial candidates who declined to respond to our questionnaire. When candidates decline to respond to questions from the public, this suggests a certain degree of cynicism about the political process in which these candidates participate. Perhaps that cynicism is justified, and perhaps it's naive for the Advance Arkansas Institute to try to enlarge the role of questions of legal and judicial philosophy in Arkansas judicial elections. But I hope not.

I found the absence of responses from two candidates especially disappointing. One of the six candidates, whom I will not name, told me a year or so ago in a private meeting that it was especially important to put questions of legal and judicial philosophy at the center of judicial elections, and added that he thought that a questionnaire approach was an excellent way to accomplish this goal. A year later, his refusal to participate in a process that he previously endorsed is notable. Another candidate, Job Serebrov, told me shortly after receiving his copy of the questionnaire that Arkansas's judicial rules of ethics barred him from answering it. Serebrov was incorrect: I discuss his case in more detail in the final appendix to this report.

Of greater interest are the actual responses to questions that I received from McMenis, Judge Murphy, and Judge Womack. We provide their answers in the next three sections of this report. I then provide some brief comments on their answers in Appendix I. Appendix II names the candidates who did not respond and briefly describes the methodology we used to ensure that all judicial candidates received notice of our questionnaire. Appendix III, "The Strange Case of Job Serebrov," discusses judicial candidate Job Serebrov's repeated contentions that ethics rules barred him from answering our questionnaire.

Dan Greenberg
President, Advance Arkansas Institute
January 16, 2016

# Questionnaire

1. Please provide your name and mailing address.

2. Describe or list the continuing education programs you have participated in for the last two years.

3. Please provide at least one text that you have written that displays your approach to the law. This could be an article, a speech, a report, a letter to the editor, a judicial opinion, etc., that is relevant to the Arkansas legal system. Please provide at least one, and no more than three, such texts. If the text is on the Internet, either the text or a link to it will be sufficient.

4. Some say that the American legal system produces excessively large verdicts. In your opinion, is this is a problem? If so, what solutions would you recommend to solve this problem?

5. To what extent does the 'equal protection' clause of the Constitution tolerate public policies which distribute benefits on the basis of race or skin color?

6. Roughly 2000 men seek emergency-room assistance every year because they have zipped up their pants, but by mistake have caught a part of their body in the zipper. Suppose an Arkansas litigant filed suit in trial court against a clothing manufacturer, arguing that the injurious pants are an inherently dangerous consumer product and that they lacked appropriate warnings: is he entitled to his day in court, or should the case be dismissed? Please provide your view and explain your reasoning.

7. In Arkansas, policymakers have publicly disagreed over to what extent legislators should write court rules, as compared to what extent courts should write court rules. Please provide your view on this question of judicial policy; explain your reasoning.

We recommend that you combine your answers into one document and email it to advancearkansas@gmail.com. Deadline: December 31, 2015.

# JAMES E. MCMENIS

*ATTORNEY & COUNSELOR AT LAW*

*Candidate for Judge, Arkansas Court of Appeals, Position 5*

618 N. Broadway/P.O. Box 7
Smackover, AR 71762-0007

Fax: (870) 863-5120
December 30, 2015

Phone: (870) 725-4629
Cell: (870) 866-4428


MEMORANDUM FOR: Dan Greenberg, Advance Arkansas Institute
55 Fontenay Circle, Little Rock, AR 72223

1. Enclosed please find my responses to the questionnaire sent via your November 23, 2015 letter. I received the resent letter via US mail this morning

2. As you know, I am a candidate for Associate Judge, Arkansas Court of Appeals, Position Five (5).

3. I look forward to visiting with you and the institute concerning the proper role of the judiciary in our system of three co-equal branches of government designed (at least in theory) so that we have checks and balances.

4. Should you have any questions, please call or fax me.

Respectfully Submitted,

James E. McMenis

Enclosure: as stated

JEM/mj/jem

[Detailed]

## ANSWERS/RESPONSES TO 2015 JUDICIAL CANDIDATE QUESITIONAIRE

1. Candidate Name: **JAMES E. MCMENIS,** *ATTORNEY & COUNSELOR AT LAW*

*Candidate, Associate Judge, Arkansas Court of Appeals, Position Five (5)*

618 N. Broadway/PO Box 7 Smackover, AR 71762-0007 Business Phone: (870) 863-5119
Cell Phone: (870) 866-4428 Campaign Phone: (870) 725-4629 Fax Number: (870) 863-5120
Email: mcmenis law@yahoo.com; Campaign Email address: McMenisforJudge@facebook

2. After admission to the Arkansas Bar, I continuously attended various CLE programs. I always had a credit (carry forward) balance. In the past two years I attended:

a. A CLE Seminar in November 2015 hosted by the local chamber of commerce on tax and estate planning;

b. The Arkansas Bar Annual Meeting and CLE in June 2015 and June 2014 (and earlier years);

c. The mid-winter Arkansas Bar Meeting and CLE in February 2015 and January 2014.

3. Enclosed is:

a. A copy of my speech for civic groups;

b. Briefs [which I have copied verbatim from the pleadings in court which are a *matter of public record* and are not redacted]:

(1) Two separate briefs on Domestic Relations Law;

(2) One brief re statutory termination of temporary guardianships.

4. In my view, the word "excessively large verdicts" may be misleading. For example:

A. Many cite the McDonald's coffee cup case as an example of justice gone wrong. However, I understand that the harmed woman had to have reconstructive surgery and that this particular McDonalds deliberately had the coffee extra hot because some people had complained that the coffee cooled before they could get to work. And, I understand that the woman initially approached McDonald's just to pay her medical expenses – which it refused.

B. In the past one of the 13th Judicial District Circuit Judges published annually a list of civil cases with the jury award listed. What was interesting – and a reason as a plaintiff's attorney to push for settlement – was the very low dollar amount awarded by those juries. I sometimes stated that those juries must have thought it was their own money and not the Defendant (or Defendant's insurance company) money.

C. I am concerned [but unsure of the remedy] about what appears to be excessive class actions matters in federal courts. For example in the Disney case the named plaintiff and her son got less than $50,000.00, plaintiffs in the "class" got a coupon for purchase of another Disney movie and the attorneys got a very large attorney fee.

D. In Arkansas quite often the presiding judge will reduce what he believes is an excessive damage award, as do the two appellate courts. This levels the playing field.

5. I do not believe that the "equal protection" clause **mandates** that public benefits [to include admission to colleges and professional schools] should be determined on the basis of race or skin color, which seems to be an impermissible discriminatory basis. Merit selection should in my view be the only criteria. Just because someone believes they are from a group which may have had past discrimination does not require us as a society to now discriminate in favor of that class and allow such persons to "leap over'" more qualified candidates. This is the essence of the arguments in the Baake (sp) case and now before the US Supreme Court in the matter of the Texas woman who claims less qualified persons were placed above her due to selective criteria of race and other socio issues rather than merit selection.

In rendering any decision before my panel, I will apply the current legal precedents as to that issue.

6. Zipper/trouser question. Any litigant is entitled file a cause of action. However the trial courts are charged with the responsibility to ensure that frivolous unmerited matters do not remain on the docket. In my view, this type of case would likely be dismissed via a Summary Judgment on the issue of

contributory negligence. Trouser accidents due not occur because zippers are inherently dangerous but due to careless or hurried actions by those adversely affected. It would sadden me to see on all men's pants a statement that negligent use of zippers can cause damage to skin tissue - but that could become a reality in our litigious society.

7. In my view the role of the legislature is to enact laws not establish rules of court procedure. Amendment 80, passed by the voters, clearly charges the Arkansas Supreme court with the responsibility to promulgate rules of procedure. There are only a small number of attorneys in our legislature. What benefit would it be to our state's public policy to have non legally trained laymen writing rules of procedure for our Courts. The separation of powers and our constitutional goal of three separate but equal branches of government should dictate that procedural matters to include court rules is the proper province of the Courts not the legislature.

[Added] The role of the judiciary is not to invent or create new law, but to render opinions based on law, procedure and evidence in the record of cases properly presented to the Court; and when necessary, to interpret the law. A Court or Judge does not go out looking for such cases, but acts on those cases properly presented to it.

The *McMenis for Judge Campaign*, a grass-roots effort, focuses on my **education**, [BA, Ouachita University, Magna Cum Laude, 1970; JD, University of Arkansas' School of Law, Upper One-Third (1/3), 1973; Masters of Military Law, US Army Jag School, 1979; Masters of Law University of Virginia, 1982]; as well as my **tradition** of **service**, **trust** and **integrity**, as well as my legal and life **experiences**, to include my service as part-time Magistrate for the Union County District Court; my military experience - to include service as the legal advisor to the military command responsible for military assistance to civil authority and military assistance to civil defense [now under the "homeland security" umbrella]; in addition to my private practice of law.

I want to be a judge you know, whose judgment you trust.

*Advance Arkansas* could assist my campaign by informing others about me, to include my background, and my record; and by encouraging its members and supporters to support me, and to contact me about any issues or concerns they may have.

IN THE CIRCUIT COURT OF COLUMBIA COUNTY, ARKANSAS
PROBATE DIVISION/FIFTH DIVISION

IN THE MATTER OF THE GUARDIANSHIP
OF GEORDRENA KING; JASON CONLEY, JR.,
AND TERRY SIMMONS, JR., Minors PR 2012-154-5

## RESPONDENT'S BRIEF

Comes now the Respondent, CHARLETHA ROBINSON, by and through her attorney, James E. McMenis, and for her Brief as to the issue lack of jurisdiction of a Temporary Guardianship after ninety (90) days, and the standard for custody determination states that:

## JURISDICTION OF THIS COURT

For her brief in support of lack of jurisdiction, Respondent states that the Court is without proper jurisdiction for at least two reasons: A.C.A. §28-65-218(a)(1) states that a Temporary Guardianship shall not exceed ninety (90) days; A.C.A. §28-65-218(a) (2)(A) directs: "if the incapacitated person is a minor, the initial period for the appointment of a temporary guardian shall be for a period not to exceed ninety (90) days. (B). However, on or before the expiration of the ninety (90) day period, the Court may Extend the Temporary Guardianship, not to exceed an additional ninety (90) days, if the Court finds after a hearing on the merits that there remains imminent danger to the health of the minor if the Temporary Guardianship is not extended."

A. That the Court ruled from the bench that this matter is a Temporary Guardianship and that no Motion or Order extending the Guardianship beyond ninety (90) days had been entered. Accordingly, based on the statutory provisions, the Court lost jurisdiction at the end of ninety (90) days, (i.e. March 18, 2013).

B. There have been no reported cases under the 2011 amendment (which allowed after a hearing — a second ninety (90) day period of time for continuing guardianship). However, under prior law the Supreme Court held that "It Was Clearly The Intent Of The Legislature . . . to prohibit the Appointment of a Temporary Guardian Or The Retention Of An Individual As Guardian For More Than Ninety (90) Days" [*Becker v. Rogers*, 235 Ark-603, 361 S.W. 2d 262 (1962)]. Accordingly, the guardianship should be dismissed effective March, 2013.

2. In addition, among the issues raised in the Petition is that Respondent is without the parenting skills and other issues. In such situations, the Arkansas Supreme Court has held that such a situation is better served by a Juvenile Division Dependency – Neglect Case [See *Devine v. Martins*, 371 Arkansas 60, 263 SW 515] (2007), rather than a Temporary Guardianship. The Court noted for example in a Dependency – Neglect Case, the Court could Order DHS services, such as counseling, parenting classes, etc., to improve the parenting skills; and could Order random drug tests and the like. Accordingly, the Petition for Permanent Guardianship should be dismissed for this second reason.

## STANDARD FOR PERMANENT GUARDIANSHIP

For her Brief in support that the standard for continued guardianship should be high, Respondent states that: If the Court does not dismiss for lack of jurisdiction, the second issue is the Standard of Review as to proper custody. The question is: does the Court have to find the birth mother unfit before it considers the "best interests" of the children? Respondent further states:

1. It is not challenged that this Court had initial jurisdiction in an emergency situation, for example, if the children were subjected to or threatened with maltreatment or abuse, imminent danger to the safety and health of the said children, – [see A.C.A. § 28-65-218 (a)]. However, the Petition, supporting affidavits, and the testimony given at the hearing, do not support a finding of continued imminent danger to the life or health of the minors. Accordingly, this case should be dismissed as no need for a permanent guardianship has been established.

2. Where there is a fit, natural parent, a Permanent Guardianship is **not** appropriate, unless the actions of the Respondent rose to the level of manifest indifference [see *Devine v. Martins*].

A. The Law prefers a parent over a grandparent, unless the parent is incompetent or unfit [see *Devine v. Martins*; *Freeman* 360 ARK 4 45, 202 SW 3d 485; *Blunt v. Cartwright* 342 ARK 662, 30 SW 3d 737 (2000): *Schuh v Roberson*, 302 ARK 305, 788 SW 2d 740 (1990) *Stamp v Rawlins*, 297 ARK 370 761 SW 2d 933, (1988); See also *Lloyd v. Butts* 343 ARK 624, 37 SW 3d 606 (2001), where the Court held that "Courts are very reluctant to take from the natural parents the custody of their child and will not do so unless the parents have manifested such indifference to its welfare as indicates a lack of intention to discharge the duties . . . to their offspring . . . . "See also *Holmes v Coleman*, 195 ARK 196, 111 SW 2d 474 (1937); and *Hancock vs. Hancock* 198 ARK 652, 130 SW 2d 1(1939).

B. In *Devine v Martins*, the Court found that these type issues (and raised in this matter) "are more akin to issues that typically arise in Dependency-Neglect Cases . . . [where] our state's policy strongly favors reunification with the natural parent above all other alternatives . . . . The state's courts should not be in the business of permanently removing children from their parent's custody simply

because the parents have exercised poor judgment . . . . Frankly, it is not in a child's best interest to take custody from a natural parent . . . . and grant custody to . . . grandparents."

3. That the Petitioners have not met their burden of proof and that the issue of best interest does not arise until the court has determined that Respondent is unfit. Accordingly the Petition for Permanent Guardianship should be dismissed. There is no evidence that the Respondent is unfit.

WHEREFORE, the Respondent respectfully requests that the Court dismiss the Guardianship for lack of jurisdiction and/or dismiss because the standard for a permanent guardianship has not been met, and/or find that a permanent guardianship is not appropriate and further prays for her attorney's fees and costs herein expended and for all other just and proper relief to which she may show herself entitled.

RESPECTFULLY SUBMITTED,
CHARLETHA ROBINSON,
RESPONDENT

BY: _____
James E. McMenis # 73157
Attorney for Respondent
202 N. Washington, Suite 206
El Dorado, Arkansas 71731-0490
TEL. (870) 863-5119~FAX: 863-5120

CERTIFICATE OF SERVICE

I, James E. McMenis, do hereby certify that a copy of the above and foregoing Brief was duly served on the Guardian by mailing and faxing copy, postage prepaid, to the Guardian's Attorney, Claudell Woods, ESQ., a copy to 621 N. Washington/ P.O. Box 187 Magnolia, Arkansas 71753, and a copy provided to the chambers of the Honorable Larry Chandler via fax and regular mail on this ___ day of April 2013.

_____
James E. McMenis

IN THE CIRCUIT COURT OF UNION COUNTY, ARKANSAS
DOMESTIC RELATIONS DIVISION/THIRD DIVISION

LAVONNE ANNETT MARTIN PLAINTIFF

NO. DR-2010-0359-3

RICHARD A. DRUMMOND DEFENDANT

**SUPPLEMENTAL MOTION TO REOPEN HEARING AND/OR TO MODIFY/AMEND THE COURT'S JUDGMENT FROM THE BENCH AND FOR OTHER RELIEF [WITH INBEDDED BRIEF OF LAW]**

Comes now Defendant, Lavonne Martin, by and through her attorney, James E. McMenis, and for her post trial/hearing Supplemental to Reopen Hearing and or Other Relief to Include *Coram Nobis*, and *Nunc Pro Tunc* and to Modify/Amend the Court's Judgment pursuant to Rule 60 (6), ARCP and/or to Amend findings and Conclusions of Law pursuant to Rule 52 (a) ARCP, states that the an previous post trial motion was filed on original Motion was prepared simultaneously with the submission to the presiding judge a precedent Order/ Judgment from the March 27, 2013 hearing filed of record on June x, 2013, and further states:

1. That no final order has been entered from the hearing and this Motion is properly before the Court. In lieu of a supporting Affidavit, the Plaintiff has verified the statements herein. That this matter came on for hearing and was heard on March 27, 2013; at the close of the hearing the Court issued a bench ruling which among other things; terminated spousal support and modified child support, and due to the distance between Defendant and the children, established a monthly summer visitation of one month set for July unless the parties otherwise agree as well as ordering

Defendant to pay Plaintiff's attorney fees, and directed that child support paid directly by Defendant should be through the Registry of the Court.

2. There was a miscarriage of justice [See *Young vs. Honeycutt*, 324 ARK. 120, 919 SW 2d 216 (1996); *Brant vs. Sorrells*, 293 ARK. 276, 737 SW 2d 450 (1987) and *Bearden vs. J.R. Grobmeyer Lumber Company*, 331 ARK. 378, 961 SW 2d 760 (1998). The fact that the presiding judge was also the judge who had approved the previous Decree (entered on August 4, 2010 and the parties' approved and incorporated the Property Settlement Agreement therein, and had previously continued the spousal support in his July 1, 2011 Order/Judgment may have prejudiced his findings as to these issues. Plaintiff suggests that she was prevented from a fair hearing on the following grounds [See Rule 59(a), (2), (3), (4), (5), (6) & (7) ARCP].

A. Child Support:

1). The Court determined that child support would be reduced pursuant to Defendant's *pro se* pleading filed of record on October 19, 2012 and:

* Determined that the Defendant had a reduction of income and now (currently) netted the sum of $400.00 weekly from his employer, as well as netting the monthly sum of $129.80 from his military retirement pay.

* However, the Court in setting said support, [based on Defendant's testimony that he netted the sum of $400.00 weekly], the Court inadvertently multiplied $400.00 weekly net income by four (4) (rather than

4.33) reaching a monthly income of $1,600.00, upon which to set **monthly** support; however that the multiplier should have been 4.33 [or weekly income times 52 weeks divided by twelve months] to obtain a valid monthly employment income sum] which would set net income from wages at **$1,732.00 [not $1,600.00]**. Also, based on Defendant's testimony the Court separately found that Defendant was receiving monthly retirement pay income from the Defense Finance Accounting Service (DFAS) in the net sum of **$129.80**. Accordingly, child support should have been set at a monthly net income of **$1,861.80**, which according to the Support Chart, for five children would reflect a child support figure of **$836.00** [verses $772.00] for the period November 1, 2012 through May 31, 2013, when Ashley Drummond, now eighteen (18) years old, graduates from Smackover High School; and a child support figure of **$757.00**, [verses $669.00] effective June 1, 2013 – both with an additional 20% for arrearages.

B. The Court determined child support arrearages based on what Plaintiff alleges was an incorrect monthly income figure and therefore established a judgment figure for the period beginning November 1, 2012. That if the suggested corrections are made, the arrearages would be increased by the amount of the correct support over the incorrectly stated amount beginning with the period November 1, 2012 through March 27, 2013, in the additional judgment of **$320.00** [$836.00 – $772.00 = $64.00] a month for November 1, 2012 – March 1, 2013.

3. Over the objection of Plaintiff, the Court also determined that it would terminate spousal support based on the Defendant's reduction in income effective November 1, 2012.

A. Modification of Agreement and Decree. Jurisdiction of the Court to Modify a Settlement Agreement incorporated into the Order (Decree) of the Court: In *Bachus vs. Bachus*, 216 ARK. 802, 227 SW 2d 439 (1950), the Court held that a Court, after it approves an Agreement, cannot modify an Agreement or a Decree which incorporates an Agreement, and cannot reduce or terminate said spousal support – if the said Agreement does not refer to a pending divorce (i.e., based on normal contract principles). If the Court approves a settlement and awards support money upon that basis, Court has no jurisdiction to modify Decree at a later date. In *Anding v. Anders*, 249 ARK. 413, 459 SW 2d 416 (1970), the Arkansas Supreme Court held that "where portion of Divorce Decree was based on property settlement, Court was powerless to modify decree . . . ." [However, Arkansas' Appellate Courts have distinguished what would otherwise be a normal contract situation in matters where the Agreement of the parties sets forth that the Property Settlement Agreement is in contemplation of divorce. See for example, *Law vs. Law*, 248 ARK. 894, 455 SW 2d 854 (1970), See also *Adams vs. Adams*, 223 ARK. 656, 267 SW 2d 778 (1954)]. In *Armstrong vs. Armstrong*, 248 ARK. 835, 454 SW 2d 660 (1970), the Court held that even "Where husband and wife entered into separate and independent agreement in contemplation of divorce . . . Court

did not have authority to reduce amount of alimony even though Agreement provided that it was made a part of the Decree . . . ." See also *Collie vs. Collie*, 242 ARK. 297, 413 SW 2d 42 (1967), where the Arkansas Supreme Court held that "As to alimony and property settlement agreement incorporated in decree, divorce decree was contractual . . . [and] decree could not be modified by judicial action as to such alimony . . . ." See also *Hodge vs. Hodge*, 241 ARK. 712, 409 SW 2d 316 (1966) where it was held that "When Property settlement including award of alimony is embraced in decree of divorce, Court is powerless to change alimony award irrespective of changes in economic situation of parties." In *Johnson vs. Johnson*, 241 ARK. 551, 408 SW 2d 885 (1966) the Court held that "once (a Court) enters a divorce decree awarding support money upon agreed property settlement, Court thereafter has no power to modify the decree as to alimony. In *Cole vs. Cole*, 82 ARK. App. 47, 110 SW 3d 310 (ARK. APP. 2003), the Court of Appeals held that "In the absence of a Settlement Agreement to the Contrary, an award of alimony is always subject to modification . . . ." **The Agreement herein provided to the Contrary.** Here, the Agreement herein specifically stated that it was not in contemplation of a divorce, nor does it reflect the case number – as it was executed moments before this action was filed. In fact, the Agreement specifically stated that it continued notwithstanding its' incorporation into a subsequent divorce, reconciliation or the like. The only method allowed under the parties' contract was via a written modification by the parties. [Article XXIV of the parties' Agreement filed herein states: "A. No modification or waiver of any of the terms of this

agreement shall be valid unless in writing and executed with the same formality of this agreement.] In some jurisdictions (e.g. the Commonwealth of Virginia (where the Agreement was prepared) and in most of the Department of Defense approved Separation Agreements prepared for service members), the Agreement specifically states that it continues notwithstanding it's' incorporation into the Order (or Decree) of the Court. Here there is such language in the Agreement. Paragraph 8 of the Decree approved and incorporated the Agreement as part of the decree – however, the Agreement it was not merged into the Decree and continued as a contract between the parties. In Arkansas, if an Agreement states that it is part of the existing divorce proceeding the parties' Agreement, and if it refers to a divorce and states that it is to be merged into the Decree – the Agreement, therefore becomes merged in the Decree and loses any contractual nature, and Court may modify the resulting Decree. See also *Lively* vs. *Lively*, 222 Ark. 501, 261 SW 2d 409 (1953); Seaton vs. Seaton, 221 ARK. 778, 256 SW 2d 555 (1953); *Birnstill* vs. *Birnstill*, 218 ARK. 130, 234 SW 2d 757 (1950). However, where an Agreement is a "stand alone" document and does not refer to a pending divorce matter, or if there has not yet even been a divorce filing, the Circuit Court has no power to modify the Agreement – only to Order compliance. In the original Decree, the Court approved the parties' Agreement. In this matter, the Agreement by its own terms continued notwithstanding its incorporation into a decree – and continued even if no Decree was ever entered. The decision by the Court, as to these issues, was against the preponderance of the evidence and the case

law of this state. These errors materially affected the Defendant's right to obtain justice. Appellee's quotation from *Rockefeller vs. Rockefeller*, 335 Ark. 145, 980 SW 2d xxx (1998) comes not from the majority opinion, but from Justice Imber's concurring opinion. The facts in Rockefeller can be easily distinguished from this matter, e.g., in Rockefeller the Agreement specifically stated that "terms and conditions of this agreement shall not be merged in any such judgment or decree and shall in all respects survive the same and shall not be subject to modification". No such language is in the Jerry's Agreement. The Rockefeller decision is consistent with *Bachus vs. Bachus*, 216 Ark. 802, 227 SW 2d 439 (1950) (cited by Appellee in the Quote from Justice Imber's concurring opinion in Rockefeller) where the Court held that a Court cannot modify an Agreement or a Decree which incorporates an agreement – if the said Agreement does not refer to a pending divorce (i.e., based on normal contract principles). However, as stated *supra* Arkansas' Appellate Courts have distinguished what would otherwise be a normal contract situation in matters where an Agreement of the parties sets forth that the said Property Settlement Agreement is in contemplation of divorce. See for example, *Law vs. Law*, 248 Ark. 894, 455 SW 2d 854 (1970). The Agreement herein specifically stated that it was to be a part of the divorce matter and, in fact was attached as Exhibit "A" to the Decree (and not otherwise separately filed with the Clerk). Rockefeller is also consistent with *Armstrong vs. Armstrong*, 248 Ark 835 454 SW 2d 56 (1970), where the court affirmed a denial of modification because ". . . the provisions of the agreement make clear that it was a separate and

independent contract entered into by the parties." However the Arkansas Appellate Courts have clearly distinguished situations where an agreement is an independent contract which by its terms prohibits merger into a judgment or decree from that where an agreement is prepared because the parties have filed a divorce action and where the agreement does not by its' terms prohibit modification.

***PRAYER FOR OTHER RELIEF***

PRAYER FOR MODIFICATION OR AMENDMENT OF COURT'S JUDGMENT (ORDER FROM BENCH) PURSUANT TO RULE 60 (b) ARCP AND TO AMEND AND/OR MAKE FINDINGS OF FACTS AND CONCLUSIONS OF LAW PURSUANT TO RULE 52 (a) ARCP

Plaintiff incorporates all above material statements in this paragraph and further states:

1. That as set forth above, the Court set child support based on what Plaintiff suggests is an incorrect calculation of Defendant's monthly net income from wages. As stated above, Defendant's net income is **$1,861.80** (**$1,732.00** net income from employment plus **$129.80** retired pay), not $1,600, which pursuant to the family support charts requires child support to be set at $836.00 per month (not $772.00) for the period November 1, 2012 through May 31, 2013, plus twenty per-cent (20%) toward arrearages. During its' ruling, the Court acknowledged this additional income.

2. The Court also terminated the periodic payments of $1,500.00 from Defendant to Plaintiff, as previously approved by the Court. The Court cited paragraph 5 of the Decree, which in Plaintiff's view was surplusage and due to a scriveners error actually had spousal support being **received (not paid)** by Defendant. The Court noted that the second sentence in paragraph 5 of the Decree states: "That the Defendant shall receive fifteen-hundred dollars ($1,500.00) per month as temporary spousal support and alimony." The parties' agreement incorporated by reference and approved and adopted by the Court correctly reflected that Plaintiff was to receive said

periodic payment in lieu of spousal support [and Defendant was to pay said periodic payments]. The Court should strike that portion of paragraph 5 of the Decree as being surplusage and inconsistent with the parties Agreement approved and adopted by the Court.

For reasons stated above Plaintiff requests that the Court Modify/Amend its' Judgment and/or Amend and/or make findings of facts and conclusions of law. In announcing its' decision, the Court opined that "It's an ability to pay issue. I don't see he can pay it, one, and two, she has an ability to work [full-time even though she had a child at home"] and further stated that "to say there's no childcare services in Smackover, I just can't imagine that, that there's nobody that will keep a child in Smackover. Plaintiff could work full-time even though she had a child at home and further stated that the Court did not believe Plaintiff's statement that there was no daycare facility in Smackover. Exhibit "A" is a Communications Record in which the Mayor of Smackover confirmed that there is no daycare facility in Smackover.

3. Plaintiff prays that the Court modify or amend its' bench judgment to reflect the corrected child support sums and restore the periodic payments of $1,500.00 pursuant to the contractual Agreement of the parties, and as approved by the Court in paragraph 8 of the Decree, or in the alternative, that the Court amend its' findings and conclusions of law.

WHEREFORE, Plaintiff prays for an Order of Court to Reopen Hearing and for Other Relief to Include an Order *Coram Nobis*, and/or *Nunc Pro Tunc* and/or to Set Aside or Modify/Amend the Court's Judgment or Findings and

conclusions of law by making or approving these requested changes in the Court's Order from the March 27, 2013 hearing; for her attorney fees and costs and for any other relief to which she may be entitled.

Respectfully Submitted,
Lavonne Martin, Plaintiff

By: _____
James E. McMenis, AR Bar # 73157
202 N. Washington, Suite 206
El Dorado, AR 71730
Tel. (870) 863-5119 ~ Fax: 863-5120

VERIFICATION

STATE OF ARKANSAS)
: SS
COUNTY OF UNION )

I, LAVONNE A. MARTIN [FORMERLY DRUMMOND], have read the above and foregoing Motion and state that the foregoing is true to the best of my knowledge, belief and information.

_____
Lavonne A. Martin, Plaintiff

SUBSCRIBED AND SWORN TO before me on this __ day of June, 2013.
**(SEAL)**

_____
Notary Public

My Commission Expires:_____

**CERTIFICATE OF SERVICE**

I, James E. McMenis, do hereby certify that a true and correct copy of the above and foregoing Motion has been served via mail to Richard A. Drummond, P.O. Box 6218, Crline California, 923x5 and provided to the

Chambers of the Honorable Edwin A. Keaton, Ouachita County Courthouse, on this the ___ day of March 2014.

_____

James E. McMenis

IN THE CIRCUIT COURT OF UNION COUNTY, ARKANSAS
DOMESTIC RELATIONS DIVISION/SECOND DIVISION

MARK CONNOR PLAINTIFF

VS. NO. DR-2013-0423-2

JENNIFER CONNOR DEFENDANT

**TRIAL BRIEF CONCERNING ALLOCATION OF MARITAL ASSETS/DEBTS TO INCLUDE DEFENDANT'S STUDENT LOANS DURING MARRIAGE**

Comes now the Defendant, Jennifer Connor, by and through her attorney, James E. McMenis, and submits this Trial Brief Concerning Allocation of Marital Assets/Debts to Include Student Loans obtained by her during her marriage to Plaintiff, Mark Connor, states that a temporary hearing was held in June 2013, and subsequently follow on hearings were held on June 5, and June 29, 2015; that a continuation of those hearings is set for August 13, 2015 at 1:00 p.m. and further states that:

**BRIEF OF ARKANSAS LAW**

1. That as evidenced by the parties' respective Affidavits of Financial Means admitted herein and other evidence before the Court, the Plaintiff has more income and assets than Defendant, who has been a stay at home caregiver and homemaker for most of her adult life.

A. That while A.C.A. § 9-12-315 requires an **equitable** distribution of **marital assets** obtained by the parties during the marriage *it does not specifically set forth a power to divide marital debts.* The presumption of equal division does not apply to the division of marital debts, *Adams vs. Adams*, 2014 Ark App 67 16 432 SW 3d 48 (2014).

B. The Arkansas Appellate Courts have interpreted the marital assets code provision to include a trial court's implied power to divide marital debt even though not specifically stated in the Code – otherwise the completeness of a divorce matter would be incomplete. See *Adams vs. Adams*, 2014 Ark App 67, 16, 432 S.W. 3d 48 (2014), where the appellate court stated that "[t]he allocation of marital debt is an essential item to be resolved in a divorce dispute and must be considered in the context of the distribution of all of the parties property." Other cases include:

1. In *Ellis vs. Ellis*, 75 ARK APP 173, 57 SW 3d 220 (2001), the Appellate Court held that while the code does not provide specific power to divide marital debts as between the parties, the power was implied. The ARK APP Court held that a judge has the power to adjust marital debts as "between the parties" even though not expressly stated in the code. See *Warren vs. Warren* 33 ARK APP 63 800 SW 2d 730 (1990).

2. In *Hackett vs. Hackett*, 278 ARK 82 643 SW 2d 560 (1982), the Arkansas Supreme Court held that while a judge "was not required to divide the parties debts' (i.e. direct each party a specific debt), he [is] obligated to consider those debts in deciding alimony, support for the children, and perhaps the division of property."

3. In *Grace vs. Grace*, 328 ARK 312, 930 SW 2d 930 (1996) the Arkansas Supreme Court held that "Questions about marital debts and whether they should be considered as liabilities under ACA 9-12-315 (a) (1) (A) (VII) in assigning marital property are questions of fact." [In this matter before this court, the Defendant fled the former marital home with only some of her and her children's clothing – Plaintiff retained all former marital property.]

C. The Appellate Courts have upheld unequal distribution of marital debts due to ability of each party to pay said debt.

1. In *Williams vs. Williams*, 82 ARK APP 294, 108 SW 3d 629 (2003) the Arkansas Appellate Court upheld "the trial judge's unequal division of marital debts due to the disparity between the parties' income and their relative abilities to pay the debts."

2. In, *Bailey vs. Bailey* 97 ARK APP 96, 244 SW 3d, a "trial court abused its' discretion in ordering the parties to each pay one-half (½) of the marital debt . . . [when evidence reflected] husband had the ability to earn substantially more income."

3. Specifically, as to student loans/debt the student loans of the Defendant, Jennifer Conner, the same is and should be determined to be marital debt and that all or most of said indebtedness should be the Plaintiff's – as the debt was contracted during the marriage and during the time when the Defendant was primarily a stay-at-home caregiver and homemaker - attempting to improve her education so as to better nurture her children as well as others to whom care was entrusted. And, there is evidence before the court that Defendant had other grants, scholarships and the like which paid the majority of her student expenses allowing for refunds of a significant portion of her student loans to be used for household expenses as she was able to at most work part time outside the home (See Statement of Facts, Exhibit "A" hereto with enclosure.)

A. Plaintiff received a benefit in that much of the educational expense was "free" and refunds were used by the household for household expenses. There is evidence before the Court that the Defendant received "free educational assistance" which allowed a major part of the student loans to be refunded to her for her and Plaintiff's use for household expenses.

B. From the Affidavits of Financial means and other evidence before the court it is obvious that Plaintiff has more income than Defendant who was primarily a stay-at-home mom, caregiver and homemaker.

1.) In *Easley vs. Easley*, 2010 ARK APP 73, 2010 WL 307967, __ SW 3d __ (January 27, 2010), the Appellate Court upheld the finding that 85 percent of a wife's student loan was a marital debt because [as in this matter] funds were used to pay household debts . . . 'and each should be responsible based on respective ability to pay.'

2.) In *Burns vs. Burns, 2012 Ark App 522 (2012),* the Court held that "debts must be apportioned in an equitable manner." Such "a determination . . . will not be reversed unless it is clearly erroneous" *Adams* at *16. But, see *Hackett* above and *Williams* below. *Burns* is distinguishable easily by the facts in *Easley* which are similar to this matter - where the testimony is that because Defendant had other grants, scholarships and the like, the student loans were refunded which left her with a credit balance after the loans were applied; and as testified were used for everyday household expenses.

3. Defendant testified that to her knowledge all refund checks (Student Loan Refund Checks and other college refunds) were often payable to Jennifer Conner and Mark Conner. In any event, her recollection is that she gave each and every refund check to Plaintiff, Mark Connor, and that he assured her that each was deposited into the household accounts, in Mark's name, either at *Simmons* or *Bancorp South* or other banking institutions to be used for everyday household expenses as Defendant being a full-time student only worked outside the home part-time.

4. Defendant prays that the Court consider all of her student loans as marital debt, and divide such debt unequally with Plaintiff being responsible much more than one-half (½) due to (1) his ability to pay more (2) the fact that he kept all marital assets from the marriage except for a few clothes of the Defendant and the children (3) and his assets from which such payments would

be made while Defendant has few if any assets and **none from the marriage**), and is serving as a caregiver to two (2) and possibly four (4) children.

Respectfully submitted,
Jennifer Connor, Defendant

BY: _____

James E. McMenis # 73157
Attorney for Defendant
202 N. Washington, Suite 206
El Dorado, Arkansas 71730
Ph. (870) 863-5119 ~ Fax: 863-5120

**CERTIFICATE OF SERVICE**

I, James E. McMenis, do hereby certify that a copy of the above and foregoing Trial Brief Concerning Marital Assets/Debts To Include Student Loans Obtained By Wife During Marriage was duly served on the Plaintiff by mailing a copy, postage prepaid, to the Plaintiff's attorney, Phillip Stone, Esq., to his address of record, 315 E. Main, El Dorado, Arkansas 71730 via fax: [863-5889] and a copy provided to the Chambers of the Honorable Michael R. Landers on this 12th day of August, 2015,

_____
James E. McMenis

1. **PLEASE PROVIDE YOUR NAME AND ADDRESS:**

Mike Murphy
P. O. Box 381
Conway, AR 72033

2. **DESCRIBE OR LIST THE CONTINUING EDUCATION PROGRAMS YOU HAVE PARTICIPATED IN FOR THE LAST TWO YEARS.** (See attached)

3. **PLEASE PROVIDE AT LEAST ONE TEXT THAT YOU HAVE WRITTEN THAT DISPLAYS YOUR APPROACH TO THE LAW. THIS COULD BE AN ARTICLE, A SPEECH, A REPORT, A LETTER TO THE EDITOR, A JUDICIAL OPINION, ETC. THAT IS RELEVANT TO THE ARKANSAS LEGAL SYSTEM. PLEASE PROVIDE AT LEAST ONE, AND NO MORE THAN THREE, SUCH TEXTS. IF THE TEXT IS ON THE INTERNET, EITHER THE TEXT OR A LINK TO IT WILL BE SUFFICIENT.** (See attached)

The letter opinion issued in *Patterson v. Kevin Elliott and Gail Cypert*, 65CV-2015-32 dealt with questions regarding disclosure of a requested document by City of Marshall officials pursuant to Arkansas' Freedom of Information Act.

The Order I wrote and entered in *Hoover v. Patil, et al*, 23CV-11-986 addressed several pretrial matters in a medical malpractice case. Ultimately, after a week-long trial, the jury returned a verdict for the defendants. The Plaintiff did not appeal the judgment or rulings of the Court.

Finally, attached is the Supreme Court's opinion in *PH, LLC v. City of Conway*, 2009 Ark. 504, 344 S.W.3d 660 (2009), which affirmed a rezoning action by the city during my tenure as city attorney. In my brief submitted on behalf of the city, I pointed out the inconsistencies in two decisions by the Supreme Court (*Camden* and *Summit Mall* in the opinion) and how distinguishing the two cases would have to be limited to increasingly specific circumstances in order to appear capable of co-existing as precedent. Based in part on the arguments in my brief, the Supreme Court overruled its prior decision in *Camden*.

4. **SOME SAY THAT THE AMERICAN LEGAL SYSTEM PRODUCES EXCESSIVELY LARGE VERDICTS. IN YOUR OPINION, IS THIS A PROBLEM? IF SO, WHAT SOLUTIONS WOULD YOU RECOMMEND TO SOLVE THIS PROBLEM?**

You've asked a question seeking my personal opinion on a particular topic which could reasonably be viewed as a "disputed or controversial legal or political" issue. See the Arkansas Code of Judicial Conduct, *Commentary, Rule 4.1.* Therefore, it is incumbent upon me, in adhering to the Code, that I preface my remarks with some important observations and caveats discussed in the commentary to those rules, including responses to questionnaires such as this:

Before speaking or announcing personal views on social or political topics in a judicial campaign, candidates should consider the impact of their statements. Such statements may suggest that the judge lacks impartiality. See *Rule 1.2*. They may create the impression that a judge has or manifests bias or prejudice toward individuals with contrary social or political views. See *Rule 2.3*. Public comments may require the judge to disqualify when litigation involving those issues comes before the judge. See *Rule 2.11*. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

Candidates who respond to these type inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected.

Frankly, the recent episode of a judge taking a bribe in the form of campaign contributions in exchange for changing a jury verdict seems a more significant problem than perceived excessive verdicts.

I'm a big believer in the jury system. I have faith in the juries that bring back verdicts in civil cases. During jury orientation, I remind our jury pool of what Thomas Jefferson said about juries, both in criminal and civil trials: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." And as Winston Churchill observed: "The scrutiny of 12 honest jurors provides defendants and plaintiffs alike a safeguard from arbitrary perversion of the law."

The recent case involving a bribe taken by a sitting judge would probably qualify, in Mr. Churchill's mind at least, as an "arbitrary perversion of the law." Disproportionate campaign contributions from special interests to judicial candidates seems to be more of a problem than perceived excessive awards from a jury made up of 12 fellow citizens.

In Arkansas, there are procedural safeguards for times when a jury verdict is arguably excessive or not supported by the law or evidence. For example, a court can order a remittitur judgment if an award is excessive under Arkansas law so as to "shock the conscience." Our rules of civil procedure allow litigants to seek a judgment notwithstanding the verdict (JNOV) in cases where a verdict is not supported by the evidence. If a trial judge fails to utilize these procedural safeguards resulting in shocking or verdicts unsupported by the evidence, there's a remedy for that, too: The ballot box.

**5. TO WHAT EXTENT DOES THE 'EQUAL PROTECTION' CLAUSE OF THE CONSTITUTION TOLERATE PUBLIC POLICIES WHICH DISTRIBUTE BENEFITS ON THE BASIS OF RACE OR SKIN COLOR?**

First, it is noted that the application and interpretation of the "equal protection" clause of the federal constitution is ultimately within the jurisdiction of federal judges and federal courts. Arkansas' appellate courts, while analyzing the occasional *Batson* argument regarding jury selection or exclusion of jurors based on race in criminal cases, rarely are called upon for the type of equal protection analysis referenced in the question.

As I understand it, the current state of the law regarding the federal Constitution requires that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. Current law recognizes that states or the federal government may act in response to either the practice or effects of racial discrimination. For example, the Supreme Court recently took up the case of the University of Texas' law school and the extent of its interest in having a diverse student body so as to justify race-based admission criteria. Current law provides that if race-based action is necessary to further a compelling interest, such action must be narrowly tailored to achieve those interests.

It's not only "tolerating" public policies which "distribute" benefits, but also no longer "tolerating" policies that deny "benefits" allowed by the government to persons of a different race. For example, interpretation of the equal protection clause has provided the "benefit" of desegregated public education (*Brown v. Board of Education*, 1954) and the "benefit" of the ability to marry a person of a different race or skin color without threat of prosecution and incarceration. (*Loving v. Virginia*, 1967)

**6. ROUGHLY 2000 MEN SEEK EMERGENCY-ROOM ASSISTANCE EVERY YEAR BECAUSE THEY HAVE ZIPPED UP THEIR PANTS, BUT BY MISTAKE HAVE CAUGHT A PART OF THEIR BODY IN THE ZIPPER. SUPPOSE AN ARKANSAS LITIGANT FILED SUIT IN TRIAL COURT AGAINST A CLOTHING MANUFACTURER, ARGUING THAT THE INJURIOUS PANTS ARE AN INHERENTLY DANGEROUS CONSUMER PRODUCT AND THAT THEY LACKED APPROPRIATE WARNINGS: IS HE ENTITLED TO HIS DAY IN COURT, OR SHOULD THE CASE BE DISMISSED? PLEASE PROVIDE YOUR VIEW AND EXPLAIN YOUR REASONING.**

Respectfully, I believe our Code of Judicial Conduct requires that I decline to answer this question as it asks me to disclose how I would rule on a particular issue of law. The problem in answering hypothetical fact situations puts a judge or judicial candidate on a slippery slope: If he or she answers one hypothetical, however far-fetched it may be, then where does one draw the line in disclosing opinions on various legal issues? In this regard, the caveats I set out from our Code above come into play.

However, let me say this: I know how to read a complaint, analyze a brief and review relevant case law. Speaking for myself as a judge, I have no interest, either personally or professionally, in making ridiculous rulings that are not supported by our law. Our Supreme Court has an excellent discussion on the topic of inherently dangerous products. I think any reasonable person can read the passage below and come away with a fair understanding of where the hypothetical above is headed:

> Black's Law Dictionary, *Fourth Edition*, Page 921, defines 'inherently dangerous' as 'danger inhering in instrumentality or condition itself at all times, so as to require special precautions to prevent injury, not danger arising from mere casual or collateral negligence of others with respect thereto under particular circumstances.' Of course, no citation of authority is necessary to support the statement that the mere fact that one is injured by a machine, or instrument, does not mean that the machine or instrument is inherently dangerous. It has been said that a product is inherently dangerous where the danger of injury stems from the nature of the product itself. An automobile, driven at a high rate of speed--or without proper brakes--or if at night, without headlights--or if operated by one who is intoxicated--can certainly become a highly dangerous instrument, capable of causing death and crippling injuries. Yet, there is general agreement among the jurisdictions that motor vehicles are not inherently dangerous (*Annot*. 74 A.L.R.2d 1111). Numerous articles or substances, which have been held not to be inherently dangerous within the meaning of the rule, include an electric body-vibrating machine, an electric stove, a chain, a haybaler, a flat iron, a gas stove, a porch swing, a sofa, a refrigerator, and others too numerous to mention. See *Defore v. Bourjois, Inc*., 268 Ala. 228, 105 So.2d 846. Still, all of the articles or instruments named can, by particular use, cause death or severe injury. In fact, as this court stated in *Reynolds v. Manley*, 223 Ark. 314, 265 S.W.2d 714, 'It is possible to use most anything in a way that will make it dangerous.' Of course, certain substances or articles are inherently dangerous, such as dynamite, nitroglycerin or other explosives, poisons, and many others.

> In the case before us, we are definitely of the opinion that the Caterpillar itself was not inherently dangerous; it was the manner of repairing that created the danger, i.e., it was the fact that the cable was deliberately cut, causing the spring to pull the ejector sharply back, that caused Lilly's death, rather than the fact that the Caterpillar was equipped with a cable and spring.'

*Walker v. Wittenberg, Delony & Davidson, Inc*. 241 Ark. 525, 412 S.W.2d 621 (1966).

**7. IN ARKANSAS, POLICYMAKERS HAVE PUBLICLY DISAGREED OVER TO WHAT EXTENT LEGISLATORS SHOULD WRITE COURT RULES, AS COMPARED TO WHAT EXTENT COURTS SHOULD WRITE COURT RULES. PLEASE PROVIDE YOUR VIEW ON THIS QUESTION OF JUDICIAL POLICY; EXPLAIN YOUR REASONING.**

Regardless of my personal views on this issue, I am required to apply the law in an impartial and fair manner. I can tell you that to a large degree, the people of the State of Arkansas, through the adoption of Amendment 80, have answered a good portion of this question. The most current case law on this question, as it relates to the Court's authority to write rules of evidence along with rules of pleading, practice and procedure is found in *Johnson v. Rockwell*, 2009 Ark. 241, 308 S.W.3d (2009):

> Our state constitution has long recognized the importance of separation of powers. It reads, "no person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Ark. Const. art. 4, § 2. Most importantly, amendment 80, § 3 to the Arkansas Constitution instructs that the Arkansas Supreme Court "shall prescribe the rules of pleading, practice and procedure for all courts."

Just as I am a big believer in our citizens acting responsibly as jurors, I have a deep and abiding respect for the people, by constitutional amendment, separating some of the powers of the legislature and judicial branch regarding the authority to write court rules.

ARKANSAS CONTINUING LEGAL EDUCATION BOARD
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AR Supreme Court Registration #: 86203
Mr. Michael Lee Murphy
Attorney at Law
POB 381
Conway AR 72033

Executive Secretary
Continuing Legal Education Board
Suite 110
2100 Riverfront Drive
Little Rock, AR 72202-1747
(501) 374-1855; FAX (501) 374-1853

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|---|---|---|---|---|---|
| AR ADMIN OFFICE OF COURTS | FALL JUDICIAL COLLEGE/JUDICIAL COUNCIL MEETING | ☐ | 10/15/2014 | 6 | 1 |
| FAULKNER COUNTY BAR ASSO | FAULKNER COUNTY BAR CLE PROGRAM | ☐ | 12/19/2014 | 2 | 0 |
| FAULKNER COUNTY BAR ASSO | FAULKNER COUNTY BAR CLE PROGRAM | ☑ | 12/19/2014 | 3 | 0 |
| NAT JUDICIAL COLLEGE | GENERAL JURISDICTION | ☐ | 4/27/2015 | 46.5 | 3.25 |
| 20TH JUDICIAL DISTRICT | 3RD 20TH JUDICIAL DISTRICT CIRCUIT COURT CLE | ☐ | 5/27/2015 | 1 | 0 |
| AR BAR ASSOCIATION | 2015 ANNUAL BAR MEETING | ☐ | 6/10/2015 | 1 | 0 |
| AR ADMIN OFFICE OF COURTS | SPRING JUDICIAL COLLEGE/COUNCIL MEETING | ☐ | 6/10/2015 | 3 | 0 |
| | | | **Total Hours** | **62.5** | **4.25** |

## Summary

| | General | Ethics | Total |
|---|---|---|---|
| **Earned this reporting period (includes year end credit):** | **62.5** | **4.25** | **66.75** |
| **To carry forward to next reporting period:** | **11** | **1** | **12** |

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ARKANSAS JUDICIARY

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| Date | Class Name | General | Ethics | Speaker | TOTAL |
|---|---|---|---|---|---|
| 8/10/2015 | ADVANCED EVIDENCE | 23.00 | 0.00 | | 23 |
| 10/14/2015 | FALL JUDICIAL COLLEGE/JUDICIAL COUNCIL M | 5.00 | 0.00 | | 5 |
| 7/1/2015 | YR-END | 11.00 | 1.00 | | 12 |
| TOTAL HOURS EARNED, INCLUDING ETHICS | | | | | **40** |

Total due for the reporting period ending 6/30/2016. (12 including 1 ethics)

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**2009 Ar k. 504**
**344 S.W. 3d 660**

**PH, LLC, A ppellant,**
**v.**
**CITY OF CONW AY, Arkansas,**
**Appe lee.**

**No. 08- 1383.**

**Supreme Cour t of Arkansas.**

**Oct. 22, 2009.Rehea ing Denied Dec. 3, 200 9.**

Header ends here.

[344 S.W.3d 661]

Quattlebaum, Grooms, Tull & Burrow, PLLC, by: Michael N. Shan ion and Joseph R. Falasco, Little Rock, fo appellant.Michael L. Murphy, Conway City Attorney, for appellee.Mark R. Hay s, General Counsel, Arkansas Municipal League, for amicus curiae.

[344 S.W.3d 662]

Cullen & Co., PLLC, by: Tim Cullen and Tasha Taylor; and National As 'n of Home Builders, by: Mary Lynn Huett and Christopher M. Whitcomb, of counsel, I ittle Rock, for amicus curiae National Ass'n of Home Builders.**ROBERT L. B ROWN, Justice.**

PH, [2009 Ark. 1 LLC (PH), a land developer, appeals a d cision by the circuit judge finding that the C onway City Council's denial of PH's petition t o rezone its land was legislative and not arb itrary, capricious, or unreasonable. We affirm that decision.

PH owns a narrow, rectangularly shaped piece of real property in Conway. The land is presently zoned as A- 1 (Agricultural). On August 29, 2007, PH a plied to the Conway City Council to rezone the property as R–1 (Residential). PH a so submitted an application to the Conway Planning Department, seeking to have a preliminary plat approved. The plat application sought to have the property divided into twenty lots. The Conway Planning Commission held a public hearing and voted unanimously to approve PH's preliminary plat conditionally, subject to rezoning by the city council. At the same meeting, the planning commission unanimously recommended to deny PH's petition for rezoning. PH appealed [2009 Ark. 2] to the city council, and, on October 9, 2007, the city council, by a vote of seven to one, denied the requested rezoning.

PH next filed a complaint in the circuit court and requested a de novo review and jury trial under Arkansas Code Annotated section 14–56–425. In the alternative, it sought a declaratory judgment that the city council acted beyond its authority in denying the rezoning request and that its actions were arbitrary, capricious, and unreasonable. PH then moved for partial summary judgment and asked to have its rights established under section 14–56–425. The circuit judge held a hearing on the motion and ruled from the bench that section 14–56–425 did not apply because the city council's action was legislative in nature. An order to that effect was entered on May 8, 2008.

Following that order, the circuit judge conducted a bench trial on the issue of whether the city council had acted arbitrarily, capriciously, or without a reasonable basis. The judge heard testimony from John Pennington, the owner of PH and the property in question; Bryan Channing Patrick, director of the Conway Planning and Development Department; six of the city aldermen who voted not to rezone; the one city alderman who voted to rezone; John Castain, a city-planning and land-use consultant; and Tab Townsell, the mayor of Conway. The deposition testimony of Shelley Mehl, the seventh alderman who voted against rezoning, was introduced at trial.

On [2009 Ark. 3] June 24, 2008, the circuit judge entered an order and judgment, finding that "there are legitimate concerns regarding the rezoning request and the City did not act arbitrarily and capriciously." The order rejected all claims by PH and dismissed its complaint.

### I. *Nature of City Council's Decision*

We first address PH's point on appeal that the circuit judge erred in determining the city council's vote not to rezone was legislative and in dismissing its claim for de novo review and a jury trial under section 14–56–425. According to PH, the city council's decision to deny its rezoning request was administrative in nature, and section 14–56–425, accordingly, applies. We turn to the applicable statutory law.

Arkansas Code Annotated sections 14–56–401 through 14–56–426 provide the Code for Municipal Planning. Section 14–56–425 of that Code specifically states:

[344 S.W.3d 663]

> In addition to any remedy provided by law, appeals from final action taken by the administrative and quasi-judicial agencies concerned in the administration of this subchapter may be taken to the circuit court of the appropriate county where they shall be tried de novo according to the same procedure which applies to the appeal in civil actions from decisions of inferior courts, including the right of trial by jury.

Ark.Code Ann. § 14-56–425 (Repl.1998).

The plain language of that statute makes clear that it applies only to final decisions from administrative or quasi-judicial agencies. It is well settled that when a municipality acts in a legislative capacity, it exercises a power conferred upon it by the General Assembly. [2009 Ark. 4] *See, e.g., City of Lowell v. M & N Mobile Home Park, Inc.*, 323 Ark. 332, 336, 916 S.W.2d 95, 97 (1996). This court has also clearly held that when city councils exercise their legislative power, courts will review their decisions only to determine if they are arbitrary, capricious, or unreasonable. *See, e.g., id.* at 336–37, 916 S.W.2d at 97. If the city council's action is purely administrative, then section 14–56–425 applies. The question in the instant appeal turns on whether the city council's action in denying PH's rezoning request was administrative or legislative in nature. To answer the question, we must examine our case law.

In *Wenderoth v. City of Fort Smith,* plaintiffs brought suit in circuit court to challenge a Fort Smith Board of Directors' ordinance, which rezoned properties that were adjacent to their land. 251 Ark. 342, 472 S.W.2d 74 (1971). This court ruled that the predecessor to section 14–56–425, under which the plaintiffs had filed suit in circuit court, was unconstitutional because it permitted a de novo review of "final action taken by the administrative, quasi judicial, *and legislative* agencies." *Id.* at 344, 472 S.W.2d at 75 (citing Ark. Stat. Ann. § 19–2830.1) (emphasis added). This court held that the statute could not, according to the Separation of Powers Clause in the Arkansas Constitution, "empower the judiciary to take away the discretionary powers vested by our legislature in the city's legislative body to enact zoning and rezoning ordinances." *Id.* at 345, 472 S.W.2d at 75. [2009 Ark. 5] The statute was thereafter amended to provide for de novo review of only administrative and quasi-judicial agency decisions.

Eight years after *Wenderoth,* this court again addressed the proper standard of review in zoning cases. *See City of Conway v. Hous. Auth. of Conway,* 266 Ark. 404, 584 S.W.2d 10 (1979). In *City of Conway,* the Conway Housing Authority applied to the Conway Planning Committee to rezone a parcel of land from R–3 (Residential) to B–3 (Business). The committee denied the

request, and the C[illegible]nway City Council affirmed that decision. [illegible]he housing authority filed a complaint in cir[illegible]uit court, contesting the failure to rezone, a[illegible]d the judge rezoned the property to B–3. Th[illegible]e city appealed, and, on review, this court affirmed the circuit judge's finding that the [illegible]ity acted arbitrarily.

We specifically said

The General Asse[illegible]bly saw fit to give cities the right to exerci[illegible]e zoning authority ... [and] granted the cities the right to legislate upon zoning matters. T[illegible]is right is, of course, not unlimited. Th[illegible]erefore, when a municipality, pursuant to authority granted by the General Assem[illegible]bly, takes action in zoning classifications, it is exercising a legislative function an[illegible]d is not subject to review by the courts of i[illegible]s wisdom. Neither do the courts have pow[illegible]er to review such legislative action by th[illegible]e cities in a de novo manner. In fact, when [illegible]he General Assembly attempted to grant the c[illegible]ourts power to review such actions de novo,

[344 S.W.3d 664]

we held such actio[illegible]ns unconstitutional. Therefore, it follows th[illegible]at the power of the court to review th[illegible]e action of the municipalities is limi[illegible]ed to determining whether or not such [illegible]ction was arbitrary, capricious, or wholly ine[illegible]quitable.
*Id.* at 409, 584 S.W[illegible]2d at 13 (internal citations omitted). Whil[illegible]e the *City of Conway* court did not explicitly address whether the city council's decision [illegible]o deny the rezoning request [2009 Ark. 6] was legislative in nature, it did say that "[i]n zoning matters the General Assembly has delegated *legislative power* to the cities in matters relating to zoning of property." *Id.* (emphasis added).

Two years after *City of Conway* was decided, this court a[illegible]gain held that the decision of a city council not to rezone a piece of property was subject to review based on whether the city coun[illegible]cil acted arbitrarily, capriciously, or unreasonably. *See City of Little Rock v. Breeding*, 273 Ark. 437, 442, 619 S.W.2d 664, 667 (1981). The *Breeding* court said that "[i]t has been well-established that such zoning decisions of the city are legislative in nature...." *Id.*

In *City of Lowell v. M & N Mobile Home Park*, some fifteen years later, this court relied on *City of Conway* for the proposition that "the judicial branch does not have the authority to review *zoning legislation* de novo, as that would constitute an unconstitutional taking of the power of the legislative branch." 323 Ark. at 337, 916 S.W.2d at 98 (emphasis added). In *City of Lowell*, a landowner owned 7.19 acres of land, of which two acres were zoned MHP for a mobile home park, and the remaining land was zoned R–1, for single-family dwellings. The landowner applied to the planning commission to have the R–1 land rezoned as MHP. The commission denied the request, and the city council likewise rejected the application. The landowner then filed a complaint in circuit court, contesting the zoning decision, and the judge rezoned the land as MHP.

[2009 Ark. 7] This court reversed the circuit judge's decision. We did not expressly determine that the city council's action was legislative in nature but said:

In summary, the party alleging that legislation is arbitrary has the burden of proving that there is no rational basis for the legislative act, and regardless of the evidence introduced by the moving party, the legislation is presumed to be valid and is to be upheld if the judicial branch finds a rational basis for it. It is not for the judicial branch to decide from evidence introduced by the moving party whether the legislative branch acted wisely.

*Id.* at 340, 916 S.W.2d at 99.

Following our *City of Lowell* decision, this court appeared to change the law regarding whether some zoning decisions, and specifically a city council's denial of a zoning request, were legislative in nature. *See Camden Cmty. Dev. Corp. v. Sutton,* 339 Ark. 368, 5 S.W.3d 439 (1999). In *Camden,* an organization owned land and petitioned to have it rezoned from R-2 (Residential) to M-2 (Manufacturing). The City of Camden Planning Commission recommended that the application be granted but the city board refused to rezone the property. After failing to have the property rezoned by the board, the landowners circulated an initiative petition seeking to have the issue put on the ballot for popular vote. The petition was certified. The Fairview Community Defense Committee, which opposed the rezoning, then filed an action in circuit court, seeking to remove the initiative from the ballot. The circuit judge found that "issues concerning whether to rezone are administrative decisions, not legislative, and thus are

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not subject to the initiative process." This court affirmed the circuit judge's decision.

[2009 Ark. 8] We began our analysis in *Camden* by framing the issue as "whether the actions taken by the Commission and the City Board were legislative or administrative." *Camden,* 339 Ark. at 372, 5 S.W.3d at 442. This court then summarized the test for determining the difference between legislative and administrative acts:

> Both legislative and executive powers are possessed by municipal corporations.... The crucial test for determining what is legislative and what is administrative is whether the ordinance is one making a new law, or one executing a law already in existence.... Executive powers are often vested in the council or legislative body and exercised by motion, resolution or ordinance. Executive action evidenced by ordinance or resolution is not subject to the power of the referendum, which is restricted to legislative action as distinguished from mere administrative action. The form or name does not change the essential nature of the real step taken.

339 Ark. at 373, 5 S.W.3d at 442 (quoting *Scroggins v. Kerr,* 217 Ark. 137, 228 S.W.2d 995 (1950)). We then found that the city board had not taken legislative action because its "decision to not accept the Commission's administrative proposal was only a rejection of proposed administrative action and did not constitute any legislative action or administrative action by the City Board." *Id.*

In its opinion, the *Camden* court distinguished the *Wenderoth* decision and specifically found that there, "the city had *adopted* a proposed change in the comprehensive ordinance" and the court did not, in that case, "analyze the action of the city on the issue of whether it was administrative or legislative in nature." *Id.* at 374, 5 S.W.3d at 443. The *Camden* court expressly held that "[i]f the observations in *obiter dicta* in *Wenderoth* are [2009 Ark. 9] inconsistent with this holding we clarify, modify, or overrule such statements to the extent that they may be in conflict with our holding in this opinion." *Id.* at 375, 5 S.W.3d at 443.

Four years after our decision in *Camden* was handed down, this court had occasion to revisit its holding. *See Summit Mall Co. v. Lemond,* 355 Ark. 190, 132 S.W.3d 725 (2003). In *Summit Mall,* landowners brought suit in circuit court, seeking to enjoin the City of Little Rock from issuing a building permit to Summit Mall or taking any other action pursuant to an enacted ordinance, which granted Summit Mall permission to develop a tract of land in West Little Rock. There were many issues on appeal in *Summit Mall,* but one is relevant to the instant case. Summit Mall and the city each argued that the circuit court lacked subject matter jurisdiction to hear the case because the City Board's action

was administrative and any challenge to the ordinance should have been brought under section 14–56–425.

This court disagreed that, under our holding in *Camden,* the city's rezoning decision was administrative in nature and should have been brought under section 14–56–425. We first noted that in *Camden,* "the appellant had sought rezoning of its property from the Camden Planning Commission when a comprehensive zoning plan was already in effect." *Id.* at 200, 132 S.W.3d at 731. We further attempted to distinguish the facts in *Camden* and said in that case "no action was taken by the City Board. Because the City Board failed to pass any ordinance, it obviously did not act legislatively." *Id.* In the *Summit Mall* case, [2009 Ark. 10] however, the city board "not only approved the recommended action of the Planning Commission and amended [the ordinance], but it rezoned the subject property and added new, specialized conditions

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to accommodate the rezoning." *Id.* at 201, 132 S.W.3d at 732. We held that this action clearly constituted rezoning and was a legislative act by the City Board.

In the instant case, the circuit judge made the following, specific, findings regarding whether the city council's action was legislative or administrative in nature:

[ *L*] *owell* and the body of case law it represents hold that *de novo* review is inappropriate in a case involving an appeal to circuit court of a city council's denial of a requested rezoning. *Camden* does not purport to overrule that body of law, as the question of "administrative" versus "legislative" action in that case was analyzed in the specific context of whether an initiative could be held pursuant to Amendment 7.

....

The court finds that analyzing the question of "administrative" versus "legislative" action by a city council in the denial of a proposed rezoning depends upon the context, and that an initiative question is a different context than the question of standard of review on an appeal of a denial of requested rezoning:

But the sense in which the word "legislation" is used in this connection is not always the same as that in which it is used in other contexts. Conduct allowed as "legislative" in character for one purpose may be deemed "not legislative" for some other and different purpose.

*Scroggins v. Kerr,* 217 Ark. 137, 228 S.W.2d 995 (1950). The Court recognizes that the denial of Plaintiff's request for rezoning in this case was administrative in nature under *Camden* for purposes of applying Amendment 7 to the Arkansas Constitution, but the Court holds that the denial of Plaintiff's request for rezoning was legislative in nature for purposes of applying Ark.Code Ann. § 14–56–425.

This court now takes this opportunity to clarify whether decisions by a city council to approve or deny a requested rezoning of land are legislative or administrative in nature. [2009 Ark. 11] We hold, in line with our precedent excepting the *Camden* decision, that zoning decisions by city boards are legislative in nature. We specifically hold that zoning decisions, whether grants or denials, are legislative in nature. Accordingly, the procedure set forth in section 14–56–425 does not apply. Moreover, because our holding in *Camden Cmty. Dev. Corp. v. Sutton,* 339 Ark. 368, 5 S.W.3d 439 (1999), involved a denial of a zoning request and has lent confusion to this issue, we overrule it.

We affirm the circuit judge on the point that the city council's action was legislative in

nature, but we dissociate ourselves from the judge's attempt to distinguish *Camden* because we are overruling that case in this opinion.

### II. *Arbitrary, Capricious, or Unreasonable*

Because we hold that the city council's action was legislative in nature, we turn next to the question of whether the circuit judge clearly erred in holding that it was not arbitrary, capricious, or unreasonable. PH contends that the circuit judge erred in finding that there were "legitimate concerns regarding the rezoning request and that the City did not act arbitrarily or capriciously." It specifically asserts that (1) the city council acted outside of its authority in considering factors that were only to be analyzed by the planning commission; (2) the city council's decision constitutes illegal reverse spot zoning; (3) the city council's actions constituted improper contract zoning; and (4) the city council's decision is not supported by substantial evidence.

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[2009 Ark. 12] We begin by observing once more that the standard for review of legislative acts by the city council is well settled. The court should affirm the city council's decision unless it was arbitrary, capricious, or unreasonable. *See City of Lowell*, 323 Ark. at 336-37, 916 S.W.2d at 97. The circuit judge highlighted the following factors on the arbitrariness point and made his findings and conclusions as follows:

1. The deference that must be given to the city council's actions as being legitimate.

2. The unique configuration of the property in question here today.

3. The location of the property as it relates to the elementary school and the safety concerns expressed by the citizens, especially in light of Mr. Pennington's recommendations of what he would do to go above and beyond what was required under R–1.

4. Mr. Castain's assessment that an alleyway in the back may be better, given the fact that an R–1 zoning would require all lots be given access to Country Club, which is a collector street.

5. The Court finds at this point in time that there are legitimate concerns regarding the rezoning request and that the City did not act arbitrarily or capriciously.

6. With respect to PH's contentions regarding *Richardson v. City of Little Rock Planning Comm'n*, 295 Ark. 189, 747 S.W.2d 116 (1988) and "reverse spot zoning," the Court thinks the one thing that is very imperative is that the cases all talk about property that is similarly situated. Just because the property is surrounded by R–1 does not require that the city council automatically rezone this property as R–1. The Jefferson Place, Applewood, Westfield and White Oak Drive areas all have been zoned as R–1 and developed and do not dump onto the collector street. I think that is different and shows that those properties, as developed, are not similarly situated as it relates to the property in question. So I do not find that *Richardson* controls.

7. The Court does not find any reverse spot zoning or attempt to contract zone.

8. Based upon, but not limited to, the above and forgoing, the Court hereby denies all the claims of PH, LLC.

[2009 Ark. 13] This court's standard of review on appeal is also well settled. *See, e.g., Smith v. City of Little Rock*, 279 Ark. 4, 648 S.W.2d 454 (1983); *see also* Ark. R. Civ. P. 52(a) (2009). This court will affirm the circuit judge's findings unless they are clearly erroneous or clearly against the

preponderance of the e[illegible]idence. *Id.* at 7, 648 S.W.2d at 456; *see also City of Little Rock v. Breeding*, 273 Ark. at 44[illegible]2, 619 S.W.2d at 667. A finding is clearly erro[illegible]eous when, although there is evidence to sup[illegible]port it, the reviewing court based on the entir[illegible] evidence is left with a firm conviction that a mistake has been committed; disputed facts and determinations of credibility are within the province of the fact-finder. *See, e.g., Chavers v. Epsco, Inc.*, 352 Ark. 6[illegible]5, 70, 98 S.W.3d 421, 423 (2003).

### A. Planning Com[illegible]ission Factors

PH devotes a subst[illegible]antial part of its brief before this court to its a[illegible]rgument that the city council considered impe[illegible]rmissible factors. PH specifically maintains that the "Planning Commission is vested with the exclusive authority to administer the Subdivision Regulations regarding the development of land and 'provisions o[illegible] access to lots and parcels.' " PH conte[illegible]nds that once the planning commission [illegible]determined that the proposed plat me[illegible] the minimum requirements under Con[illegible]way's Subdivision

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Regulations for an R–[illegible] zoning designation, this court's decision in *Richardson v. City of Little Rock Planning C[illegible]ommission* precluded the city council from [illegible]weighing traffic and safety concerns in decid[illegible]ing whether to grant the rezoning request. [illegible]295 Ark. 189, 747 S.W.2d 116 (1988). This [illegible]rgument must fail.

[2009 Ark. 14] In *Richardson*, a landowner submitte[illegible] a subdivision application to the Li[illegible]ttle Rock Planning Commission, which [illegible]was denied. The landowner brought an a[illegible]ction in circuit court challenging the denial, [illegible]and the judge found that, even though certai[illegible]n technical violations of the subdivision regu[illegible]lation were not the basis for the planning [illegible]commission's denial, nevertheless the co[illegible]mission had the discretion to disapprove the application. This court reversed, holding that "[w]hen a subdivision ordinance specifies minimum standards to which a preliminary plat must conform, it is arbitrary as a matter of law to deny approval of a plan that meets those standards." *Id.* at 191–92, 747 S.W.2d at 117.

PH argues in the instant case that the city council's denial of his rezoning petition was an "end run" around *Richardson* because the city council expressed traffic concerns that were only to be weighed by the planning commission in determining whether to approve the preliminary plat. We disagree. Nothing in *Richardson* prevents the city council from considering potential traffic problems or public safety in deciding whether to rezone. In fact, the *Richardson* case specifically says that "if the plat is within the use permitted *by the zoning classification* and meets the development regulations set forth in the subdivision ordinance, then the plat by definition is in 'harmony' with the existing subdivisions." *Id.* at 192, 747 S.W.2d at 117 (emphasis added).

In the instant case, the preliminary plat was not "within the use permitted by the zoning classification" because the land was still zoned A–1. The fact that the planning [2009 Ark. 15] commission approved a preliminary plat, in the event the land was rezoned to R–1, does not automatically entitle PH to have the property rezoned. We further observe that PH cites no authority for the proposition that the city council was precluded from considering traffic and safety concerns in assessing its rezoning request. It is well settled that this court requires parties to cite authority for arguments made on appeal. *See, e.g., Gatzke v. Weiss*, 375 Ark. 207, 215, 289 S.W.3d 455, 461 (2008).

The circuit judge's decision that *Richardson* did not apply in the instant case and that the city council's actions were not arbitrary, capricious, or unreasonable was not clearly erroneous.

**B. Reverse Spot Zoning**

PH also claims that the city council's denial of the rezoning request was reverse spot zoning because the property is an "agricultural island in a sea of residential."

This court has acknowledged that "spot zoning, by definition, is invalid because it amounts to an arbitrary, capricious and unreasonable treatment of a limited area within a particular district." *See Riddell v. City of Brinkley*, 272 Ark. 84, 87, 612 S.W.2d 116, 117 (1981) (quoting R. Wright and S. Webber, *Land Use* (1978)). Furthermore, we have said that spot zoning is arbitrary because "it departs from the comprehensive treatment or privileges not in harmony with the other use classifications in the area *and without any apparent circumstances which call for different treatment.*" *Id.* (emphasis added). Reverse spot [2009 Ark. 16] zoning has been recognized where a city arbitrarily refuses to rezone property to bring it in conformity with the surrounding property. *See*

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*Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 132, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (Reverse spot zoning is "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones.").

The circuit judge did not clearly err in finding that there was no reverse spot zoning in the instant case and that the city council's decision was reasonable and based on legitimate concerns. According to the testimony of seven aldermen, they denied PH's request based on the unique configuration of the land involved and the restrictions of an R–1 zoning classification. They also emphasized legitimate traffic and safety reasons for the denial. We further note that the instant case is distinguishable from the cases cited by PH from other jurisdictions in that the city council has not refused to rezone PH's property from agricultural to residential. Rather, it determined that R–1 was not the appropriate residential zoning classification.

In *City of Conway*, this court affirmed the circuit judge's finding that the city acted arbitrarily in refusing to rezone the landowner's property from residential to business. The circuit judge based the decision, in part, on the fact that the property on all four sides of the parcel in question had already been rezoned to business. 266 Ark. at 410, 584 S.W.2d at 13. In that case, however, the evidence supported the circuit judge's additional finding that the [2009 Ark. 17] city actually wanted to purchase the property from the landowner, and its denial of the rezoning request was arbitrary because it was aimed at inducing the landowner to sell to the city. *Id.* That is a very different scenario from that set out in the instant case.

As a final point, this court has repeatedly stated that the fact that property is surrounded by parcels with different zoning designations does not automatically entitle a landowner to have his or her property rezoned. *See id.* at 409, 584 S.W.2d at 13. We have said that "this is so even though the highest and best use of the property might be other than the current zone designation." *Id.* The *City of Conway* court clearly said that "[i]f we were to allow any property abutting business property to be rezoned as business property, there would be no need of a zoning ordinance in the first place." *Id.* We affirm on this point.

**C. Contract Zoning**

PH also urges that the city council's suggestion that it would consider rezoning the property to Planned Use Development (PUD) as an alternative residential designation indicates that it intended to force improper contract zoning on PH. Contract zoning occurs when there is an agreement between a property owner and a local government in

which the owner agrees to certain conditions in return for the gove[illegible]nment's rezoning or enforceable promise to r[illegible]ezone. *See Murphy v. City of West Memphis*, [illegible]52 Ark. 315, 322, 101 S.W.3d 221, 226 (200[illegible]). The *City of West Memphis* case indicates that some jurisdictions hold that contract zoning is prohibited and other[illegible] hold that it is permissible. *Id.* Howev[illegible]er, this court [2009 Ark. 18] did not determine whether contract zoning would be perm[illegible]tted in Arkansas in *City of West Memphis* [illegible]and has not done so since. *Id.*

We likewise declin[illegible]e to do so in the instant case. PH has not shown this court that there was an agreem[illegible]ent to rezone the property or that it agre[illegible]ed to any conditions proposed by the city c[illegible]ouncil. Furthermore, despite the citation to [illegible]authority from other jurisdictions regarding contract zoning, PH has not cited this court t[illegible]o any case in which a court found improper co[illegible]ntract zoning where a city council considered a different, more suitable, zone designa[illegible]ion in determining whether to approve

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a petition to rezone. In[illegible]stead, PH makes the conclusory statement th[illegible]at "the only purpose for requiring PH to go through the PUD in this instance is to allo[illegible]w the City to have subjective control over [illegible]he development and to exact promises from [illegible]PH as a *quid pro quo* for rezoning." As alread[illegible]y discussed, however, that is not the only re[illegible]son the city council might prefer the PUD. T[illegible]he record reflects that the PUD, unlike the R-[illegible]1 designation, could accommodate the city council's legitimate concerns about traffic an[illegible]d safety.

**D. Substantia[illegible]l Evidence**

PH finally contends that the city council's decision is not suppo[illegible]rted by substantial evidence. This point [illegible]on appeal, though, incorrectly frames our standard of review. The circuit judge deter[illegible]mined that the city council's decision w[illegible]as not arbitrary, capricious, or unsupported by any rational basis. As has already been discussed, the circuit judge did not [2009 Ark. 19] clearly err in finding that there were legitimate, reasonable concerns about rezoning the property.

Affirmed.

**MIKE MURPHY**
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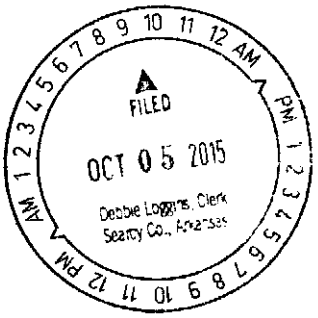


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RE: *Patterson v. Kevin Elliott and Gail Cypert,* 65CV-2015-32 (Searcy County)

Dear Counselors:

Thank you for your professional and courteous presentations during last week's hearing.

Based on a review of the pleadings, testimony, exhibits and arguments and briefs of the parties, the Court finds and orders as follows:

Plaintiff's employee, Paula Smith, called Defendant Gail Cypert1 on Tuesday, September 8, 2015 and requested a copy of a contract referenced in city council minutes from May 2015. Ms. Cypert testified that she told Ms. Smith she would "need a written request" and that the request was faxed over the same day from Mr. Patterson's law office.2

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1 Plaintiff named in the lawsuit Ms. Cypert, the elected recorder of the City of Marshall and Kevin Elliott, the elected mayor. Neither is named in their individual capacity. Arkansas appellate courts have recognized that a suit against a city official in his or her official capacity is not a suit against that person but is instead a suit against that official's office. *Sullivan v. Coney*, 2013 Ark. 222 (2013), citing *Smith v. Brt*, 363 Ark. 126, 211 S.W.3d 485 (2005). Therefore, this matter is essentially an action against the City of Marshall.

2 While a written request can help streamline the process, especially in cases of requests for multiple documents and can also help both the custodian of records and requestors develop a written "paper trail" of the process, there is no requirement under the Arkansas FOIA that a request be in writing.

Ms. Smith testifie( l that Ms. Cypert told her that she wasn't sure whether she could release the contract and indicated :hat she would contact the Arkansas Municipal League for guidance. Ms. Cypert, the recorder, test fied that she probably did say she would call the Municipal League. Instead, she testified, she alked to the mayor, Mr. Elliott.

Defendants argue t hat any delay in providing the document at the time of the original request may be excused by the FO[A when "personnel records" are the subject of a request and there is a 24 hour period to contact the Attorney General for an opinion.

The Arkansas FOI A states in relevant part at Ark. Code Ann. § 25-19-105(c)(3)(A):

> (3)(A) Upc n receiving a request for the examination or copying of personnel )r evaluation records, the custodian of the records shall determine within twenty-four (24) hours of the receipt of the request whether th: records are exempt from disclosure and make efforts to the fullest e xtent possible to notify the person making the request and the subject of the records of that decision.
>
> (B)(i) If the subject of the records cannot be contacted in person or by telephone within the twenty-four-hour period, the custodian shall send writte n notice via overnight mail to the subject of the records at his or her l ast known address. Either the custodian, requester, or the subject of the records may immediately seek an opinion from the Attorney C eneral, who, within three (3) working days of receipt of the reques , shall issue an opinion stating whether the decision is consistent with this chapter.

While there was s me testimony that a person apparently associated with the contract was contacted and gave assent to the release of the contract, it is unclear whether, under the FOIA, the contract was a "personnel )r evaluation" record. The person was not named. His or her relationship to the city, whether a city employee, contractor, vendor, etc., is unknown. Neither party sought to introduce a copy of the co ntract which was the subject of the request. Further, the procedures that might allow the custodian of records twenty-four (24) hours to contact the subject of a request then seek an opinion from the A ttorney General were not followed. The testimony was clear that neither the Attorney General was contacted nor was the Municipal League contacted for guidance.

By the following d ay, September 9, 2015, it was clear that the city was satisfied that there was no issue regarding "personnel or evaluation" records and thus no need to delay under that statutory section, as appar ntly the individual associated with the contract had been contacted and a copy of the contract had a ready been made for the mayor. This was the testimony of Ms. Cypert, when she related that Mr. Patterson came to her office in person.

Ms. Cypert testified that upon conferring with the mayor, he indicated to her his belief that the city had seventy-two (72) hours, or three (3) days, to turn over the document. While Ms. Cypert testified that the document was in "storage," the mere use of that term does not transform the manner in which the document was kept by the custodian to have been "in storage" under the plain language of the statute. Indeed, Ms. Cypert testified that the contract was in the city council minutes book in her office. Were it not for her stated belief that the mayor would give Mr. Patterson the copy the mayor had already made, she might have simply opened the book and produced the document. Whether a document is "in storage" for purposes of the Arkansas FOIA turns on whether there is some reason it is not "available at the time a citizen asks to examine it." Clearly it was available. Again, as Ms. Cypert testified, it was "right there."

Mayor Elliott was candid in his testimony. He admitted that when he encountered Mr. Patterson in the parking lot and the request for the document was repeated, the copy of the contract was in the seat of his vehicle. He told Mr. Patterson that he "was busy" due to some recent rains and water system issues[3] and wasn't going to "waste time arguing" with Mr. Patterson. He testified that because of some negative previous encounters with Mr. Patterson he was going to wait and give Patterson the document "when we get caught up or within three (3) days or at my convenience." Mayor Elliott, when questioned by the Court, agreed that he could have possibly diffused the situation by simply handing Mr. Patterson the copy when he was opening the door to his vehicle to leave. The Court inquired as to whether this was a situation where Mayor Elliott decided he was going to simply make Mr. Patterson "cool his heels" and be made to wait. Again, Mayor Elliott was candid and generally agreed with that assessment of the situation.

Clearly, the statute requires that documents be provided to the public immediately upon request if they are readily available. Ark. Code Ann. 25-19-105(e) states:

> If a public record is in active use or storage *and therefore not available at the time a citizen asks to examine it*, the custodian shall certify this fact in writing to the applicant and set a date and hour within three (3) working days at which time the record will be available for the exercise of the right given by this chapter. (Emphasis added)

Certainly, the contract was not in storage within the meaning of the statute. And the three (3) day period is meant to be the time by which the document is to be retrieved. Once retrieved, a custodian of records should then provide it immediately; there is nothing in the statute suggesting public officials may hold the document until 72 hours elapses once the document is secured following a request. Even if the City's officials believed the document was "in storage," they were required under the statute to "certify this fact in writing to the applicant and set a date and hour within three (3) working days at which time the record will be available." This was not done.

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3 Mayor Elliott, in addition to being the mayor in his first term, has been employed with the city as its water superintendent for several years.

Counsel for the City argues that Mr. Patterson's lawsuit was premature, that Mr. Patterson eventually got the document and was not damaged by not promptly receiving the document. Further, counsel asserts Mr. Patterson's lawsuit was frivolous. The Court disagrees.

Arkansas has a strong Freedom of Information statute from the perspective of the requesting party. Our courts have been consistent in this regard: "We give a liberal construction to the FOIA to accomplish its 'broad and laudable purpose that public business be performed in an open and public manner.'" *Harris v. City of Fort Smith*, 366 Ark. 277 (2006), citing *Fox v. Perroni*, 358 Ark. 251, 256 (2004).

The lawsuit was not premature. Simply put, a document which was readily available to the public was denied to the requestor. At that time, a cause of action arose. Whether or not a requestor is damaged with regard to the timeliness of a response is not relevant to the issue of whether there has been a denial of a right given by the FOIA.

Counsel for the City cites several excerpts from Professor John Watkins, a prominent expert and authority on Arkansas FOIA. As Professor Watkins has noted, "[w]hile not letting government agencies off the hook merely because open records compliance is difficult, courts have tolerated delayed or restricted access when open records compliance would otherwise render custodians or agencies unable to do their jobs." -- John J. Watkins & Richard J. Peltz, THE ARKANSAS FREEDOM OF INFORMATION ACT (Arkansas Law Press, 5th ed., 2009), pp. 275-76.

However, this is not such a case. The request for a single contract that was readily available was not a difficult or burdensome task. It certainly would not render the City's officials unable to perform their public functions. Mayor Elliott admitted that he could have provided Mr. Patterson the copy with little or no inconvenience, but decided against it under the mistaken belief that he could delay production of the document for up to 72 hours.

The Court finds that Mr. Patterson has substantially prevailed in his suit to enforce a right granted under the FOIA.

Mr. Patterson, an attorney himself, is seeking costs and attorney's fees. Arkansas's FOIA allows for an award of attorney's fees under Ark. Code Ann. § 25-19-107(d), which provides in pertinent part:

> In any action to enforce the rights granted by this chapter, or in any appeal therefrom, the court shall assess against the defendant reasonable attorney's fees and other litigation expenses reasonably incurred by a plaintiff who has substantially prevailed unless the court finds that the position of the defendant was substantially justified or that other circumstances make an award of these expenses unjust.

Thus, the first prong of the test for whether attorney fees may be awarded has been satisfied.

The remaining issue is whether the City's position was substantially justified or other circumstances make an award of attorneys' fees or costs unjust. See Ark.Code Ann. § 25-19-107 and *Harris v. City of Fort Smith*, 234 S.W.3d 875, 366 Ark. 277 (2006).

The *Harris* case overruled prior case law that suggested there must be a finding of bad faith on behalf of the custodian of records before awarding attorney fees. Subsequently, the Supreme Court reiterated the holding in *Harris* in *City of Little Rock v. Carpenter*, 374 Ark. 511 (2008):

> The plain language of the statute here is clear and controlling. Under the plain language of the statute, attorney's fees shall be assessed against the defendant when the plaintiff substantially prevailed in his suit to enforce a right granted under the FOIA, unless the position of the defendant was substantially justified or other circumstances make an award of attorney's fees or costs unjust.

The Court finds that the City's position in not providing the requested document from the time Mayor Elliott made a copy for Mr. Patterson until it was ultimately supplied to him was not substantially justified.

The remaining question under our statute is whether any other circumstances make an award of attorney's fees or costs unjust.

The Court notes that the testimony of Mayor Elliott as to his apparent belief that the three (3) day period is a discretionary window of time to respond to any FOIA request is, based on the Court's background and experiences, a widespread misunderstanding. As discussed above, the three (3) day period within which a custodian must respond only applies to documents in storage or active use or otherwise not available at the time of the request. If available, compliance with the request should be immediate.

However, the Court is cognizant that the public officials involved are not attorneys. From the testimony about calling the Arkansas Municipal League for guidance on FOIA matters, the Court can reasonably infer that the City of Marshall, being a smaller municipality in our state, does not have access to full-time local counsel or city attorney. Mayor Elliott is in his first term as mayor and does not have extensive experience with FOIA requests. The testimony also begs the question of whether the matter could have been diffused further by Mr. Patterson, as an attorney, attempting to refer to the statute and point out the error in any belief as to a three (3) day "grace period."

Be that as it may, public officials in Arkansas that are charged with compliance with the FOIA are presumed to know the law. Further, it is clear from Mayor Elliott's testimony that there was no legitimate reason to simply give Mr. Patterson the copy from the seat of his vehicle.

In balancing the interests in making a determination of what is just with regard to an award of attorney's fees, the Court finds that there is a strong public policy in favor of an award so as to accomplish the FOIA's "broad and laudable purpose that public business be performed in an open and public manner." *Harris, id.*

These purposes include the idea that an award of fees or costs might have a deterrent effect and serve as an example to other cities when these matters are discussed by and between our state's municipal officials. Absent a finding of bad faith, which is not required since the *Harris* case, the Court hopes that the parties view any award under the statute not as punitive in nature, but as a tool for reaffirming the strong public interest in our state's FOIA.

In determining what is "just," the Court has reviewed Mr. Patterson's Billing Statement, admitted as Plaintiff's Exhibit No. 1. The Court finds that Mr. Patterson's billing rate is not exorbitant or unreasonable. However, Mr. Patterson seeks these fees to reimburse himself. And while the Court is ever mindful of President's Lincoln's admonition that "a lawyer's time is his stock in trade," the Court's approach to what is "just" would likely differ if these fees were billed to a citizen client of Mr. Patterson, as opposed to an award to an attorney representing himself or his law firm. Certainly, the time spent on this lawsuit might have prevented Mr. Patterson from engaging other clients on other matters. But the Court feels that the public policy concerns in this matter can be accomplished with an award of something less than has been sought.

The review of the city council meetings may have been an impetus for the FOIA request, the time for that review is not necessarily related to the action to enforce the FOIA. With regard to the other matters billed, the Court awards attorney's fees to be paid by the City of Marshall in the amount of $485.00 together with the filing fee of $165.00 and summons service fees of $100.00 for a total award of $750.00.

If Mr. Patterson will prepare a draft Order for Mr. Martin to review, it would be most appreciated.

Thank you.

Sincerely,

Michael L. Murphy
1st Division Circuit Judge

MLM:krp

Cc: Circuit Clerk, "for the file"

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IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
FIRST DIVISION

GARY KEVIN HOOVER — PLAINTIFF

BY _____ DC

VS. 23CV-11-986

RAJU PATIL, *et al* — DEFENDANTS

**ORDER**

A hearing was held on the parties' various motions *in limine* on the 22nd day of June, 2015. During the course of argument the parties announced agreement to the Court on some issues, withdrew various motions on other issues and submitted contested questions to the Court.

**PLAINTIFF'S MOTION TO EXCLUDE CUMULATIVE AND PREJUDICIAL EVIDENCE OF PLAINTIFF'S PRIOR USE OF ALCOHOL**

Plaintiff seeks an order prohibiting introduction of portions of medical records that contain possibly inflammatory and prejudicial references to his history of alcoholism. Defendants argue that such evidence is relevant to their medical assessments and treatment plan during the events that gave rise to this cause of action. Also, such evidence is relevant with respect to life expectancy and future damages.

In *Oxford v. Hamilton*, 297 Ark. 512 (1989), the Arkansas Supreme Court considered the question of the introduction of medical records which reflected Plaintiff's history of heavy drinking and alcoholism. The Plaintiff's objection was that the evidence was irrelevant or at least more prejudicial than probative. The jury was instructed that, in computing the appellant's life expectancy, it could consider the mortality table "in connection with other evidence relating to the probable life expectancy..., including evidence of his occupation, health habits, and other activities." *Oxford*, 297 Ark. 512 (1989).

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The Court went on to note that the trial court has discretion in determining the relevance of evidence and in gauging its probative value against unfair prejudice. Given the fact that evidence of the appellant's habits was useful and even necessary to assist the jury in determining his life expectancy, the Arkansas Supreme Court found no abuse of discretion.

The Court in this case holds that Hoover's medical records regarding his chronic alcoholism are relevant to assist the jury in determining his life expectancy and future damages. At the same time, the Supreme Court in *Oxford* did not grant *carte blanche* that such medical records must always come in without exception. The Court recognized that probative value must be gauged against unfair prejudice and trial courts must exercise discretion to balance the interests of all parties.

Other state courts have addressed this balancing of unfair prejudice against probative value. In *Fritts v. McKinne*, 1996 OK CIV APP 132, 934 P.2d 371 (1996), a medical malpractice case, the Oklahoma court addressed the Plaintiff's history of substance abuse and its relevance to the issue of damages where there is evidence of its effect on probable life expectancy and future earnings. The Court found that while such evidence was admissible for life expectancy and future damages, it was not proper for the jury to consider such evidence in regard to the underlying claim of negligence against the doctor. "Where evidence is admissible on a certain point only, the trial court should at least advise the jury to consider it on that point alone in order to assure that the evidence will not be applied improperly." *Fritts v. McKinne*, 1996 OK CIV APP 132, 934 P.2d 371 (1996), citing *St. Louis & San Francisco Ry. Co. v. Murray*, 50 Okla. 64, 150 P. 884 (1915).

The *Fritts* court found that "... evidence of Fritts' intoxication and history of substance of abuse, along with repeated references to it by defense counsel, was sufficiently prejudicial to Plaintiff's case as to have prevented a full and fair trial of the issues."

In Mr. Hoover's case, there was some disagreement between the attorneys during the June 22 hearing as to whether and to what extent Mr. Hoover's history with alcohol would be relevant regarding their assessments and treatments that gave rise to the lawsuit, i.e. the underlying claim of negligence in assessment and treatment as opposed to issues of life expectancy and future damages.

In their *Joint Response* to Plaintiff's motion, Defendants assert that they anticipate that "both Drs. Hudson and Pati will testify at length as to the importance of Mr. Hoover's history of chronic alcoholism *as it related to their assessments of him and proposed plan for treatment.*" *Response*, p. 4. (Emphasis mine) Plaintiff's attorney was adamant that the Defendant's had not consulted or read the medical records containing the purported inflammatory or prejudicial references to alcohol abuse during the assessment and treatment in question.

Certainly, it would be difficult to reach a perfect resolution fair to both parties when legitimate evidence of past alcohol abuse reaches the jury on the issues of future damages and life expectancy, lest the Plaintiff complain that the evidence is bleeding over into questions of negligence and causation, to his detriment. Of course, the Defendants argue that at least some of this evidence helps put into proper context the judgments and assessments made in coming up with a plan for treatment.

The Oklahoma court suggested that where the evidence is extremely inflammatory, bifurcation of trial of the liability and damages issues or a limiting instruction to the jury are ways to avoid the possibility of prejudice from such evidence.

Based on some of the contents of the medical records in question, the Court finds that there is a substantial likelihood of unfair prejudice to Mr. Hoover if Defendants attempt to make unnecessary or repeated and cumulative references to portions of the medical records. Certainly, the medical records are relevant to the issues of life expectancy and future damages. Defendants assert there is important relevance with respect to the assessment and plan for treatment during the events leading up to the discovery of the abscess on Mr. Hoover's spine.

The Court finds that an approach that blends the suggestions in the *Fritts* case from Oklahoma with our Supreme Court's holding in *Oxford* is reasonable in this situation.

Thus, the Court holds that Plaintiff's motion *in limine* on this issue is **GRANTED IN PART and DENIED IN PART**:

Defendants may reasonably introduce such evidence as it relates to life expectancy, future damages or other proper purposes pursuant to the Arkansas Rules of Evidence, including impeachment or credibility. Caution is given that such evidence of Plaintiff's alcoholism should certainly not be cumulative, redundant, or presented in such a manner as to suggest Mr. Hoover was undeserving of proper medical care due to his disease. As my late father used to advise, "When in doubt, don't."

Defendants may also reasonably introduce such evidence as it relates to causation but only if it is specifically related to and was relied upon as part of Defendants' assessment and plan for treatment during the time of the events at issue (January 19-20, 2009).

The parties are ordered to submit their own proposed jury instruction in an effort to accomplish the objectives set out above.

Certainly, the parties are free to collaborate and come up with an agreed instruction.

**JOINT MEMORANDUM MOTION *IN LIMINE* TO LIMIT AND EXCLUDE MEDICAL AND ECONOMIC TESTIMONY OF TANYA OWEN, PH.D**

**A. Expression of medical opinions as hearsay**

It is anticipated that Dr. Owen will be qualified as an expert in the field of life care planning. An expert may base his or her opinion on facts learned from others, despite their being hearsay. *Dixon v. Ledbetter* 262 Ark. 758, 561 S.W.2d 294 (1978). ). See *Carter v. St. Vincent Infirmary*, 15 Ark. App. 169, 690 S.W.2d 741 (1985). Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or an inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The test under Rule 703 is whether the expert's reliance is reasonable. *Dixon, supra.* In a case involving surveyors, the Arkansas Court of Appeals observed:

> The strength or lack of strength of the evidence on which an expert's opinion is based goes to the weight and credibility, rather than to the admissibility, of the opinion in evidence... Where the testimony shows a questionable basis for the opinion of the expert, the issue becomes one of credibility for the fact finder, rather than a question of law.

*Killian v. Hill*, 32 Ark. App. 25 (1990), citing *Higgs v. Hodges*, 16 Ark. App. 146, 697 S.W.2d 943 (1985) and *Arkansas State Highway Commission v. First Pyramid Life Ins. Co. of America*, 265 Ark. 417, 579 S.W.2d 587 (1979. See also, *Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 50-51 (Ct.App. 2000) (stating "an expert may testify as to matters of hearsay for the purpose of showing what information he relied on in giving his opinion of value") In *Hundley*, the plaintiff's economist was allowed to disclose to the jury plaintiff's anticipated future medical expenses as calculated in a life care plan that a third party had prepared for the plaintiff and which was never admitted in evidence.

The Defendants' motion with regard to opinions based upon hearsay is **DENIED**.

**B. Damages testimony discounted to present value**

Defendants seek an order prohibiting Dr. Owen, Plaintiff's life care planner expert, from testifying as to future damages because she cannot testify as to the present value of those damages. Defendants argue that the trial court should exclude testimony about projected future damages and future medical expenses because in her deposition Dr. Owen admitted she was not an economist and had not reduced her opinions on future damages and expenses to present value. Dr. Owen, as an expert life care planner, testified in her deposition about the future costs that were reasonable and necessary as a result of Mr. Hoover's condition. Counsel for Defendants object to Dr. Owen's testimony about projected future damages on the basis that projected costs should be discounted to present value.

The question of present value is a matter within the province of the jury. The jury is capable of making a determination of the present value of future damages without the aid of expert opinion especially when they are properly instructed. See *J. E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136 (2001). The Defendants are certainly free to aid the jury with their own economist's or other expert's testimony regarding present value.

Another case instructive on this point is *Gross & Janes Company v. Brooks*, 2012 Ark. App. 702 (2012). The question of future "caretaking expenses" arose. The Plaintiff, Brooks, did not even list such damages in his complaint. Instead, "... he first raised them in opening statements when counsel suggested awarding $31,500 to cover handyman tasks for the next thirty-five years of Brooks's life."

Defendant Gross argued that there was no proof from which the jury could ascertain the value of the services sought by Brooks. Recovery for such services cannot be denied merely because such damages cannot be determined with exactness. *Gross & Janes Company v. Brooks*, 2012 Ark. App. 70? (2012), citing *Carr v. Nance*, 2010 Ark. 497, 370 S.W.3d 826; see also *Graftenreed v.Seabaugh*, 100 Ark. App. 364, 268 S.W.3d 905 (2007).

Finally, this issue was also addressed in a medical malpractice case by the Missouri Supreme Court, and their view of the issue is worth noting:

"The fact that a dollar today is not the same thing as a dollar payable some years from now, furthermore, is the matter of plainest fact which could be appropriately argued without the need for expert testimony." *Klotz v. Anthony's Med. Ctr.*, 311 S.W.3d 752, 767 (Mo. banc 2010), citing *Bair v. St. Louis-San Francisco Ry. Co.*, 647 S.W.2d 507, 513 (Mo. Banc 1983), *cert. denied*, 464 U.S. 830 (1983).

Counsel for Defendants may well offer evidence, including their own economist, concerning the present value of Mr. Hoover's future damages. They may tell the jury in closing argument that future economic damage figures were not reduced to present value by Dr. Owen and that any such award should be expressed at present value. They'll be instructed as to present value. Ultimately, the determination of the present value of any award for future damages is a question for the jury following a proper instruction. The Court **DENIES** Defendants' motion.

**DEFENDANT PATIL'S MEMORANDUM MOTION *IN LIMINE* TO LIMIT TESTIMONY OF WENDELL PAHLS, M.D.**

Separate Defendant Patil argues that Dr. Pahls should not be allowed to testify regarding hospital to hospital transfers. The motion is **DENIED**. Dr. Pahls' deposition indicated sufficient knowledge of the transfer protocols so that the Plaintiff can explore this line of questioning,

Subject to proper foundation and application of the Arkansas Rules of Evidence. Again, if the testimony shows a questionable basis for the opinion of the expert, the issue becomes one of credibility for the fact finder, rather than a question of law. Any relevant testimony should not be unnecessarily preempted by an order as a result of a motion *in limine*.

**DEFENDANT HUDSON'S MEMORANDUM MOTION IN LIMINE TO EXCLUDE CERTAIN EXPERT OPINION TESTIMONY FROM DR. RABIE**

In *Heritage Physician Group, P.A. v. Minton*, 2014 Ark. App. 155 (2014), a medical malpractice case, our Court of Appeals cited the Arkansas Supreme Court:

> [a]n expert witness need not be one who has practiced in the particular locality, or one who is intimately familiar with the practice in it, in order to be qualified as an expert in a medical malpractice action, "if an appropriate foundation is established to demonstrate that the witness is familiar with the standard of practice in a similar locality, either by his testimony or by other evidence showing the similarity of localities." *White v. Mitchell*, 263 Ark. 787, 568 S.W.2d 216 (1978), citing *First Commercial Trust Company v. Rank*, 323 Ark. 390 at 401, 915 S.W.2d at 267 (1996).

In *Heritage*, the Court of Appeals rejected the physician's argument that Plaintiff's expert never offered any testimony regarding his familiarity with Hot Springs, Arkansas, the size of the local hospital there, the facilities available to one of the Defendants there, or the local standard of care applicable to a general surgeon in Hot Springs, Arkansas. Likewise, the Court of Appeals was not moved by the argument that the Plaintiff's expert did not discuss his familiarity with any similar localities, as the expert was from Columbus, Ohio, with a population of around 1.5 million, while Hot Springs, Arkansas, had only 30,000. The Court of Appeals stressed that the Plaintiff's expert in that case demonstrated knowledge of the differences in the locales and also that there was testimony that for the type treatment at issue, "there are no situations where the patient would be treated differently in a different locality."

Our Supreme Court has held that: "... an expert need not be familiar with the practice in the particular locality, but must demonstrate a familiarity with the standard of practice in a similar locality, either by his testimony or by other testimony showing the similarity of localities." *Mitchell v. Lincoln*, 366 Ark. 592 (2006). See also *Wolford v. St. Paul Fire & Marine Ins. Co*, 331 Ark. 426, 961 S.W.2d 743 (1998).

Therefore, the relief sought by Defendant seems premature and inappropriate for a motion *in limine*. Plaintiff should be allowed to attempt to lay a foundation and establish his proof, subject to cross examination by Defendant.

With regard to the "same type of practice or specialty" as set out in Ark. Code Ann. § 16-114-206(a)(1), cited and relied upon by Defendant Hudson, the requirement that expert testimony in malpractice actions are to be given by medical-care providers of the same specialty as a defendant was held to violate the separation of powers. *Broussard v. St. Edward Mercy Health System, Inc.*, 2012 Ark. 14, 386 S.W.3d 385 (2012). While there have been proposed rule changes for Rule 702, the "same specialty" language proposed by the task force has not been adopted. See *In Re Special Task Force on Practice & Procedure in Civil Cases — Final Report*, 2014 Ark. 47 (2014).

Defendant's motion is **DENIED**.

**DEFENDANT PATIL'S MEMORANDUM MOTION *IN LIMINE* TO PRECLUDE EXPERT OPINION NOT STATED TO A REASONABLE DEGREE OF MEDICAL PROBABILITY**

Arkansas does not require any specific "magic words" with respect to expert opinions, and they are to be judged upon the entirety of the opinion, not validated or invalidated on the

presence or lack of "magic words." *Rose Care, Inc. v. Ross*, 91 Ark. App. 187 (2005), citing *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 148 S.W.3d 754 (2004).

> Even in medical-malpractice cases proximate cause may be shown from circumstantial evidence, and such evidence is sufficient to show proximate cause if the facts proved are of such a nature and are so connected and related to each other that the conclusion may be fairly inferred. *Rose Care*, 91 Ark. App. 187 (2005)

Where experts' opinions, taken in their entirety, contain substantial evidence from which the jury could fairly infer a causal link between a defendant's conduct and a plaintiff's injuries, it should be allowed. See *Rose Care, supra.* See also, *Heritage Physician Group, P.A. v. Minton*, 2014 Ark. App. 155 (2014), where the Court of Appeals notes that an expert opinion as to proximate cause "... must be stated within a reasonable degree of medical certainty or probability." The Court of Appeals went on to hold that even though the expert, in testifying about the deviation in the appropriate standard of care, used the term "contributed" when discussing the relation of the conduct of defendant to Mintons's death, such evidence was sufficient to have created a question of fact regarding proximate cause.

Defendant's motion is **DENIED.**

**JOINT OBJECTIONS OF RAJU PATIL, M.D. AND STEPHEN HUDSON, MD TO PLAINTIFF'S DESIGNATIONS OF TANYA OWEN, PH.D**

Defendants' motion is **DENIED.**

**DEFENDANTS' OBJECTIONS TO CERTAIN OF PLAINTIFF'S DESIGNATIONS FROM THE DEPOSITION OF JASON TULLIS, M.D.**

Defendants' motion is **DENIED.**

**MEMORANDUM MOTION IN LIMINE TO EXCLUDE REFERENCE TO IOWA LAWSUIT ON BEHALF OF RAJU PATIL M.D.**

Defendants' motion is **GRANTED**, subject to the Plaintiff's ability to contradict or impeach testimony pursuant to Rule 32(a)(1), Arkansas Rules of Civil Procedure. This may be an additional matter to explore more fully prior to Plaintiff seeking to attempt such contradiction or impeachment.

**IT IS SO ORDERED** this 2nd day of July, 2015.

CIRCUIT JUDGE MIKE MURPHY

**Mike Murphy**

**To:** Mike Murphy
**Subject:** RE: CLE Year End Report

**From:** Nancie Givens <Nancie.Givens@arcourts.gov>
**Date:** December 15, 2015 at 11:14:40 AM CST
**To:** 'Mike Murphy' <mountpisgah@yahoo.com>
**Subject: RE: CLE Year End Report**

Mr. Murphy,

The list is in reverse order. It begins with the listing of the Carry Forward hours you had accumulated when the next reporting period began on July 1, 2014. It ends with the Carry Forward balance you had when the reporting period began on July 1, 2013. The first column of hours are your General CLE hours and the second are your Ethics hours earned.

I hope this is of assistance. If you need more information, please let me know.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| YR-END | 7/1/2014 | BALANCE CARRIED FORWARD | 0 | 6.5 | 0 | 7/1/2014 |
| HEA45730 | 2/28/2014 | LITTLE ROCK | 0 | 2.5 | 0 | 3/14/2014 |
| GOV45443 | 2/7/2014 | RUSSELLVILLE | 0 | 2 | 0 | 2/11/2014 |
| FAM44576 | 10/28/2013 | CONWAY | 0 | 2 | 0 | 11/6/2013 |
| YR-END | 7/1/2013 | BALANCE CARRIED FORWARD | 0 | 11 | 1 | 7/1/2013 |

Nancie Givens

**Judge Shawn Womack for**
**Arkansas Supreme Court Associate Justice, Position 5**
**Advance Arkansas Institute Judicial Candidate Questionnaire**

1. Judge Shawn Womack
   P.O. Box 332
   Mountain Home, AR 72654

   www.judgewomack.com
   Facebook: Judge Shawn Womack
   Twitter: @judgewomack

2. CLE Presented:
   - National Business Institute: A Day With the Judges-Domestic Relations
     I served on an all-day panel with 5 Judges in Fayetteville (2015).
   - Pulaski County Bar Association: A Civil and Domestic Relations Update
     I presented one hour by myself in Little Rock (2015).
   - University of Arkansas School of Law: Legal Ethics Jeopardy
     I co-presented one hour with Justice Rhonda Wood in Fayetteville (2015).
   - Benton County Bar Association: A Civil and Domestic Relations Update
     I presented one-half hour by myself in Rogers (2014).

   CLE Attended:
   - Arkansas Judicial Council Fall Conference: Texarkana (2015)
   - Arkansas Judicial Council Spring Conference: Hot Springs (2015)
   - Arkansas Judicial Council Fall Conference: Fort Smith (2014)
   - Arkansas Judicial Council Spring Conference: Hot Springs (2014)
   - Integrity First Bank: Business and Tax Issues in Mountain Home (2014)

3. As a Circuit Judge I have not written any articles or letters to the editor and the opinions that I write tend to be very case and fact specific. I have given many speeches but I do not use written speeches. If you are trying to assess my judicial philosophy, it is basically as follows: Judges are not and should not be policy makers. Policy should be left to the people either directly or through their elected representatives. While some court decisions do have the effect of making policy in areas where the legislature has not acted, courts should act with restraint and give deference to the legislature on issues of policy so long as there is not a constitutional violation. Judges should apply the law to the facts of the cases in front of them.

The Constitutions of the United States and the State of Arkansas must be followed. Maintaining the constitutionally directed separation of powers is critical to proper functioning of government.

*Disclaimer: The Arkansas Judicial Canons prohibit judges and judicial candidates from taking a public position that prejudices a case that is either pending or that may come before them. The answers to questions 4-7 are intended to answer each question in a way that conveys a general position or possible outcome to a fact pattern without taking a position that would indicate how I would rule on any particular case that may come before me.*

4. There are some specific examples of excessive verdicts that can be cited. It is important to maintain the appropriate balance, within the scope of the law, between the right to a jury trial and an appropriate verdict based on the facts of the case.

   When, in an individual case, this balance is shifted in favor of an excessive award of damages, which is beyond the merits of the case, the courts do have the ability to make adjustments to the verdict. When there becomes a pattern or widespread occurrences of excessive damage awards it may be appropriate to adjust the law or rules of procedure to ensure fairness to all parties appearing before the court and to bring awards for damages back into balance based on the facts and merits of the cases and the law as properly applied.

   When I was a member of the Arkansas House of Representatives and the Arkansas Senate in the late 1990s and the early 2000s, I was both a sponsor and a co-sponsor on multiple tort reform bills.

5. Chief Justice John Roberts famously wrote in 2007 that "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." The Equal Protection Clause of the constitution protects people who are similarly situated from being treated differently by their government. While there are some provisions in the law that carve out certain exceptions for protected classes, any differential treatment among citizens should be carefully considered and allowed only in limited scenarios.

6. While every case warrants a review of the facts alleged in the pleadings, it appears likely that this fact scenario would be vulnerable to either a Motion to Dismiss or a Motion for Summary Judgment.

As Judges, one of our duties in jury trials is to give the jury a set of instructions before they take the case for consideration. Arkansas Model Jury Instruction #104 says "*In considering the evidence in this case you are not required to set aside your common knowledge, but you have a right to consider all evidence in the light of your own observations and experiences in the affairs of life."* This common knowledge instruction is often referred to as the "common sense" instruction. While we give this instruction to jurors at the end of a trial, the use of common sense should apply to judges who are considering issues at all phases of litigation.

7. Amendment 80, §3 to the Arkansas Constitution states that "*The Supreme Court shall prescribe the rules of pleading, practice, and procedure for all courts; provided these rules shall not abridge, enlarge, or modify any substantive right…"* My job is to follow the Constitution. As it stands now, these items are governed by the Supreme Court and the people have two ways to impact this; they can either elect Supreme Court Justices that they believe will write these rules in the most appropriate way or they can amend the Arkansas Constitution to give the power to the legislature. Either way, my job is to follow the Constitution. I will note, that the line between what is substantive and what is procedural in nature is one that may warrant additional consideration.

JUDGE SHAWN WOMACK SUPREME COURT

# Biography

Judge Shawn Womack is a Circuit Judge in the 14th Judicial District of Arkansas, serving Baxter, Boone, Marion, and Newton Counties. He was first elected to this position in 2008 and was reelected in 2014 to a second term. Before becoming a Judge, Shawn served first in the Arkansas House of Representatives where he was elected in 1998 and reelected in 2000 and then in the Arkansas Senate where he was elected in 2002 and reelected in 2004. He was also in private practice from 1997 to 2008.

Shawn has held several leadership positions as a Judge and a State Senator, including the following:

- Chairman of the Joint Budget Committee
- Chairman of Litigation Oversight Subcommittee of the Arkansas Legislative Council
- Chairman of the Desegregation Subcommittee
- Vice-Chairman of the Senate Judiciary Committee
- Senate Minority Leader
- Chairman of the Legislative Task Force on District Courts (This Task Force created the process to designate full time District Judges throughout the state)
- Former member of the Council of State Governments' Legal Task Force
- Henry Toll Fellow with the Council of State Governments
- Currently serves as the Chairman of the Legislative Committee of the Arkansas Judicial Council
- Appointed by Arkansas Supreme Court Chief Justice Jim Hannah to represent the Arkansas Judiciary at the National Judicial College Leadership Program, which was sponsored by the United States Department of Justice
- Appointed Special Associate Justice to the Arkansas Supreme Court by Governor Asa Hutchinson to serve during a recusal

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Follow us on Twitter @judgewomack

JUDGE SHAWN WOMACK SUPREME COURT

# Career and Education

**Career:**

- Circuit Judge - 2009-Present
- Special Associate Justice Arkansas Supreme Court - April-May 2015
- Arkansas State Senator- 2003-2008
- Arkansas State Representative - 1999-2002
- Private Legal Practice - 1997-2008
- Legislative Aide, United States Senate - January-July 1997

**Education:**

- University of Arkansas School of Law, Fayetteville, Arkansas - Juris Doctor
- University of Central Arkansas, Conway, Arkansas –Bachelor of Business Administration, Accounting
- Mountain Home High School

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# Appendix I:
# Candidate Answers: Summary and Comments

**QUESTIONS 1-3.** ***Biographical/informational questions.***

These questions requested contact information, educational information, and a sample of something that the candidate had written that might display his or her approach to the law. All three candidates provided all this information. McMenis provided several family law briefs; Judge Murphy provided, among other things, a sophisticated and conscientious legal analysis in his decision letter regarding the application of the Freedom of Information Act; and Judge Womack provided several paragraphs that summarized his judicial philosophy.

**QUESTION 4,** ***which asked candidates to discuss whether the American legal system produces excessively large verdicts.***

**McMenis** provided several arguments to support his view that the phrase "excessively large verdicts" might be misleading. He discussed the notorious McDonald's "hot coffee" case, noting that the plaintiff in that case had to have reconstructive surgery and that she had initially requested only medical expenses. He also stated that a list of jury awards he had seen struck him as containing a "very low dollar amount." He furthermore noted that judges at both the trial and appellate levels can reduce jury damage awards, a process known as "remittitur." However, he also stated that he was "concerned" about "what appears to be excessive class actions matters" in federal courts, which I take to be a concern about relatively small awards to class members and relatively large attorney fees in class actions.

**Judge Murphy** was careful to follow the Code of Judicial Conduct rules in his answers, and qualified his answers carefully so as to ensure that those answers conformed to the Code. He argued that corruption via bribery is a larger problem than excessive verdicts. He also brought up remittitur as well as the ballot box remedy – namely, if an elected judge is doing a bad job, voters can replace him. It is unclear to me that the ballot box remedy is especially effective in such cases.

**Judge Womack** was also careful to follow the rules of the Code of Judicial Conduct in this and succeeding questions – he provided a disclaimer before his answers to underscore that he was not locking himself into any particular answer for any particular case. He also alluded to remittitur, and added some general language that when we see "a pattern or widespread occurrences of excessive damage awards," it "may be appropriate to adjust the law." He also stated that he supported several tort reform bills as a state House and Senate member.

**QUESTION 5,** ***which tested the candidates' views about the possible tension between the Constitution's guarantee of equality before the law and existing programs of race-conscious affirmative action.***

**McMenis** discussed affirmative action from a general (and somewhat skeptical) political perspective. He noted that past group oppression did not require preferential treatment of that group in the future – a position which is consistent with current law, given that current law prohibits the use of past oppression of any particular group as a justification for affirmative action. However, he did not really provide much guidance to how he might understand affirmative action as a legal or judicial matter generally, although he emphasized that he would apply precedent in this or any other case.

**Judge Murphy** provided a brief summary of equal protection law as it pertains to race, but did not really address the question of tension between race-conscious affirmative action and equality before the law that the question raises.

**Judge Womack**, in contrast, quoted John Roberts's famous apothegm that "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." It is reasonable to interpret Womack's answers, based on his suggestion that "differential treatment among citizens should be … allowed only in limited scenarios," as signaling that he would not be especially permissive in judgments about the constitutionality of affirmative action in edge cases.

QUESTION 6, *which asked for candidates' reactions to the hypothetical case of someone who was injured in the course of zipping up his or her pants, who then sued on the basis that a pants zipper was an inherently dangerous product which contained inadequate warnings.*

**McMenis** suggested that this cause of action would likely be dismissed as a matter of law, and provided an embryonic argument to the effect that zippers on pants are not inherently dangerous.

**Judge Murphy** makes the fair point that this question might invite its recipient to do the forbidden – namely, to take a stand and prejudge a particular case. However, he adds that the scope of "inherently dangerous" products under the law is sharply constrained by state Supreme Court precedent, leaving it to the reader to work through whether the citation he provides applies to the case at hand. This is a reasonable and thoughtful answer, although it does not address the "failure to warn" concerns that the original question raises.

**Judge Womack** states (after noting that every case must ultimately rest on details and facts) that "it appears likely" that such a case could be dismissed as a matter of law – adding a suggestion that the "common sense" that guides juries in model jury instructions should guide judges as well. (Of course, this answer must be read in the context of his earlier disclaimer: namely, that he is obliged by ethics not to take a position on any particular future case.) Dismissal as a matter of law is probably the correct result, but Womack's "common sense" answer does not really explain his reasoning.

QUESTION 7, *which asks candidates for their opinions about (in retrospect) the most controversial part of Amendment 80, which has been interpreted to shift responsibility from the state legislature to the courts with respect to the writing of court rules.*

**McMenis** was the only one of the three candidates who appeared willing and eager to defend the current system on policy grounds. He argued (as I understand him) that non-legally trained legislators should not be writing court rules. I do not see the force of this argument, because non-legally trained legislators necessarily write laws on all manner of complex subjects under our system.

**Judge Murphy**, once again, provided a brief summary of the law as it stands now. He did not really address the question at issue, even though it's certainly a matter of public debate and can legitimately be addressed both publicly and privately by lawyers and non-lawyers. I think the final paragraph of his answer hints that he is happy with the existing distribution of powers in Amendment 80, just the way it is.

Like Judge Murphy, **Judge Womack** summarized existing law for the most part when addressing this question. However, he did make the interesting point that there is some play in the system, in that the boundary that the state Supreme Court has drawn between what is substantive and what is procedural remains somewhat unresolved in terms of its application to future cases.

# Appendix II:
# All Appellate Judicial Candidates

The Advance Arkansas Institute sent questionnaires to the nine candidates for appellate judgeships in Arkansas.

The three candidates who answered our questionnaire were:

1. Judge Mike Murphy (candidate for Court of Appeals, dist. 2, pos. 2)
2. Judge Shawn Womack (candidate for State Supreme Court, pos. 5)
3. James McMenis (candidate for Court of Appeals, dist. 5)

The six candidates who did not answer our questionnaire:

1. Justice Courtney Goodson (candidate for State Supreme Court, pos. 1)
2. Cody Hiland (candidate for Court of Appeals, dist. 2, pos. 2)
3. Judge Dan Kemp (candidate for State Supreme Court, pos. 1)
4. Mark Klappenbach (candidate for Court of Appeals, dist. 5)
5. Clark Mason (candidate for State Supreme Court, pos. 5)
6. Job Serebrov (candidate for Court of Appeals, dist. 5)

We sent a questionnaire to each one of these candidates via signature-required registered mail. With respect to the candidates who did not respond a few days before the deadline, we followed up with phone calls. With respect to the judicial candidates who did not answer the questionnaire, it wasn't because of AAI's lack of trying.

One candidate, Job Serebrov, explained to us that the state's ethics rules prohibited him from answering our questions. This contention is incorrect. We discuss this at greater length immediately below.

# Appendix III:
## The Strange Case of Job Serebrov

Three of nine appellate judicial candidates returned AAI's survey. Six of nine did not. Of those six, only one candidate – Job Serebrov – claimed that judicial ethics precluded him from doing so.

Here's my question: what's the real reason that Job Serebrov didn't answer the Advance Arkansas Institute's questionnaire?

Is it because he doesn't want to answer, or is it because (as he told me) he is prohibited from doing so because he was advised by the state's judicial ethics commission that "answering these questions was forbidden to judicial candidates" (as he claimed in an e-mail to me)? If the latter is true, it will obviously come as a great surprise to the three judicial candidates who answered AAI's questionnaire.

There are really only two ways for candidates to deal with questionnaires: answer them or decline to answer them. I have the most respect for judicial candidates who see it as part of their job to publicly answer questions on issues of legal and judicial philosophy. Refusing to answer such questions is less admirable – regrettably, some judicial candidates see discussions of questions of legal and judicial philosophy as pointless or a waste of their time, and I fear that other candidates believe that answering such questions might do them more harm than good in the race. Serebrov seems to want to choose a third way – to claim that the law prohibits him from answering. When I spoke to Serebrov, he told me that he would like to answer our questions, but that he was disallowed from doing so as a matter of law. This has the effect of giving him the benefit of not answering without the embarrassment that comes with refusing to do so.

Subsequently, Serebrov told me by email that he asked the state's Judicial Discipline and Disability Commission for guidance on this issue. He said that the Commission's staff advised him that he was "forbidden" to answer any questions. This was most surprising: as I told him subsequently, that position is contrary to both the Arkansas Code of Judicial Conduct as well as established law at both the state and federal levels. (See the Arkansas Code of Judicial Conduct, Rule 4.1, Comment 13A; *Beshear v. Butt*, 863 F. Supp. 913 (E.D. Arkansas, 1994); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

While judicial candidates must not provide answers on questions or controversies that may arise if they win their election, there is certainly no blanket prohibition on answering questionnaires such as the one submitted by AAI. Indeed, part of what the questionnaire tests is whether a candidate can competently discuss questions of legal and judicial philosophy without running afoul of the Canons of Judicial Conduct.

Specifically, in an e-mail to me, Serebrov explained that he was told, "These questions appear to be soliciting from you, a judicial candidate, opinions regarding matters, issues or controversies that could come before you were you to win the elected position you seek. Please see Canon 4, Rule 4.1 for clarification." Serebrov explained to me that the guidance from the Commission quoted immediately above served as a blanket prohibition that required him to decline to answer all questions.

Serebrov's interpretation is groundless. There is no blanket prohibition; rather, as the quoted text demonstrates, he was given guidance to be cautious about answering questions generally, so as to ensure that they comport with the Canons. The Commission's guidance refers to the portion of the Canons that Serebrov would ideally be guided by when making public statements as a candidate.

When Serebrov told me that judicial ethics blocked him from answering questions, I was taken aback – I could only conclude that Serebrov had a serious misunderstanding of the guidance he received from the Judicial Discipline and Disability Commission. I called the Director of the Commission, David Sachar, who told me that he had never communicated with Serebrov about this matter. Sachar advised me that I should talk to the only other person authorized to speak for the Commission on such matters, Deputy Director Emily White, who he thought might have communicated with Serebrov.

I spoke to White, who then confirmed my understanding of the nature of the guidance she had previously supplied to Serebrov. After I contacted White about her conversation with Serebrov (and provided her the emails that Serebrov had sent me, in which he said that he was "forbidden" by ethics rules from answering AAI's questions), she eventually told me:

*My statement to him was only with regard to a couple of the questions, where I said it looked like the questions were possibly asking him for a response to something that may come before him if he were to win. And it wasn't every one of the questions. So it appears to me, from what you sent to me – as far as his response to you – that he used that as a blanket kind of a response to your entire list of questions. That was not my intent.*

As White's statement demonstrates, when Serebrov e-mailed me to say "it was made clear that answering these questions was forbidden to judicial candidates," he was wrong in several respects. Of course he was not "forbidden" from answering anything, only cautioned to consider his answers in light of the relevant judicial Canon. And of course AAI's questions can be answered without violating the Canons of Judicial Conduct – although it is possible for me to imagine some hypothetical answers to our questionnaire that would indeed violate the Canons of Judicial Conduct, there are plenty of ways to answer these questions without any violation of the rules.

The kindest way to understand this situation is that Serebrov is in possession of a terribly flawed understanding of our state's judicial ethics rules. This does not speak well for someone who is running for a seat on the Court of Appeals. After all, we expect every lawyer to interpret the law competently – and competent interpretation of the law is the fundamental building block of the work that we expect appellate judges to do. Serebrov has apparently misinterpreted both the written law and several different communications from the relevant enforcement agency. I prefer not to think about the other possibility – that Serebrov intentionally communicated with me in a false or misleading way in an attempt to avoid answering AAI's questionnaire – given that such conduct would violate the portion of the Canon which says that a judicial candidate shall not "knowingly, or with reckless disregard for the truth, make any false or misleading statement" (Rule 4.1 (A)(11)).

It is certainly possible that Serebrov misunderstood what Emily White told him. Given the rhetoric of certitude that he resorted to in multiple communications with me about this matter, that is troubling enough. (In one email, he informed me that "I was correct in my reading of your questions according to the Office of Director for Judicial Discipline and consequently must decline to respond to your questionnaire." In a subsequent email that responded to my suggestion that such a statement reflected a misunderstanding of his rights and duties under the law, he informed me that "The response I sent was the end result of a phone discussion with the Office of Judicial Discipline where it was made clear that answering these questions was forbidden to judicial candidates." In retrospect, it is hard to avoid the conclusion that Serebrov was flatly wrong both times.) I appreciate that people can misunderstand things, although in this context such a misunderstanding strikes me as – at best – mildly unbelievable. But if Serebrov intentionally misrepresented judicial ethics rules as a pretext to avoid answering AAI's questions, that isn't just a political problem – rather, it's a problem that is itself punishable by the Judicial Discipline and Disability Commission.

To sum up – I have a great deal of respect for the judicial candidates who supplied answers to our questions. And I appreciate that some judicial candidates will decide that they are just too busy to answer our questions, or that answering such questions doesn't really benefit their campaign, although I think taking such a position suggests some degree of cynicism or contempt for the voters. But providing a groundless explanation to the effect that ethics rules prevent judicial candidates from answering questions is something that I don't respect or appreciate at all.

(This article originally appeared, in slightly different form, in The Arkansas Project, the news and commentary website of the Advance Arkansas Institute.)

The Advance Arkansas Institute is a nonprofit research and educational organization committed to advancing public policy based on free markets, individual liberty, and limited, transparent government. Please contact **Dan Greenberg**, AAI's president, with any questions about this report. Contact him at **advancearkansas@gmail.com** or **501-588-4245**.


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