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## Recent Developments

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## RECENT DEVELOPMENTS

### Eighth Circuit Remands Arkansas Party-Filing Deadline Case for Lack of Record

**Moore v. Martin**, No. 15-3558, 2017 WL 1485036 (8th Cir. 2017).

In a two to one decision, the Eighth Circuit Court of Appeals remanded a ballot access restriction case back to the United States District Court for the Eastern District of Arkansas. The case arose after three independent candidates sought declaratory judgment in response to a 2015 piece of legislation that moved the 2016 date for non-presidential candidates running in party primaries from May to March. The candidates maintained that the new deadline was unnecessarily early and violated the First and Fourteenth Amendments. The district court granted Arkansas's motion for summary judgment and one of the candidates, Mark Moore, appealed.

Plaintiff Mark Moore was an independent candidate for Lieutenant Governor in the 2014 election, who claims on appeal that he plans to run in 2018. He originally sued the Arkansas Secretary of State claiming that the March deadline for independent candidates was not narrowly tailored to serve a government interest. The district court disagreed, and held that "Arkansas has a compelling interest in timely certifying candidates and initiatives to the general election ballot."

Writing for the majority, Judge Roger L. Wollman held that a genuine issue of material fact existed as to whether the new deadline was narrowly drawn to serve a compelling state interest. Under the 2015 legislative changes, a person seeking to run as an independent candidate for any office other than the President or Vice President must submit the requisite signed petition. These petitions must be verified by the Arkansas Secretary of State and county clerks. The majority highlighted these and a number of other procedural requirements that candidates must go through before having their names appear on the general election in November. The opinion also noted that

Arkansas's ballot access statutes have been repeatedly challenged, citing cases from 1975, 1976, 1977, 1988, and 1994.

Here, the district court erred "in concluding that there was no genuine dispute of material fact whether the March 1 deadline is narrowly drawn to serve [a] compelling interest." Pointing to the Secretary of State's evidence of a higher number of independent candidates who had petitioned for inclusion, the majority questioned whether this increase in nonpartisan petitions caused an increase in litigation and interference with the verification process. The majority concluded that "the increase in the number of nonpartisan petitions does not by itself establish the existence of a compelling interest that the March 1 deadline is narrowly tailored to serve." Even if the increase caused Arkansas to hire more election workers to process the petitions, citing the cost as a compelling government interest would not likely render the legislative change constitutional. The United States Supreme Court has held that the possibility of increased administrative costs does not justify a statute prohibiting a political party from opening its primary to voting by independents. The decision elaborates on gaps in the record regarding timing, feasibility, and past practices. Without more, the majority concludes, the lack of record precludes a finding of summary judgment.

Judge Lavenski Smith dissented, faulting the filing deadline as "neither actually required nor narrowly drawn" and concluding that Moore was entitled to judgment as a matter of law.

Eighth Circuit Affirms Grant of Summary Judgment in  
Lawsuit Against Missouri Police Force Alleging  
Excessive Force

**Boude v. City of Raymore**, No. 16-1183, 2017 WL  
1749664 (8th Cir. 2017).

In a unanimous decision, the Eighth Circuit affirmed the United States District Court for the Western District of Missouri's grant of summary judgment in favor of the City of Raymore Police Department. Plaintiff-Appellee Kimberly Boude was arrested by Officer Michael Heady after being physically removed from her motor vehicle in March 2012. After one member of the Raymore Police Department had found her huffing aerosol spray cans inside her SUV, Officer Heady was dispatched to respond to a motorist in need of assistance who matched Boude's description from the day before. After Officer Heady approached her car, he spoke with Boude about turning her car off. When Boude reached for the gearshift, her car's brake lights turned on at which point, Officer Heady said "no, no, no," reached through the front window, and turned off the ignition. After taking Boude's keys, he asked her to step out of the car. When she refused, he physically removed her and placed her on the ground before handcuffing her. Another police officer's dash camera recorded the events.

After Boude pled guilty to driving while intoxicated, she claimed injuries from the arrest alleging excessive force, negligence and battery. The district court granted summary judgment on the grounds of qualified and official immunity. Writing for the Court, Judge Duane Benton held it was objectively reasonable for Officer Heady to (1) believe that plaintiff's reach for the gearshift was an attempt to shift the car to drive and to flee; and (2) believe that the plaintiff's refusal to exit her vehicle and subsequent movement was a non-compliant attempt to possibly flee on foot. On appeal, Boude argued that Officer Heady's actions became unreasonable after he had already taken her keys and eliminated the risk that she might flee. However, the Court found Heady could have reasonably believed that she "would continue to be non-compliant or attempt to flee on foot." The Court also dismissed Boude's

contention that Office Boude forfeited his official immunity by acting in bad faith. The Court found these conclusory allegations insufficient to defeat summary judgment.

Arkansas Supreme Court Affirms Class-Action Status  
with Exception of Negligence Claims Against Nursing  
Home

**Robinson Nursing & Rehabilitation Center, LLC v.  
Andrew Phillips**, 2017 Ark. 162, 2017 WL 1827824  
(unpublished).

In May, the Arkansas Supreme Court affirmed most of a circuit court's order granting class certification in part, allowing plaintiffs to proceed in a lawsuit against Robinson Nursing and Rehabilitation Center, LLC, its owner Michael Morton, and related entities (collectively, "Robinson"). Andrew Phillips filed the original lawsuit on behalf of his deceased mother, Dorothy Phillips, and later filed an amended class-action complaint to include other residents or estates of residents who resided at the Center from June 11, 2010, to present. Phillips alleges Robinson's business practice of chronic understaffing breached the Arkansas Deceptive Trade Practices Act (ADTPA), constituted negligence and civil conspiracy, and unjustly enriched Robinson.

Relying on a 2015 Arkansas Supreme Court case, Robinson argued that class certification was inappropriate. Circuit Court Judge Timothy Fox found otherwise, concluding that the class definition was proper and not overbroad. He also identified twelve issues common to the class members and concluded that these issues predominated over the individual issues. Further, Judge Fox found that the class requirements of numerosity, typicality, superiority, and adequacy were satisfied and granted class certification. Robinson filed an interlocutory appeal, arguing that Phillips's case was fundamentally different from two previous class action appeals where class certification was proper. In particular, Robinson maintained that the class definition was overbroad and that Phillips did not meet his burden of proving (1) commonality; (2) predominance; (3) superiority; and (4) typicality under Rule 23 of the Arkansas Rules of Civil Procedure, which governs class actions and class certification.

Justice Karen Baker wrote the opinion, agreeing with Phillips's contention that the arguments presented by Robinson

were already rejected by the court. She affirmed the circuit court's class certification as Phillips's breach of contract, ADTPA, and unjust enrichment claims. Relying on the same two nursing home class actions, the Court upheld Judge Fox's findings of commonality and predominance. As for superiority, the Court noted that the class was "cohesive and manageable group because the common question of understaffing can be ascertained on a classwide basis." In addressing the typicality requirement, the Court concurred with Judge Fox, explaining that "the class representative's claim arises from the same alleged wrongful conduct, understaffing." The Court also agreed that the class definition was sufficiently definite.

However, Judge Baker disagreed that Phillips's negligence claim was appropriate for class certification. Under Arkansas law, she wrote, "negligence requires an individual analysis of each plaintiff's specific allegations." Further, the law requires proof that breach of contract was the "proximate cause of the plaintiff's injuries" and that "negligence is never assumed." In remanding the case, Justice Baker instructed the circuit court to decertify the class solely on the negligence claim.

Justice John Dan Kemp authored a separate opinion, concurring and dissenting in part, joined by two other justices. He faults the majority's position that the class's negligence claim requires an individualized proximate-causation analysis. This thinking, he explains, involves the majority "mistakenly delv[ing] into the merits of the underlying claims." Justice Josephine Linker Hart, joined by Justice Shawn Womack, filed an opinion concurring with the reversal on a class action for negligence, but dissenting on the class certification for the contract, unjust enrichment and the ADTPA claims.

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