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Diligence and Belated Appeals: Ark R. App P.-Civ. 4(b)(3) in Theory and Practice

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DILIGENCE AND BELATED APPEALS: ARK R. APP P.-CIV. 4(b)(3) IN THEORY AND PRACTICE

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I. INTRODUCTION

A series of Arkansas appellate decisions addresses a recurring issue—the entry of a final order without notice to one or more litigants.[1] Appellate deadlines run from the date of entry of a final order, so the lack of notice typically results in the inability to perfect an appeal,[2] as a party unaware of the entry of a final order is unlikely to timely perfect an appeal.[3] This troublesome issue has arisen in Arkansas with sufficient frequency to merit a specific provision in the Arkansas Rules of Appellate Procedure—Civil.[4] If a party can satisfy its requirements, Rule 4(b)(3) of the Arkansas Rules of Appellate

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1. *See* Tissing v. Ark. Dep't of Human Servs., 2009 Ark. 166, at 4, 303 S.W.3d 446, 448; Kidwell v. Rhew, 371 Ark. 490, 491 n.1, 268 S.W.3d 309, 310 n.1 (2007); Francis v. Protective Life Ins. Co., 371 Ark. 285, 294-95, 265 S.W.3d 117, 124 (2007); Sloan v. Ark. Rural Med. Prac. Loan & Scholarship Bd., 369 Ark. 442, 444, 255 S.W.3d 834, 836 (2007); Arkco Corp. v. Askew, 360 Ark. 222, 225, 200 S.W.3d 444, 446-47 (2004); Arnold v. Camden News Publ'g Co., 353 Ark. 522, 524-25, 110 S.W.3d 268, 269-70 (2003); *see also* Davis v. State, 2016 Ark. 47, at 3-4, 481 S.W.3d 764, 766-67; Anderson v. Holada, 2010 Ark. App. 143, at 2, *opinion after rebriefing,* 2010 Ark. App. 425, at 1; River Valley Homes, Inc. v. Freeland-Kauffman & Fredeen, Inc., 2010 Ark. App. 682, at 3, 5; Williams v. Blissard Mgmt. & Realty, Inc., No. CA-02-1339, 2003 WL 22053063, at *2 (Ark. Ct. App. Sept. 3, 2003).

2. *See, e.g.*, *Sloan*, 369 Ark. at 446, 255 S.W.3d at 838; *Arkco Corp.*, 360 Ark. at 229, 200 S.W.3d at 449; *Arnold*, 353 Ark. at 528, 110 S.W.3d at 272.

3. ARK. R. APP. P. CIV. 4(a); *see also* Ark. Sup. Ct. Admin. Order No. 2. (noting that timely filing of a notice of appeal is jurisdictional); *see, e.g.*, Ellis v. Ark. State Highway Comm'n, 2010 Ark. 196, at 13, 363 S.W.3d 321, 328.

4. ARK. R. APP. P. CIV. 4(b)(3).

Procedure—Civil permits an attorney or litigant who did not receive notice of a judgment, decree, or order from which an appeal is sought to obtain an extension of time to file a belated notice of appeal.[5]

Whether a party can make the required showing to obtain relief under Rule 4(b)(3), however, is another matter entirely. One precondition to obtaining relief under Rule 4(b)(3) is the requirement that the litigant or attorney demonstrate "diligence."[6] The "diligence" requirement obligates a litigant or an attorney to monitor the status of his, her, or its case including knowing the contents of the court's docket, and the documents filed.[7] Before 2006, Arkansas appellate courts interpreted Rule 4(b)(3) as implicitly requiring a party seeking a belated appeal to show "diligence" as a condition to obtaining relief.[8] A 2006 amendment made the diligence requirement explicit in the text of Rule 4(b)(3).[9] Whether evaluating the explicit or implicit diligence requirement, Arkansas courts have frequently declined relief under Rule 4(b)(3),[10] finding diligence lacking because either a litigant or his counsel failed to diligently monitor a case and, with diligence, would have timely learned of the entry of the final order or judgment.[11] As a result, the vast majority of the reported cases in Arkansas deny relief sought under Rule 4(b)(3).[12]

Despite a specific rule addressing extending the time for appeal when the final order was entered without notice to one or more litigants and a line of cases addressing the issue, there has been a dearth of scholarship on Rule 4(b)(3). This Article intends to fill that void by examining the issues precipitated by the entry

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5. ARK. R. APP. P. CIV. 4(b)(3).

6. ARK. R. APP. P. CIV. 4(b)(3).

7. *See, e.g.*, *Arkco Corp*., 360 Ark. at 228, 200 S.W.3d at 448; *Arnold*, 353 Ark. at 528, 110 S.W.3d at 272.

8. *See* ARK. R. APP. P. CIV. 4(b)(3); *see, e.g.*, *Arkco Corp.*, 360 Ark. at 228, 200 S.W.3d at 448; *see also*, cases cited *supra* note 1.

9. *See* ARK. R. APP. P. CIV. 4 addition to reporter's note, 2006 amendment (codifying the diligence requirement for parties seeking to reopen the time to file a notice of appeal).

10. *See* cases cited, *supra* note 1. *But see infra* notes 113-19 and accompanying text.

11. *See Arkco Corp.*, 360 Ark. at 229, 200 S.W.3d at 449; *Arnold,* 353 Ark. at 528, 110 S.W.3d at 272.

12. *See* cases cited, *supra* note 1 (collecting cases where relief is denied). *But see infra* notes 113-19 and accompanying text for the sole exception.

of a judgment without notice to a party.[13] Since the principal complication resulting from the lack of notice of the order is the loss of the right to an appeal, Part II summarizes Arkansas civil practice to discuss the entry of final judgments by Arkansas courts emphasizing some points where their practices differ from practice before federal courts.[14] Part III then examines the elements necessary to obtain relief under Rule 4(b)(3).[15] Part IV traces the evolution of Rule 4(b)(3) from a provision originally omitted from Rule 4 of the Arkansas Rules of Appellate Procedure—Civil to its current formulation by exploring significant decisions and amendments to the Rules.[16] This Article concludes with a critique of potential solutions to this reoccurring problem.[17]

II. ARKANSAS CIVIL PRACTICE

Although the procedural rules effective in Arkansas are generally taken from their federal counterparts, Arkansas civil practice for entry of orders departs from federal practice in certain material respects. This Article examines civil practice for entry of orders in Arkansas state courts with a focus on those differences.

Any discussion of the entry of orders in Arkansas must begin with the circuit clerk's recordkeeping responsibilities.[18] The

13. Such orders are colloquially referred to as "stealth orders" because they are entered without notice to the parties.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

18. Until the adoption of Amendment 80 to the Arkansas Constitution in 2000, Arkansas courts were divided into circuit, chancery and probate courts. *See generally* John J. Watkins, *The Right to Trial by Jury in Arkansas After Merger of Law and Equity,* 24 U. ARK. LITTLE ROCK L. REV. 649 (2002) (discussing prior structure and implications of Amendment 80). Each had jurisdiction over certain civil actions with the circuit court generally responsible for actions at law, the chancery court responsible for actions lying in equity, and the probate court responsible for probate and family law matters. *See id.* In 2000, the adoption of amendment 80, however, unified the structure of Arkansas courts, rendering the circuit court as the trial court of general jurisdiction over actions at law or in equity. *Id.* Despite the merger, the county clerk may serve as the *ex-officio* clerk of the probate division, if the division exists. ARK. CODE ANN. § 14-14-502(a)(2)(B) (2001). Because this article focuses on civil practice post-Amendment 80, which lies in the circuit

circuit clerk has two primary recordkeeping responsibilities. First, the circuit clerk must maintain a "civil docket."[19] The clerk is to note on the docket all papers filed with the clerk in chronological order including, process issued, returns of process, appearances, orders, verdicts, and judgments, and is to file a copy of the papers in the folio with a mark of the file number.[20] Second, the circuit clerk must maintain a judgment record book.[21] In the judgment record book, the clerk maintains correct copies of every final judgment or appealable order, as well as copies of any order that affects "title to or lien on real or personal property," or any other orders that the circuit court orders kept.[22] Considering these recordkeeping responsibilities, we turn to Arkansas practice for entry of judgments, orders, and decrees in civil cases.

Rule 58 determines when a judgment[23] or decree is effective.[24] Under Rule 58, a judgment or decree is effective only when two factors are met: first, the separate document requirement is satisfied, and second, the document is "entered."[25] As to the first factor, Arkansas follows the separate document requirement for judgments or decrees.[26] Just as its name implies, this principle requires that a judgment or decree "be set forth on a separate document."[27] The purpose of this Rule is to simplify the process and make certain when a judgment becomes effective

court, any discussion of the duties remaining with the county clerk is beyond the scope of this Article.

19. Ark. Sup. Ct. Admin. Order No. 2(a).

20. Ark. Sup. Ct. Admin. Order No. 2(a). "In counties where the county clerk serves as the *ex officio* clerk of any division of the circuit court, the filing" of the document with either the circuit or county clerk satisfies any filing requirement for a "pleading, paper, order, judgment, decree, or notice of appeal." Ark. Sup. Ct. Admin. Order No. 2(a) (emphasis added).

21. Ark. Sup. Ct. Admin. Order No. 2(b)(1).

22. Ark. Sup. Ct. Admin. Order No. 2(b)(1).

23. A "[j]udgment . . . includes a decree and any order from which an appeal lies." ARK. R. CIV. P. 54(a). Although Rule 58 continues to use "decree," a term traditionally used in chancery cases, Amendment 80 to the Arkansas Constitution and the resulting merger of courts of law and equity eliminates the need to preserve this distinction. 2 DAVID NEWBERN ET AL., ARK. PRAC. SERIES CIVIL PRACTICE & PROC. § 31: 1, at 653 n.16 (5th ed. 2010) (citing 10 C. WRIGHT ET AL., FED. PRAC. & PROC. § 2651 (1998)).

24. ARK. R. CIV. P. 58.

25. ARK. R. CIV. P. 58.

26. ARK. R. CIV. P. 58.

27. ARK. R. CIV. P. 58.

for purposes of an appeal.[28] As to the second factor, Rule 58 provides that a judgment or decree is effective only when "entered as provided in Administrative Order No. 2."[29] Administrative Order No. 2 defines "entry" for purposes of determining when a judgment, decree or order is "entered."[30] Administrative Order No. 2 notes that "[t]he clerk shall denote the date and time that a judgment, decree or order is filed by stamping or otherwise marking it with the date and time and the word 'filed.'"[31] Administrative Order No. 2(b)(2) provides that "[a] judgment, decree or order is entered when so stamped or marked by the clerk, irrespective of when it is recorded in the judgment record book."[32] "Entry," for purposes of Administrative Order No. 2, means the date and time when the clerk[33] stamps the document "filed."[34]

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28. *See* Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 (1978); United States v. Indrelunas*,* 411 U.S. 216, 220 (1973).

29. ARK. R. CIV. P. 58. The previous version of Rule 58 referred to Rule 79(a), which was abolished in 1987 with the Arkansas Supreme Court's adoption of Administrative Order No. 2. *In re* Changes to the Ark. R. Civ. P., 294 Ark. 664, 669, 742 S.W.2d 551, 554 (1987); *see also* ARK. R. CIV. P. 58 addition to reporter's note to 1990 amendment. Rule 79(a) previously provided: "[a]ll papers filed with the clerk, all process issued and returns thereon, all appearances, orders, verdicts and judgments shall be noted chronologically in the dockets and filed in the folio assigned to the action and shall be marked with its file number." ARK. R. CIV. P. 79(a) (superseded 1987). It continued: "[t]hese entries shall be brief, but shall [sic] show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process." ARK. R. CIV. P. 79(a) (superseded 1987). It then provided: "[t]he entry of an order or judgment shall show the date the entry is made." ARK. R. CIV. P. 79(a) (superseded 1987). In 1990, Rule 58 was amended to replace the reference to the abolished Rule 79(a) with the current reference to Administrative Order No. 2. ARK. R. CIV. P. 58 addition to reporter's note to 1990 amendment.

30. Ark. Sup. Ct. Admin. Order No. 2(b)(2); *see also* Sunbelt Couriers v. McCartney, 303 Ark. 522, 523, 798 S.W.2d 92, 93 (1990) ("'Entry' occurs when a judgment or order is filed with the clerk of the court."). Significantly, paragraphs (2) to (4) of subdivision (b) of Administrative Order No. 2 were added in 1999. *In re* Admin. Order No. 2*,* 338 Ark. 812, 812-13 (1999); *see also* ARK. R. CIV. P. 58 addition to reporter's note to 1999 amendment

31. Ark. Sup. Ct. Admin. Order No. 2(b)(2).

32. Ark. Sup. Ct. Admin. Order No. 2(b)(2).

33. Administrative Order No. 2 defines the term "clerk" as referring to the Clerks of the various Arkansas Circuit Courts, but also includes the county clerk to the limited extent that the law requires probate matters to be filed in the office of the county clerk. Ark. Sup. Ct. Admin. Order No. 2(f).

34. Ark. Sup. Ct. Admin. Order No. 2(b)(2); *see also* ARK. R. CIV. P. 58 reporter's note to Rule 58 ("This rule provides that a judgment or decree shall not be effective unless and until it is entered pursuant to Rule 79(a). Thus for appeal purposes, the date of entry or filing of the judgment or decree is the effective date, as opposed to the date of rendition.") (citations

Arkansas permits the filing of a judgment, order, or decree by facsimile.[35] A fax filing raises similar issues for determining the time of "entry." If the clerk's office has a fax machine, at the direction of the court, the clerk is to accept the fax transmission of a judgment, decree, or order for filing.[36] The clerk is to mark the faxed copy "filed" on the date and time it is received on the clerk's fax machine during the office's regular business hours or, if received outside the clerk's regular business hours, at the time the office opens on the next business day.[37] While the date stamped on the faxed copy controls all appellate deadlines, the Rule requires that the original judgment, decree, or order be substituted for the faxed copy within fourteen days of transmission.[38]

Alternatively, if the clerk's office is not open for business, the court may make an order immediately effective by expressly finding extraordinary circumstances exist, signing the order, noting the time and date on the order, and marking or stamping the order "filed in open court."[39] An order issued to be immediately effective must be filed with the clerk the next day that the clerk's office is open, and the filing date controls all appellate deadlines.[40] While parties have argued an order was "entered" based on its filing with the judge,[41] Arkansas appellate courts have rejected this argument and held merely having the

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omitted). Accordingly, under Administrative Order No. 2, the current practice is substantially the same as prior practice under the now-abolished Rule 79(a). *See In re* Changes to the Ark. Rules of Civ. Proc., 294 Ark. 664, 669, 742 S.W.2d 551, 554 (1987); *see also* Exigence, LLC v. Baylark, 2010 Ark. 306, at 12-13, 367 S.W.3d 550, 556-57 (reversing discovery sanctions where order setting deadline for production was not entered until after the deadline established in the order, making timely compliance impossible).

35. Ark. Sup. Ct. Admin. Order No. 2(b)(3).

36. Ark. Sup. Ct. Admin. Order No. 2(b)(3).

37. Ark. Sup. Ct. Admin. Order No. 2(b)(3). This practice also applies where a judge permits pleadings to be filed with him or her by facsimile. ARK. R. CIV. P. 5(d); *see generally* NEWBERN ET AL., *supra* note 23, § 11:17.

38. Ark. Sup. Ct. Admin. Order No. 2(b)(3); *see also* Francis v. Protective Life Ins. Co., 371 Ark. 285, 291, 265 S.W.3d 117, 122 (2007).

39. Ark. Sup. Ct. Admin. Order No. 2(b)(4).

40. Ark. Sup. Ct. Admin. Order No. 2(b)(4).

41. *See* ARK. R. CIV. P. 5(d). Interestingly, the cases do not discuss the apparent limitation in Rule 5(d) that would permit a judge to file only "papers or pleadings." ARK. R. CIV. P. 5(d). This omission may result from the expansive definition of "papers" to include "all pleadings, papers and other documents generated in the lawsuit." ARK. R. CIV. P. 5 additions to reporter's note to 1985 amendment (internal quotations omitted).

order signed by the judge with the recitation "filed with the judge" or similar words to that effect is insufficient to constitute entry of the order.[42]

Arkansas practice for determining the time of entry of a judgment, decree, or order varies from federal practice. The recordkeeping requirements of the clerk of a federal district court are substantially the same as those imposed on Arkansas circuit clerks.[43] Federal district clerks, however, have significantly more responsibility for entering judgments than their state court counterparts. Unless the district court orders otherwise, federal clerks are responsible for preparing, signing, and entering judgment without the court's direction when the jury returns a general verdict, the court awards costs or a sum certain, or the court denies all relief.[44] Similarly, the clerk is responsible for promptly entering judgment, the form of which is approved by the court, when a jury returns a special verdict or a general verdict on interrogatories, or when the court grants other relief.[45] Federal clerks may also enter default judgments,[46] although the general practice of most federal district court judges in Arkansas is to rule on motions for default judgment themselves or refer such motions to a magistrate judge.[47]

As to the entry of judgment, federal practice also follows the separate document requirement.[48] In federal practice, however, "entry" generally refers to the clerk's notation of the judgment on the court's civil docket.[49] The "entry" on the civil docket is the

42. *See, e.g.*, Voyles v. Voyles, 311 Ark. 186, 187, 842 S.W.2d 21, 22 (1992) (per curiam); Sullivan v. Wickliffe, 284 Ark. 33, 34, 678 S.W.2d 771, 771 (1984) (per curiam).

43. *See* FED. R. CIV. P. 79.

44. FED. R. CIV. P. 58(b)(1). Such a judgment is, however, subject to the provisions of Rule 54(b) for certification of issues for an immediate appeal where there are multiple claims or parties. FED. R. CIV. P. 58(b)(1).

45. FED. R. CIV. P. 58(b)(2). As previously noted, such a judgment is, however, subject to the provisions of Rule 54(b) for certification of issues for an immediate appeal where there are multiple claims or parties. FED. R. CIV. P. 58(b)(2).

46. FED. R. CIV. P. 55(b)(1).

47. *See* Local Rules of the United States District Court for the Eastern and Western Districts of Arkansas, Rule 72.1(VIII)(A)(6) (permitting a district judge to designate a magistrate judge to conduct hearings and to submit proposed findings of fact and conclusions of law on "motions to dismiss an action and to review default judgment").

48. *See* FED. R. CIV. P. 58(c)(2).

49. FED. R. CIV. P. 58(c); *see also* FED. R. CIV. P. 79(a); 12 JOSEPH T. MCLAUGHLIN, MOORE'S FEDERAL PRACTICE: CIVIL § 58.03 (3d ed. 2013); 12 CHARLES A. WRIGHT ET

seminal event.[50] If no separate document is required, a judgment is "entered" in federal court when the clerk enters it on the civil docket.[51] If a separate document is required, the federal rules provide that a judgment is entered when the judgment is entered in the civil docket *and* the earlier of two events occurs: either the judgment is set out in a separate document, or 150 days expires from its entry in the civil docket.[52] In order to make an "entry," federal procedure requires the clerk to create an entry on the civil docket so as to avoid any potential confusion of the timing of the entry that might result from a judgment being filed with the judge, rather than with the clerk.[53] After a judgment is entered, federal district clerks may further tax costs to a prevailing party.[54]

Beyond the mechanics of entry, Rule 58 of the Arkansas Rules of Civil Procedure also discusses the preparation of the judgment, decree, or order.[55] Subject to the procedures of Rule 54(b) for certifying issues for immediate appeal,[56] when the circuit court decides to grant or deny the relief sought, or the jury enters a special or general verdict, the circuit court may direct the prevailing party to "promptly prepare and submit, for approval by the court and opposing counsel, a form of judgment or decree which shall then be entered as the judgment or decree of the court."[57] Alternatively, the circuit court may prepare and enter its own form of judgment or decree, or simply enter the precedent prepared by the prevailing party without the consent of opposing counsel.[58] So, consistent with traditional Arkansas practice, Rule

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AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3103 (3d ed. 2014); 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2786 (3d ed. 2013).

50. *See* FED. R. CIV. P. 58(c).

51. FED. R. CIV. P. 58(c)(1).

52. FED. R. CIV. P. 58(c)(2).

53. FED. R. CIV. P. 58(c); FED. R. CIV. P. 5(d)(2)(B).

54. FED. R. CIV. P. 54(d)(1) ("The clerk may tax costs on 14 days' notice."). While Rule 54(d)(1) suggests the clerk should tax costs, with the clerk's decision reviewed by the Court "[o]n motion served within the next 7 days," Arkansas federal courts have generally continued to tax costs on application, too. FED. R. CIV. P. 54(d)(1); *see* ARK. R. CIV. P. 54(d)(2).

55. ARK. R. CIV. P. 58.

56. ARK. R. CIV. P. 58; *see also* ARK. R. CIV. P. 54(b).

57. ARK. R. CIV. P. 58.

58. ARK. R. CIV. P. 58.

58 permits a circuit court to delegate the preparation of the precedent to counsel for a party.[59]

In civil practice, the delegation of preparing the precedent prevails. Arkansas courts have traditionally ordered counsel for the prevailing party to prepare the form of judgment or decree.[60] In this respect, the requirements of Rule 58 exist separate and apart from ethical obligations of counsel.[61] The delegation permitted by Rule 58 implicitly includes the right of opposing counsel to have an opportunity to approve the form of the judgment or decree.[62] The Reporter's Notes to Rule 77 note that this practice of delegation in Arkansas civil cases justified the omission of the requirement that the circuit clerk serve notice of judgment from Rule 77 of the Arkansas Rules of Civil Procedure.[63] The Reporter's Notes to Rule 77 observed a provision similar to Rule 77(d) of the Federal Rules was unnecessary in light of Arkansas' practice, stating "[s]ince the clerk does not prepare the judgment, there does not appear to be any necessity for the clerk to serve notice that a judgment has been entered." [64] The Reporter's Notes continue: "[t]his is

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59. ARK. R. CIV. P. 58; *see also* ARK. R. CIV. P. 58 reporter's notes to Rule 58; *see generally,* Walter Cox & David Newbern, *The New Civil Procedure: The Court that Came in from the Code,* 33 ARK. L. REV. 1, 72-73 (1979) (observing differences in federal and state practice and discussing criticisms of delegation).

60. *See, e.g.*, Barnett v. Howard, 363 Ark. 140, 144, 211 S.W.3d 494, 497 (2005) (noting "it is customary for trial judges to rely upon the members of the bar to prepare judgments, orders and decrees in accordance with the court's instructions."); Farmers Ins. Co. v. Snowden, 366 Ark. 138, 144-45, 233 S.W.3d 664, 668 (2006) (stating "[t]he simple fact that one party's prepared precedent was used does not suggest that the court did not exercise its independent judgment.").

61. The submission of proposed orders may implicate ethical concerns including, without limitation, concerns about *ex parte* communications and candor toward the tribunal. *See, e.g.*, ARK. R. PROF'L COND. 3.3, ARK. R. PROF'L COND. 3.5(b). A detailed examination of the ethical obligations related to the entry of orders is, however, beyond the scope of this article.

62. ARK. R. CIV. P. 58 reporter's notes to Rule 58; *see also* Jones-Blair Co. v. Hammett, 51 Ark. App. 112, 116-17, 911 S.W.2d 263, 265-66 (1995) (en banc), *rev'd on other grounds,* 326 Ark. 74, 930 S.W.2d 335 (1996).

63. *Compare* ARK. R. CIV. P. 77 reporter's notes to Rule 77 *with* FED. R. CIV. P. 77(d)(1) ("Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear."). However, the lack of notice of the entry does not affect the time for an appeal or the authority of the court to relieve a party for failing to appeal within the allowed time, except as allowed by Fed. R. App. P. 4(a). ARK. R. CIV. P. 58 reporter's notes to Rule 58; FED. R. APP. P. 4(a).

64. ARK. R. CIV. P. 77 reporter's notes to Rule 77.

particularly true since counsel normally prepares the judgment and opposing counsel is afforded an opportunity to approve same."[65]

Permitting the court to delegate the preparation of an order or judgment to counsel for a party is a significant departure from federal practice.[66] Federal courts have expressed concern that the wholesale adoption of a party's proposed findings, conclusions, or proposed order abandons the judicial function.[67] Commentators criticized the practice in federal court because it delays resolution of the action, and a party may overreach in preparing the judgment or poorly craft the document.[68] Reported Arkansas cases suggest these criticisms are not without merit.[69] However, state courts have generally defended the practice for three reasons: first, a relative lack of judicial resources including, for most state courts in Arkansas, a lack of law clerks,[70] second, the heavier caseload of state trial courts when compared to their

65. ARK. R. CIV. P. 77 reporter's notes to Rule 77.

66. ARK. R. CIV. P. 58 reporter's notes to Rule 58; *accord* FED. R. CIV. P. 58(b); WRIGHT ET AL., *supra* note 49, § 2786.

67. *See* United States v. El Paso Nat'l Gas Co., 376 U.S. 651, 656 (1964); *see also In re* Cmty. Bank of N. Va., 418 F.3d 277, 319 (3d Cir. 2005); Bright v. Westmoreland Cnty., 380 F.3d 729, 732 (3d Cir. 2004).

68. 11 WRIGHT ET AL., *supra* note 49, § 2786; FED. R. CIV. P. 58 advisory committee's note to 2002 amendment.

69. *See, e.g.*, Ouachita Trek & Dev. Co. v. Rowe, 341 Ark. 456, 460, 462-63, 17 S.W.3d 491, 493-95 (2000) (addressing language in judgment differing from trial judge's letter opinion); Davis v. Davis, 291 Ark. 473, 474, 725 S.W.2d 845, 845-46 (1987) (noting precedent submitted awarded damages of $24,761.14, almost twice the $12,836.14 awarded by the court); Carver v. Carver, 93 Ark. App. 129, 131-32, 217 S.W.3d 185, 187 (2005) (addressing divorce decree that mistakenly omitted property settlement provision dividing a retirement account).

70. At the time of this writing the vast majority of circuit court judges in Arkansas do not have the assistance of law clerks. *See, e.g.*, ARK. CODE ANN. § 16-13-1410 (1989) (detailing appointment of law clerks in Sixth Judicial Circuit, but Chapter 13 omits any reference to law clerks in any other circuit). While I am aware some other judicial circuits may have law clerks, the reality is law clerks at the trial court level in Arkansas are far from common.

federal counterparts,[71] and third, the traditional use of this practice in civil cases without complications.[72]

Contrary to the practice in federal courts,[73] Arkansas does not require that the clerk serve a copy of a judgment, order, or decree on the parties to an action not in default, or require service of a copy by a party.[74] In this respect, the Arkansas practice is a significant departure not only from practice in federal courts, but also from the practice in most jurisdictions.[75] Most other jurisdictions require the service of notice of entry or a copy of the judgment, order, or decree on the parties not in default, by someone—the clerk,[76] the court or court personnel,[77] or a party or

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71. The available statistics still lend support to the proposition that, statistically speaking, state trial courts have significantly heavier civil caseloads than their federal counterparts. Statewide, for civil cases in calendar year 2018 in Arkansas state courts, the courts reported 46,199 civil filings and 42,881 dispositions. ARK. JUDICIARY, 2019 ANNUAL REPORT TO THE COMMUNITY: PREPARING FOR THE FUTURE 27, https://perma.cc/N8WD-QXMQ. Statistics from the Administrative Office of the Courts show that for the Eastern and Western Districts of Arkansas for the 12-month period ending December 31, 2018, there were 2,429 cases pending on December 31, 2017, 2,818 cases commenced, 2,989 cases terminated, and 2,258 cases pending as of December 31, 2018. *Statistical Tables for the Federal Judiciary*, ADMIN. OFF. OF U.S. CTS. (Dec. 31, 2018), https://perma.cc/W52T-QMRL. This disparity is, however, not unexpected given the general jurisdiction of state trial courts compared with the limited jurisdiction of federal district courts.

72. *See supra* notes 55-65 and accompanying text.

73. FED. R. CIV. P. 77(d)(1).

74. *See, e.g.*, Roberts v. United Water, Inc., 2007 WL 4415388, at *1-2 (Ark. Ct. App. Dec. 19, 2007).

75. *See infra* notes 76-78 and accompanying text.

76. *See* ALA. R. CIV. P. 77(d); ALASKA R. CIV. P. 73(d); ARIZ. R. CIV. P. 58(c)(1)(A); CONN. R. SUPER. CT. § 7-5; D.C. SUPER. CT. R. 77(d)(1); HAW. R. CIV. P. 77(d); IDAHO R. CIV. P. 2.3(b); IND. R. TRIAL P. 72(D); IOWA R. CIV. P. 1.442(6); KAN. STAT. ANN. § 60-258 (2010); KY. R. CIV. P. 77.04(1); LA. CODE CIV. PROC. ANN. art 1913(A) (2018); ME. R. CIV. P. 77(d); MD. CIR. CT. R. CIV. P. 1-324(a); MASS. R. CIV. P. 77(d); MICH. ADMIN. R. CT. 8.105(C); MISS. R. CIV. P. 77(d); MO. R. CIV. P. 74.03; NEB. REV. STAT. § 25-1301.01 (2018); OHIO R. CIV. P. 58(B); OKLA. STAT. tit. 12, § 696.2(B) (2007); R.I. SUPER. CT. R. 77(d); S.C. R. CIV. P. 77(d); TENN. R. CIV. P. 58(2)-(3); TEX. R. CIV. P. 306(a)(3); W. VA. R. CIV. P. 77(d); WYO. R. CIV. P. 77(d)(1). Some states have an electronic filing for some or all of their courts. *See, e.g.*, ALA. R. CIV. P. 77(d); FLA. STAT. § 28.2405 (2012); IND. R. TRIAL P. 86; MASS. R. CIV. P. 77(d)(2); N.H. SUPP. SUPER. CT. R. 13(e); N.M. R. CIV. P. 1-005.2(C); S.D. SUP. CT. R. 13-12; TEX. R. CIV. P. 21(f)(1); UTAH R. CIV. P. 5(b)(3)(B); VA. SUP. CT. R. 1:17(a); VT. STAT ANN. tit. 12, § 5(a) (2019); *see generally* David Schanker & Timothy A. Guidas, *E-Filing in State Appellate Courts: An Updated Appraisal*, NAT'L CONF. OF APP. CT. CLERKS, Sept. 2014, https://perma.cc/7LDM-CRWT.

77. *See* COLO. R. CIV. P. 58(a) (requiring court to serve copy of judgment when party not present for its signature); DEL. SUPER. CT. R. CIV. P. 77(d) (Prothonotary to serve copies); FLA. R. JUD. ADMIN. 2.516(h)(1); MINN. R. CIV. P. 77.04; OR. REV. STAT. § 18.078(1) (2005); PA. R. CIV. P. 236 (Prothonotary to serve copies).

counsel.[78] Although the Arkansas Supreme Court's committee on civil practice recommended adopting a requirement in the mid-1980s similar to that of the federal courts, Arkansas clerks successfully opposed the proposal.[79]

As the contrast in practices illustrates, federal practice places more responsibility on the clerk. Neither the Federal Rules of Civil Procedure nor the Arkansas Rules of Civil Procedure impose a duty on the court to provide litigants notice of entry of a judgment, decree, or order.[80] Rule 77 of the Federal Rules of Civil Procedure, however, requires that "[i]mmediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear."[81] Alternatively, Rule 77(a) of the Federal Rules of Civil Procedure permits a party to serve notice of entry in accordance with Rule 5(b).[82] The implementation and proliferation of the federal courts' case management and electronic case filing (CM/ECF) system has automated this task and, therefore, made it less prone to human error. Yet, despite automation, errors have still occurred[83] and, even in federal court,

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78. *See* ARIZ. R. CIV. P. 58(c)(1)(B) (providing optional notice by parties); CAL. CIV. PROC. CODE § 664.5 (2018) (requiring counsel for party proposing precedent to serve copy or clerk if prevailing party is not represented); 735 ILL. COMP. STAT. 5/2-1302(a) (counsel to serve notice of default judgment); MONT. R. CIV. P. 77(d); NEV. R. CIV. P. 58(e)(1) (party selected by court); N.C. R. CIV. P. 58 (party designated by court or, if none, party preparing judgment); N.D. R. CIV. P. 58(b)(2); N.J. R. CT. 1:5-1(a); N.Y. CT. R. 202.5(a); UTAH R. CIV. P. 58A(g); WASH. SUPER. CT. R. 54(f); WIS. STAT. § 806.06(3) (2019).

79. NEWBERN ET AL., *supra* note 23, § 40:3 n. 23; *see also* Watkins, *supra* note 18, at 13 n. 23.

80. *See, e.g.*, Roberts v. United Water, Inc., 2007 WL 4415388, at *1-2 (Ark. Ct. App. Dec. 19, 2007).

81. FED. R. CIV. P. 77(d)(1). The clerk must also record the service on the docket. FED. R. CIV. P. 77(d)(1).

82. FED. R. CIV. P. 77(d)(1). "Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party." FED. R. APP. P. 4 advisory committee's note to 1991 amendment.

83. *See, e.g.*, Maples v. Thomas, 565 U.S. 266, 270-71, 290 (2012) (reversing and remanding dismissal of habeas corpus case of convicted inmate who missed appellate deadline where attorneys abandoned representation of convicted inmate); Two-Way Media LLC v. AT&T, Inc., 782 F.3d 1311, 1317-18 (Fed. Cir. 2015) (affirming refusal to extend time to appeal where notice of electronic filing's description of order was incomplete); *In re* Worldcom, Inc., 708 F.3d 327, 340-42 (2d Cir. 2013) (reversing to deny relief under similar federal rule to hold notice under Rule 77(d) is for parties' convenience, parties are obliged to monitor docket for entry of order, where notice not received because party failed to update

parties may not rely entirely on notice from the clerk, as courts have held the parties have an obligation to monitor the docket to ascertain when an order is entered in a case.[84]

Rule 5 of the Arkansas Rules of Civil Procedure does require service of "every pleading and every other paper, including all written communications with the court, filed subsequent to the complaint, except one which may be heard *ex parte*, . . . upon each of the parties, unless the court orders otherwise because of numerous parties."[85] Although it excepts parties in default for failing to appear from the service requirement,[86] Rule 5 requires that every pleading, paper,[87] or other document that must be served under Rule 5 on a party or his attorney contain a statement that a copy has been served in accordance with Rule 5, state "the date and method of service and, if by mail, the name and address of each person served."[88] Despite this statement, Arkansas courts do not appear to have interpreted Rule 5 as requiring service of a judgment on all other parties.

In practice, the venue usually impacts the mechanics of entry of an order or judgment. For example, if the county has implemented electronic filing, counsel may simply submit a proposed precedent electronically. Upon entry, the order or judgment normally appears on the Court's docket and is available to view. Parties registered for electronic filing who appeared in the case generally then receive a courtesy notice advising them of the entry of the order or judgment on the docket.[89] Similarly, if the venue has not adopted electronic filing, the geographic location of chambers may impact the entry of the order or judgment. When a judge's chambers are geographically near the

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CM/ECF profile with new email address); Benavides v. Bureau of Prisons, 79 F.3d 1211, 1214 (D.C. Cir. 1996) ("If in a particular case the movant is at fault—if the movant negligently failed to notify the clerk of his change of address, for example—then the district court may, in its discretion, deny relief . . . .").

84. *See, e.g.*, *In re Worldcom, Inc.*, 708 F.3d at 341; *Two-Way Media LLC*, 782 F.3d at 1316.

85. ARK. R. CIV. P. 5(a) (emphasis added).

86. ARK. R. CIV. P. 5(a).

87. *See supra* note 41 and accompanying text (discussing the broad definition of "paper" in ARK. R. CIV. P. 5).

88. ARK. R. CIV. P. 5(e).

89. Ark. Sup. Ct. Admin. Order No. 21(7)(c)(1).

clerk's office,[90] the judge or chambers' staff will often, as a courtesy to counsel, file a signed order or judgment and return a copy of the entered precedent to counsel. Practitioners appreciate this courtesy as it minimizes delay and moves the case towards resolution. However, when a judge is hearing cases in a venue other than where he or she maintains chambers, the judge may simply sign the order or judgment and return it to the attorney for filing. As the judge may only hold court in the venue periodically, this practice usually permits counsel to obtain the entry of the judgment or order without delay. Some judges' chambers address the issue by simply declining to file any orders or judgments and returning all signed documents to counsel. Perhaps, it could be more efficient for chambers or, perhaps, by returning the document to the proponent, it ensures parties, not in default, receive notice of the entry of the order or judgment. In practice, suffice to say, the venue may significantly impact the mechanics of entry of an order or judgment.

The omission of service of a judgment from the duties of the circuit court and the circuit clerk leaves a gap in the responsibility for providing notice to the parties when a circuit court acts. A

90. The State of Arkansas is divided into twenty-three judicial districts, although some districts are subdivided based on geography. *See* ARK. CODE ANN. § 16-13-901 (1977) (First); ARK. CODE ANN. § 16-13-1001 (1977) (Second); ARK. CODE ANN. § 16-13-1101 (1977) (Third); ARK. CODE ANN. § 16-13-1201 (1977) (Fourth); ARK. CODE ANN. § 16-13-1301 (1977) (Fifth); ARK. CODE ANN. § 16-13-1401 (1977) (Sixth); ARK. CODE ANN. § 16-13-3101(b) (1999) (Seventh); ARK. CODE ANN. § 16-13-3201(a) (1997) (Eighth-North); ARK. CODE ANN. § 16-13-3201(b) (1997) (Eighth-South); ARK. CODE ANN. § 16-13-1701(a) (1995) (Ninth-East); ARK. CODE ANN. § 16-13-1701(b) (1995) (Ninth-West); ARK. CODE ANN. § 16-13-1801 (1977) (Tenth); ARK. CODE ANN. § 16-13-1901(a) (1983) (Eleventh-East); ARK. CODE ANN. § 16-13-1901(b) (1983) (Eleventh-West); ARK. CODE ANN. § 16-13-2001 (1995) (Twelfth); ARK. CODE ANN. § 16-13-2101 (1983) (Thirteenth); ARK. CODE ANN. § 16-13-2201 (1977) (Fourteenth); ARK. CODE ANN. § 16-13-2301 (1977) (Fifteenth); ARK. CODE ANN. § 16-13-2401 (1977) (Sixteenth); ARK. CODE ANN. § 16-13-2501(a) (1999) (Seventeenth); ARK. CODE ANN. § 16-13-2601(a) (1977) (Eighteenth-East); ARK. CODE ANN. § 16-13-2601(b) (1977) (Eighteenth-West); ARK. CODE ANN. § 16-13-2701 (1977) (Nineteenth); ARK. CODE ANN. § 16-13-3001(a) (1997) (Nineteenth-East); ARK. CODE ANN. § 16-13-3001(b) (1997) (Nineteenth-West); ARK. CODE ANN. § 16-13-2801 (1977) (Twentieth); ARK. CODE ANN. § 16-13-2901 (1995) (Twenty-first); ARK. CODE ANN. § 16-13-3101(a) (1999) (Twenty-second); ARK. CODE ANN. § 16-13-2501(b) (1999) (Twenty-third). As a result, some judges have their chambers near the circuit clerk's office. For example, in Pulaski County, the clerk's office is located on the first floor of the Pulaski County Courthouse, while many of the circuit judges have chambers in the courthouse. Most circuit judges, however, still "ride the circuit" and routinely hear cases in locations where they do not maintain chambers.

common example illustrates this failure. If a circuit court sitting in a venue that has not yet adopted electronic filing orally ruled on a summary judgment motion at a hearing and delegated preparation of the order to the attorney for the prevailing party, notice could depend on how the order was entered. If the attorney for the prevailing party returned to his office, prepared the precedent, and submitted the proposed precedent to the circuit court, Rule 5(a) would require the party to provide notice to the parties by serving his letter to the circuit court and a copy of the proposed order on all parties, as a "paper."[91] However, if upon receipt of the precedent the circuit court signed the judgment, walked across the hall to the clerk's office, and filed it, the Rules do not require service of the judgment by either the court or the clerk.[92] Yet Rule 5(a) likely requires notice if, instead of filing the judgment, the circuit court signed the judgment, placed the signed judgment in an envelope, and returned the judgment to counsel by mail for filing.[93] Rule 5 on its terms appears to require the prevailing party to serve a copy of the judgment, now signed, on his opponent when the judgment is filed.[94]

The lack of notice becomes problematic because the date of entry of an order is a significant jurisdictional milestone under Arkansas law. Arkansas measures the time period within which an appeal may be perfected from the date of entry of the judgment, decree, or order from which an appeal is taken.[95] Ordinarily, to appeal a judgment, decree, or order, Arkansas appellate courts require the filing of a notice of appeal within thirty days of the entry of the judgment, decree, or order from which an appeal is

91. ARK. R. CIV. P. 5(a); *see also* ARK. R. CIV. P. 5, additions to reporter's note to 1985 amendment (noting that precedent for judgment prepared at Court's direction would have to be served in compliance with Rule 5).

92. ARK. R. CIV. P. 5, additions to reporter's note to 1985 amendment (noting that precedent for judgment prepared by counsel at Court's direction would have to be served in compliance with Rule 5); *see also* River Valley Homes, Inc. v. Freeland-Kauffman & Fredeen, Inc., 2010 Ark. App. 682, at 5.

93. The implications for ethical considerations about *ex parte* communications are beyond the intended scope of this article. *See supra* note 61 and accompanying text. *But see* Fitzhugh v. Comm. on Prof'l. Conduct, 308 Ark. 313, 318, 823 S.W.2d 896, 899 (1992) (affirming discipline for violation of ARK. R. PROF. CONDUCT 3.3(d) and 3.5 where attorney failure to disclose material facts to special judge when submitting proposed precedent).

94. ARK. R. CIV. P. 5(a).

95. ARK. R. APP. P. CIV. 4(a).

taken.[96] One can conceive numerous scenarios that result in the entry of an order without notice to the parties.[97] Recognizing that mistakes can and will occur, this Article does not attempt to explore all of the various acts that might result in the entry of an order without notice. When a litigant fails to receive notice of entry of a judgment, decree, or order in time to timely perfect an appeal, Rule 4(b)(3) of the Arkansas Rules of Appellate Procedure—Civil purports to provide relief, so this Article will next explore the terms of that rule.

III. RELIEF UNDER RULE 4(B)(3) GENERALLY

The current version of Rule 4(b)(3) presently states, in pertinent part:

> Upon a showing of failure to receive notice of the judgment, decree or order from which appeal is sought, a showing of diligence by counsel, and a determination that no party would be prejudiced, the circuit court shall, upon motion filed within 180 days of entry of the judgment, decree, or order, extend the time for filing the notice of appeal for a period of fourteen (14) days from the day of entry of the extension order. Notice of any such motion shall be given to all other parties in accordance with Rule 5 of the Arkansas Rules of Civil Procedure.[98]

Accordingly, a party seeking relief under the current version of Rule 4(b)(3) must establish five prerequisites to relief: (A) a failure to receive notice of the judgment, decree, or order from which it seeks to appeal, (B) timeliness of its motion, (C) that it provided notice of the motion to all other parties, (D) diligence by counsel, and (E) lack of prejudice.[99] If the circuit court finds these elements satisfied, it must enter an order permitting the belated

96. ARK. R. APP. P. CIV. 4(a). Similarly, a notice of cross appeal must "be filed within ten (10) days after receipt of a notice of appeal," but in no event, "shall a cross-appellant have less than thirty (30) days from the entry of the judgment, decree or order within which to file a notice of cross-appeal." ARK. R. APP. P. CIV. 4(a).

97. The cases arising under Rule 4(b)(3) offer numerous examples where one or both parties failed to receive notice of entry of an order or judgment. *See supra* note 1 (collecting cases).

98. ARK. R. APP. P. CIV. 4(b)(3).

99. *See* ARK. R. APP. P. CIV. 4(b)(3).

notice of appeal.[100] The movant then has fourteen days during which to file a belated notice of appeal.[101] Rule 4(b)(3) does not permit other extensions.[102] The remainder of this Part will review each of the elements necessary for relief under Rule 4(b)(3) generally.

A. Lack of Notice

The first element, failure of notice, is straightforward.[103] In the reported cases, the failure of notice has referred generally to a party's lack of receipt of a judgment or final order in sufficient time of its entry to permit the timely filing of a notice of appeal.[104] Where a party's counsel received a copy of the order not marked "filed" and a letter from the circuit court indicating the order was sent to the clerk for filing, the Court of Appeals concluded that the party had notice such that Rule 4(b)(3) did not apply, so there was no error in denying a motion for belated appeal.[105] Similarly, Arkansas courts have upheld denial of relief under Rule 4(b)(3) where a party failed to provide sufficient factual evidence of a lack of notice.[106] Likewise, Arkansas courts have held Rule 4(b)(3) will not support an extension on a basis other than lack of notice, such as "unavoidable casualty."[107] Rule 4(b)(3) as applied

100. ARK. R. APP. P. CIV. 4(b)(3); ARK. R. APP. P. CIV. 4(b)(3), additions to reporter's note to 2004 amendment (noting amendment replaced "may" with "shall" and thus "require[ed] the circuit court to extend the time under the circumstances described in this provision"); *see also* Arkco Corp. v. Askew, 360 Ark. 222, 228-29, 200 S.W.3d 444, 449 (2004).

101. ARK. R. APP. P. CIV. 4(b)(3).

102. *See* River Valley Homes, Inc. v. Freeland-Kauffman & Fredeen, Inc., 2010 Ark. App. 682, at 4 (2010) (dismissing appeal where notice of appeal filed on 15th day after extension order under ARK. R. APP. P. CIV. 4(b)(3)).

103. ARK. R. APP. P. CIV. 4(b)(3).

104. *See, e.g.*, Arnold v. Camden News Publ'g Co., 353 Ark. 522, 525, 110 S.W.3d 268, 270 (2003); *Arkco Corp.*, 360 Ark. at 225, 200 S.W.3d at 446-47.

105. *See* Lawrence v. Ark. Dep't of Human Servs., 2003 WL 22853894, at *2 (Ark. Ct. App. Dec. 3, 2003). The Court of Appeals found it significant the attorney did not contact the clerk's office to check on the status of the order until February 11, 2003, so while the opinion was silent as to when the attorney received the letter and the unfiled copy of the signed order, presumably based on its discussion of a lack of diligence, counsel received the letter near the January 8, 2003 date. *Id.* at *1.

106. *See, e.g.*, Ark. State Highway Comm'n v. Philrite Dev., Inc., 30 Ark. App. 88, 91, 782 S.W.2d 595, 596 (1990).

107. Brewer v. Alcoholic Beverage Control Div., 97 Ark. App. 238-A, 245 S.W.3d 719, 721 (2006).

by Arkansas courts is, therefore, limited on its terms to circumstances where there was a lack of notice.

B. Timeliness

The second element, timeliness, relates to the timing of the motion seeking a belated appeal. Such a motion for extension must be filed within 180 days of entry of the judgment, decree, or order from which an appeal is sought, rather than an order granting the motion.[108] Arkansas courts have been unforgiving when litigants have missed this deadline.[109] While Rule 4(b)(3) expressly provides that "[e]xpiration of the 180-day period . . . does not limit the circuit court's power to act pursuant to Rule 60 of the Arkansas Rules of Civil Procedure."[110] The 2004 amendments to Rule 4(b)(3) made clear that the circuit court retains the power to act under Rule 60 of the Arkansas Rules of Civil Procedure when an extension of time is no longer possible.[111] Because of the potential for relief, this Article will briefly examine the circumstances offered by Rule 60 and will discuss the existing cases arising under Rule 60 on the typical facts.

Rule 60 has three parts, each of which could potentially offer some relief. First, for limited purposes, Rule 60(a) permits a court to "modify or vacate a judgment, order or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk."[112] The prerequisites to relief under Rule 60(a) are "[t]o correct errors or mistakes or to prevent the miscarriage of justice[.]"[113] Rule 60(a) is, however,

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108. *See, e.g.*, General Accident Ins. Co. v. Jaynes, 343 Ark. 143, 149, 33 S.W.3d 161, 164 (2000).

109. *See, e.g.*, Reaves v. Farm Bureau Mut. Ins. Co. of Ark., 336 Ark. 269, 270, 984 S.W.2d 447, 448 (1999) (per curiam) (applying earlier version of rule to reject motion to enlarge time after period of time in rule expired); Leavy v. Norris, 324 Ark. 346, 348-49, 920 S.W.2d 842, 843 (1996); Oak Hill Manor v. Ark. Health Servs. Agency, 72 Ark. App. 458, 461, 37 S.W.3d 681, 683 (2001).

110. ARK. R. APP. P. CIV. 4(b)(3). In 2004, this provision was added in response to a contrary decision by the Arkansas Court of Appeals. *See* Barnett v. Monumental Gen. Ins. Co., 81 Ark. App. 23, 25, 97 S.W.3d 901, 902 (2003).

111. ARK. R. APP. P. CIV. 4 addition to reporter's note to 2004 amendment.

112. ARK. R. CIV. P. 60(a).

113. ARK. R. CIV. P. 60(a).

inapplicable to criminal proceedings.[114] Rule 60(a) is also subject to the ninety-day limitation to act, which may be insurmountable in certain instances, such as where a party does not learn of entry of the order or judgment in that period, or where the circuit court does not rule within that period.[115] Second, Rule 60(b) permits a court to "at any time, with prior notice to all parties, correct clerical mistakes in judgments, decrees, orders, or other parts of the records and errors therein arising from oversight or omission."[116] This provision embodies the common law rule of *nunc pro tunc* orders, applicable in criminal or civil cases, which permits courts to correct clerical errors in a judgment or order "to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken."[117] Third, Rule 60(c) permits a circuit court to vacate or modify a judgment or order, other than a default judgment to which Rule 55(c) applies, after the expiration of ninety days of the filing of the judgment for seven specific reasons: (1) newly discovered evidence, (2) appearance of defendants constructively summoned, (3) "misprisions of the clerk," (4) misrepresentation or fraud, intrinsic or extrinsic, by an adverse party, (5) "erroneous proceedings against an infant or person of unsound mind," (6) death of one of the parties before judgment, and (7) errors in a judgment shown by a minor within a year of reaching the age of majority.[118] Whether Rule 60 offers a ready path to relief, however, remains uncertain.

The practical application of Rule 60 has shown that a path to relief is not readily apparent on the facts typically involved in a lack of notice case. The cases have resolved some arguments under Rule 60 already. For example, the reported decisions establish that entry of an order without notice to the parties is not a "clerical error" subject to correction at any time pursuant to Rule 60(b) of the Arkansas Rules of Civil Procedure.[119] Nor is relief

114. *See, e.g.*, State v. Rowe, 374 Ark. 19, 25, 285 S.W.3d 614, 619 (2008).

115. *See, e.g.*, Henson v. Wyatt, 373 Ark. 315, 317, 283 S.W.3d 593, 595 (2008) (per curiam).

116. ARK. R. CIV. P. 60(b).

117. *See, e.g.*, Lord v. Mazzanati, 339 Ark. 25, 28-29, 2 S.W.3d 76, 78-79 (1999).

118. ARK. R. CIV. P. 60(c).

119. *See* Watson v. Connors, 372 Ark. 56, 56, 58, 270 S.W.3d 826, 827-28 (2008).

available under Rule 60(c)(4) for misrepresentation or constructive fraud.[120] Despite the implicit right of counsel to review and approve a precedent prepared by an opponent,[121] the reported decisions have held submission of a proposed order without affording an opponent notice or an opportunity to comment is not the equivalent to misrepresentation or constructive fraud.[122] Nor have Arkansas appellate courts permitted circuit courts to simply vacate an order or judgment only to re-enter it to permit a timely appeal.[123] As a result, these circumstances will not support relief under Rule 60. Whether the remaining circumstances might offer hope for relief would require litigation of each on its own specific facts. As a result, this Article leaves that task for another day, and returns to the remaining elements necessary for relief under Rule 4(b)(3).

C. Notice

The third element, notice to other parties, is easily satisfied by compliance with the service requirements of Rule 5.[124] Rule 5 requires "every pleading and every other paper, including all written communications with the court, filed subsequent to the complaint, except one which may be heard *ex parte*, shall be served upon each of the parties, unless the court orders otherwise because of numerous parties."[125] The Reporter's Notes to Rule 5 state: "[w]ith the obvious exception of *ex parte* proceedings, and conferring some discretion on the court in cases involving multiple parties, the Rule requires service of all pleadings, papers

120. *See* Oak Hill Manor, LLC v. Ark. Health Servs. Agency, 72 Ark. App. 458, 462, 37 S.W.3d 681, 683 (2001); Barnett v. Monumental Gen. Ins. Co., 81 Ark. App. 23, 24-25, 97 S.W.3d 901, 902 (2003).

121. ARK. R. CIV. P. 58 reporter's notes to Rule 58 (stating "[i]mplicit in this rule is the right of opposing counsel to be afforded an opportunity to approve the form of judgment or decree").

122. *See Oak Hill Manor*, 72 Ark. App. at 462, 37 S.W.3d at 683; *Barnett*, 81 Ark. App. at 24-25, 97 S.W.3d. at 902.

123. *See, e.g.*, Combined Healthcare Fed. Credit Union v. Arands Corp., 2011 Ark. App. 277, at 6, 378 S.W.3d 878, 881 (noting remedy is not to vacate under ARK. R. CIV. P. 60 , but motion to extend time to file belated appeal under ARK. R. APP. P. CIV. 4(b)(3)).

124. ARK. R. CIV. P. 5(a).

125. ARK. R. CIV. P. 5(a) (emphasis added); *see also* ARK. R. CIV. P. 11(a) (requiring, with same language, attorney's signature).

and other documents generated in the lawsuit on each of the parties to the action."[126] The cases generally have not involved any real discussion of this element, likely because it is so easily satisfied.[127]

D. Diligence

As to the fourth element, diligence, "[t]he burden of diligence is on all parties to stay informed about the status of a case as a matter of Arkansas case law."[128] This requirement is extended to attorneys, who have a duty under Rule 1.3 of the Arkansas Rules of Professional Conduct[129] to "act with reasonable diligence and promptness in representing a client."[130] Arkansas courts have held that attorneys and litigants have a duty to monitor the trial court's docket following submission of orders for entry,[131] and that parties have a duty to know the contents of the court's docket and what filings have or have not been made in their case.[132] An attorney is not relieved of this duty even if the court fails to observe a mandatory obligation set forth in the Rules of Civil Procedure.[133] Because of the heavy burden to show diligence, Arkansas appellate courts have upheld an extension under Rule 4(b)(3) granted to a litigant in only a few of the decisions.[134]

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126. ARK. R. CIV. P. 5 reporter's notes (as modified by the court) to Rule 5.

127. *See supra* note 1 (collecting cases).

128. Arnold v. Camden News Publ'g Co., 353 Ark. 522, 525, 110 S.W.3d 268, 270 (2003). Interestingly, four justices of the Arkansas Supreme Court did not participate in the appeal, and three special justices joined in the final opinion. *Id.* at 528, S.W.3d at 272.

129. ARK. R. PROF'L COND. 1.3.

130. ARK. R. PROF'L COND. 1.3; *see also Arnold*, 353 Ark. at 527-28, 110 S.W.3d at 271-72.

131. *See, e.g.*, *Arnold*, 353 Ark. at 528, 110 S.W.3d at 272; Arkco Corp. v. Askew, 360 Ark. 222, 228, 200 S.W.3d 444, 448 (2004).

132. *See, e.g.*, Block v. State, 2011 Ark. 161, at 1.

133. Francis v. Protective Life Ins. Co., 371 Ark. 285, 295, 265 S.W.3d 117, 124 (2007).

134. *See, e.g.*, Kidwell v. Rhew, 371 Ark. 490, 492 n.1, 268 S.W.3d 309, 310 n.1 (2007); Anderson v. Holada, 2010 Ark. App. 143, at 2-3 *opinion after rebriefing* 2010 Ark. App. 426.

E. Prejudice

The final element, prejudice, contemplates an adverse consequence beyond having to litigate the appeal and encounter the risk of reversal.[135] While the cases have found no prejudice to an extension, they offer little insight into what prejudice might look like other than what it is not—litigation of an appeal and the risk of reversal. Apparently relying on the Reporter's Note,[136] at least one treatise suggests such prejudice might occur, where "the appellee had [acted] in reliance on the expiration of the normal time period for filing a notice of appeal."[137] This approach is consistent with the view of the federal courts applying a similar provision of Rule 4 of the Federal Rules of Appellate Procedure—Civil.[138]

F. Conclusion

While the other four elements have proven straightforward to satisfy, the necessity of showing "diligence" has proven elusive for litigants seeking relief. The reported cases make clear that the "diligence" requirement is the most difficult of the five elements to satisfy.[139] Few reported Arkansas decisions reach the merits of a case following an extension under Rule 4(b)(3).[140] Even in those cases that find an extension under Rule 4(b)(3) is appropriate, the courts offer little guidance on establishing "diligence" existed on the facts.[141] Accordingly, the next Part focuses on the diligence requirement itself and its development under Arkansas law in hopes that the facts of the cases will offer practitioners guidance on the interpretation of Rule 4(b)(3).

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135. ARK. R. APP. P. CIV. 4 addition to reporter's note to 1999 amendment.

136. ARK. R. APP. P. CIV. 4 addition to reporter's note to 1999 amendment.

137. NEWBERN ET AL., *supra* note 23, § 40:4.

138. FED. R. APP. P. 4 advisory committee notes to 1991 Amendment; *see generally* WRIGHT ET AL., *supra* note 49, § 3950.5.

139. *See, e.g.*, Arnold v. Camden News Publ'g Co., 353 Ark. 522, 525, 110 S.W.3d 268, 272 (2003); Arkco Corp. v. Askew, 360 Ark. 222, 227, 200 S.W.3d 444, 448 (2004).

140. *See, e.g.*, Kidwell v. Rhew*,* 371 Ark. 490, 492 n.1, 268 S.W.3d 309, 310 n.1 (2007); Anderson v. Holada, 2010 Ark. App. 143, at 2-3 *opinion after rebriefing* 2010 Ark. App. 426.

141. *See, e.g.*, *Kidwell,* 371 Ark. at 492 n.1, 268 S.W.3d at 310 n.1; *Anderson*, 2010 Ark. App. at 2-3.

IV. RULE 4(B)(3) AND THE EVOLUTION OF THE DILIGENCE REQUIREMENT

The origin of the diligence requirement of Rule 4(b)(3) of the Arkansas Rules of Appellate Procedure—Civil lies in both appellate decisions interpreting Rule 4(b)(3) and a series of revisions to the text of the Rule itself. To examine the diligence requirement in context, this Part will detail certain background principles that underlie the Arkansas Supreme Court's analysis and then will chronologically examine the history of Rule 4(b)(3) from the initial adoption of Rule 4 in 1979, through the current version of the Rule with an emphasis on cases applying its terms or modifications to the Rule itself.

A. Background

Three principles of Arkansas law merit discussion. Each impacts the opinions related to Rule 4(b)(3). Each existed before the Rules of Appellate Procedure were adopted.

First, under Arkansas law, the timely filing of a notice of appeal is jurisdictional, so a timely filed notice of appeal is necessary to perfect an appeal.[142] This lack of jurisdiction is not subject to waiver, even by the opponent's consent.[143]

Second, as noted above,[144] under Arkansas law, Arkansas courts have required litigants and attorneys alike to review the pleadings and remain informed about the status of their case on the court's docket.[145]

Finally, Rule 4(b)(3) did not create the diligence standard but incorporated the standard from decisions by Arkansas courts vacating or setting aside a judgment. Before the adoption of the Arkansas Rules of Civil Procedure, Arkansas courts could vacate a judgment after expiration of the term during which the judgment was entered, but only on certain limited grounds.[146] Arkansas had

142. *See, e.g.*, White v. Avery, 226 Ark. 951, 953, 295 S.W.2d 364, 365 (1956).

143. *See, e.g.*, Smith v. Boone, 284 Ark. 183, 184, 680 S.W.2d 709, 710 (1984).

144. *See supra* notes 129-135 and accompanying text.

145. *See, e.g.*, Karam v. Halk, 260 Ark. 36, 40, 537 S.W.2d 797, 799 (1976); Trumbull v. Harris, 114 Ark. 493, 494, 170 S.W. 222, 223 (1914).

146. *See, e.g.*, Davis v. McBride, 247 Ark. 895, 897, 448 S.W.2d 37, 39 (1969).

by statute enumerated the limited grounds upon which a judgment might be set aside after expiration of the term at which the judgment was rendered.[147] Among the grounds for setting aside a judgment after the term of its rendition was "unavoidable casualty or misfortune preventing the party from appearing or defending."[148] A party who sought relief from a judgment on the basis of unavoidable casualty had the burden of showing that he was diligent and without negligence.[149] Applying this standard, the Arkansas Supreme Court has considered the entry of judgments without notice to an opponent and evaluated the diligence exercised by the party seeking relief.[150] Such cases arose in a variety of contexts. Where judgment was entered by default after the clerk lost the defendant's answer, the defendant failed to appear at trial, and the defendant did not seek to vacate the judgment for eight months after entry of the default, the Arkansas Supreme Court affirmed the rejection of the vacation request for a lack of due diligence.[151] Where litigants were properly served with summons, and then contacted an attorney, but the attorney misunderstood his directions and did not raise a defense until after execution on the default judgment issued, the Arkansas Supreme Court found that the litigants "were negligent in their attention to the matter," and not entitled to relief from the judgment.[152] Similarly, where a party did not receive a copy of the precedent prepared by his opponent's counsel, awarding more than the pled damages, until after execution issued, and that same opposing counsel had failed to provide an opportunity to review the precedent, communicate the submission of the precedent to the trial court, or serve a copy of the judgment, the Court found a

147. ARK. STAT. ANN. § 29-506 (Repl. 1962) (repealed 1978). Other methods to attack such judgments existed including a bill of review in chancery court or errors of law apparent from the face of the record. *See, e.g.*, *Davis*, 247 Ark. at 897, 448 S.W.2d at 39. These other methods are not, however, germane to our discussion of diligence and lie beyond the scope of this article.

148. ARK. STAT. ANN. § 29-506 (Repl. 1962) (repealed 1978).

149. *See Davis*, 247 Ark. at 898, 448 S.W.2d at 39; Bickerstaff v. Harmonia Fire Ins. Co., 199 Ark. 424, 133 S.W.2d 890, 892 (1939).

150. *Davis*, 247 Ark. at 898, 448 S.W.2d at 39 (emphasis omitted); *Bickerstaff*, 199 Ark. at 428, 133 S.W.2d at 892 (quoting *Trumbull*, 114 Ark. at 497, 170 S.W. at 223). *See also* Karam v. Halk, 260 Ark. 36, 40, 537 S.W.2d 797, 799 (1976).

151. *Bickerstaff*, 199 Ark. at 428, 133 S.W.2d at 892.

152. *Davis*, 247 Ark. at 896-98, 448 S.W.2d at 38-39.

lack of diligence prevented vacating the judgment based on unavoidable casualty. The Court rejected an argument that fraud justified vacating the judgment, finding "no indication that fraud was practiced upon the court in the procurement of the judgment."[153] Although it cautioned litigants, stating that, while it found no abuse of discretion, it did "not approv[e] or encourag[e] the entry of a judgment on a precedent prepared by the prevailing party without the adverse party or parties having had an opportunity to see the proposed judgment and make objections to its form, content or language before entry."[154]

While these cases applied the law as it existed before the Arkansas Rules of Appellate Procedure were adopted, the Court continues to apply the diligence requirement in practice under Rule 60 of the Arkansas Rules of Civil Procedure.[155]

B. Initial Adoption of Rule 4

Rule 4 was initially adopted with the remainder of the Arkansas Rules of Appellate Procedure—Civil, effective July 1, 1979, which superseded prior law.[156] Unlike its federal counterpart, which permits the district court to extend the time for filing a notice of appeal upon a showing of excusable neglect[157] or to belatedly reopen the time to file an appeal,[158] the initial version of Rule 4 did not include a provision to belatedly extend the time for filing a notice of appeal.[159] The Reporter's Notes justified this omission stating such a provision was unnecessary because "Arkansas has long considered the filing of a notice of appeal as jurisdictional and unless timely filed, there can be no

153. *Karam*, 260 Ark. at 42, 537 S.W.2d at 800 (emphasis omitted).

154. *Id.* at 39, 41-42, 537 S.W.2d at 798-800. Significantly, the Court observed that the failure to serve the proposed judgment did not violate the court rule requiring service of all pleadings on opposing counsel because "[a] precedent for judgment is not, in any sense of the word, a pleading." *Id.* at 39-40, 537 S.W.2d at 799.

155. *See, e.g.*, Harrill & Sutter, P.L.L.C. v. Kosin, 2012 Ark. 385, at 8, 424 S.W.3d 272, 277 ("Moreover, this court has stated that a party is not entitled to relief under Rule 60(c) if diligence has not been exercised in protecting his or her interests.").

156. *See, e.g.*, LaRue v. LaRue, 268 Ark. 86, 87, 593 S.W.2d 185, 186 (1980).

157. FED. R. APP. P. 4(a)(5).

158. FED. R. APP. P. 4(a)(6).

159. ARK. R. APP. P. CIV. 4 (repealed 1986).

appeal."[160] Accordingly, the Court saw no point in including such a provision.

C. 1986 Amendments

This omission was, however, short-lived. Effective September 15, 1986, Rule 4(a) was amended to permit the trial court to extend the time for filing a notice of appeal when a party did not receive notice of the entry of the judgment or order from which the party seeks to appeal.[161] The Arkansas Supreme Court added the following text to the remainder of Rule 4(a):

> Upon a showing of failure to receive notice of entry of the judgment, decree or order from which appeal is sought, the trial court may extend the time for filing the notice of appeal by any party for a period not to exceed sixty (60) days from the expiration of the time otherwise prescribed by these rules. Such an extension may be granted before or after the time otherwise prescribed by these rules has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.[162]

So, the 1986 amendment created a narrow exception to the rule that filing a notice of appeal is jurisdictional and, absent a timely filed notice of appeal, no appeal lies.[163] The Reporter's Note observed the intent "to empower the trial court to extend the time for filing a notice of appeal when the party has not received notice of the entry of the judgment or order from which he seeks to appeal."[164] It continued, discussing the purpose of the amendment, stating "[t]he change was deemed necessary to ensure fairness when counsel has not received notice of the entry of the judgment or other appealable order."[165] Then it candidly acknowledged the reality that, "[a]lthough under longstanding

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160. ARK. R. APP. P. CIV. 4 reporter's notes (as revised by the court) to former appellate Rule 4 (citing White v. Avery, 226 Ark. 951, 295 S.W.2d 364 (1956)).

161. *See In re* Changes to the Ark. R. Civ. P., 289 Ark. 602, 612, 712 S.W.2d 296, 301 (1986); *see also* ARK. R. APP. P. CIV. 4 addition to reporter's notes to 1986 amendment.

162. *In re Changes to the Ark. R. Civ. P.*, 289 Ark. at 611-12, 712 S.W.2d at 301.

163. ARK. R. APP. P. CIV. 4 addition to reporter's notes to 1986 amendment.

164. ARK. R. APP. P. CIV. 4 addition to reporter's notes to 1986 amendment.

165. ARK. R. APP. P. CIV. 4 addition to reporter's notes to 1986 amendment.

Arkansas custom opposing counsel have been given an opportunity to approve a judgment or order prepared by opposing counsel, circumstances have arisen where counsel did not receive that opportunity and did not otherwise receive notice that a judgment had been entered."[166]

D. Significant Decisions Between 1986 and 1999

During this period, two appellate decisions merit discussion.[167] On December 18, 1995, the Arkansas Supreme Court issued a brief *per curiam* opinion dismissing an appeal in *Miller v. King*.[168] There, Paul G. Miller, a *pro se* plaintiff, had filed a complaint in equity against three defendants and each of the defendants filed a motion to dismiss.[169] The circuit court granted each motion in three separate orders, the last of which was entered June 19, 1995, dismissing the complaint as to each defendant.[170] On July 27, 1995, Miller filed an untimely notice of appeal.[171] When he tendered the appellate record to the clerk, the clerk refused to accept it.[172] Miller then filed a motion for rule on clerk, asserting the clerk should be required to accept the record because he did not receive adequate notice of the complaint's dismissal.[173] The Court denied the motion stating: "[i]t is clear that in a civil matter the plaintiff bears the responsibility of being aware of the proceedings and filing a timely notice of appeal if an adverse final ruling is entered."[174] The court then stated: "[t]here is no provision for a belated appeal on the ground that the plaintiff was unaware that an order had been entered as is permitted in certain instances under Criminal Procedure Rule 36.9 in criminal cases."[175]

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166. ARK. R. APP. P. CIV. 4 addition to reporter's notes to 1986 amendment.

167. *See* Miller v. King, 322 Ark. 819, 912 S.W.2d 416 (1995); Chickasaw Chem. Co. v. Beasley, 328 Ark. 472, 944 S.W.2d 511 (1997).

168. 3*Miller*, 322 Ark. at 819-20,819, 912 S.W.2d at 416-17 (1995).

169. *Id.* at 819, 912 S.W.2d at 416.

170. *Id.* at 819-20, 912 S.W.2d at 416.

171. *Id.* at 820, 912 S.W.2d at 416.

172. *Id.*

173. *Miller*, 322 Ark. at 820, 912 S.W.2d at 416-17.

174. *Id.* at 820, 912 S.W.2d at 417 (citing Karam v. Halk, 260 Ark. 36, 537 S.W.2d 797 (1976)).

175. *Miller*, 322 Ark. at 820, 912 S.W.2d at 417.

The *Miller* decision is interesting. The *Miller* court's suggestion that no provision permitting a belated appeal existed is inconsistent with the then-existing text of Rule 4(a), which permitted a belated appeal, if sought within sixty days.[176] Of similar interest is the *Miller* Court's acknowledgment of the differing treatment provided to criminal appeals. Even now, that differing treatment remains, Rule 2 of the Arkansas Rules of Appellate Procedure—Criminal, which incorporates the relevant provisions of former Criminal Rule 36.9, provides for belated appeals.[177] Rule 2 permits the Arkansas Supreme Court to act on a criminal case in which neither a notice of appeal was given nor the transcript timely filed, "when a good reason for the omission is shown by affidavit."[178] "[N]o motion for belated appeal shall be entertained . . . unless application has been made . . . within eighteen (18) months of the date of entry of judgment or entry of the order denying postconviction relief from which the appeal is taken."[179] Where the judgment of conviction is not entered of record within ten days of sentencing, the "application for belated appeal must be made within eighteen (18) months of the date sentence was pronounced."[180] The Court has, however, required the affidavit to support the motion before taking up the motion for belated appeal.[181] When a party's life or liberty is at stake, the circumstances seem to warrant additional latitude.

The other decision of interest in this period is *Chickasaw Chem. Co. v. Beasley.*[182] There, on May 5, 1997, the Arkansas Supreme Court granted Beasley's motion to dismiss Chickasaw Chemical's appeal.[183] On September 6, 1996, the trial court had entered judgment for Beasley, and ten days later on September 16, 1996, Chickasaw Chemical Company filed motions for a new

176. *In re* Changes to the Ark. R. Civ. P., 289 Ark. 602, 612, 712 S.W.2d 296, 301 (1986).

177. ARK. R. APP. P. CRIM. 2(e).

178. ARK. R. APP. P. CRIM. 2(e).

179. ARK. R. APP. P. CRIM. 2(e).

180. ARK. R. APP. P. CRIM. 2(e).

181. *See, e.g.*, Slack v. State, 338 Ark. 643, 643, 999 S.W.2d 668, 668 (1999) (per curiam).

182. Chickasaw Chem. Co. v. Beasley, 328 Ark. 472, 944 S.W.2d 511 (1997) (per curiam).

183. *Id.* at 473-74, 944 S.W.2d at 511-12.

trial and for judgment notwithstanding the verdict.[184] On September 30, 1996, in open court, the court denied its post-trial motions, and on October 2, 1996, Chickasaw Chemical Co. filed a notice of appeal.[185] On October 8, 1996, the trial court entered an order denying its post-trial motions.[186] On November 18, 1996, Chickasaw Chemical Co. then filed a motion to extend the time to file an appeal, and on December 2, 1996, the trial court denied the motion.[187] The next day, on December 3, 1996, Chickasaw Chemical Co. filed a second notice of appeal from the judgment, the order denying its post-trial motions, and the order denying the extension of time to file an appeal.[188] Beasley sought dismissal of the appeal arguing that the first notice of appeal was premature and a nullity, while the second was invalid because Rule 4(a) only permits an extension of time where a party did not receive a notice of entry of the order from which an appeal was sought, and Beasley asserted it should have been aware of the order.[189] The Court agreed, finding that Chickasaw Chemical should have been aware of the "deemed-denied" date for its post-trial motions and the fact that a notice of appeal was due within thirty days of that date, or by November 15, 1996.[190] Because no notice of appeal or motion for extension was filed by that date, the Court held the narrow exception in Rule 4(a) inapplicable, and dismissed the appeal.[191]

Although in *Chickasaw Chem. Co*., the Court did not use the term "diligence," its reasoning parallels the Court's later analysis in some cases applying the diligence standard; in other words, with reasonable diligence, Chickasaw would have been aware that, absent entry of an order, its post-trial motions would be deemed denied after thirty days and a notice of appeal due thirty days later.[192] Since it was not aware of the deemed-denial date and missed the appellate deadline applicable under the deemed-

184. *Id.* at 473, 944 S.W.2d at 512.
185. *Id.*
186. *Id.*
187. *Chickasaw Chem. Co.,* 328 Ark. at 473, 944 S.W.2d at 512.
188. *Id.* at 474, 944 S.W.2d at 512.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Chickasaw Chem. Co.,* 328 Ark. at 473, 944 S.W.2d at 512.

denial date, it was not entitled to relief.[193] Although not fully developed in the *Chickasaw Chemical Co.* opinion, the decision foreshadows the diligence requirement, even though it does not directly discuss the obligations imposed on a party or their counsel in terms of "diligence."

E. 1999 Amendments and Decisions

The Court revisited Rule 4 in amendments effective January 28, 1999.[194] The 1999 amendments deleted the provision addressing the situation in which a party did not receive notice of entry of a judgment, decree, or order from Rule 4(a), and relocated that language to its current location in Rule 4(b)(3).[195] Because it operated restrictively in practice, the 1999 amendment extended the time during which a party who did not receive notice of a judgment or order could seek an extension of the time to appeal.[196] The amendment deleted the reference to seeking an extension from sixty days after the expiration of the appellate deadline and inserted the current language permitting an extension "upon motion filed within 180 days of the entry of the judgment, decree, or order."[197] After entry of the extension order, the appellant must file the notice of appeal within fourteen days.[198] The amendment also requires the court to determine the extension did not prejudice another party.[199] In making the determination of whether a party is "prejudiced," the Reporter's Note added that "'prejudice' means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal."[200] As an example, it noted that "prejudice" might arise if the appellee had acted in reliance on the expiration of the normal time for perfecting an appeal.[201]

193. *Id.*
194. *See* ARK. R. APP. P. CIV. 4 addition to reporter's note to 1999 amendment.
195. ARK. R. APP. P. CIV. 4 addition to reporter's note to 1999 amendment.
196. ARK. R. APP. P. CIV. 4 addition to reporter's note to 1999 amendment.
197. ARK. R. APP. P. CIV. 4 addition to reporter's note to 1999 amendment.
198. ARK. R. APP. P. CIV. 4 addition to reporter's note to 1999 amendment.
199. ARK. R. APP. P. CIV. 4 addition to reporter's note to 1999 amendment.
200. ARK. R. APP. P. CIV. 4 addition to reporter's note to 1999 amendment.
201. ARK. R. APP. P. CIV. 4 addition to reporter's note to 1999 amendment.

On the same day the amendments to Rule 4 went into effect, January 28, 1999, the Arkansas Supreme Court decided *Reaves v. Farm Bureau Mutual Insurance Co. of Ark.*[202] denying a motion for rule on the clerk as untimely based on an extension under Rule 4(a).[203] Reaves had filed suit against Farm Bureau Mutual Insurance Company of Arkansas, Inc. and Southern Farm Bureau Casualty Insurance Company.[204] On February 17, 1998, the trial court entered an order granting the defendants' summary judgment, with copies showing to have been sent to counsel for both parties.[205] On July 16, 1998, Farm Bureau's counsel wrote the trial court concerning the status of the summary judgment.[206] On August 28, 1998, Reaves sought an enlargement of the time of thirty days to file an appeal because she had not received a copy of the summary judgment order until July 27, 1998.[207] On September 8, 1998, the trial court entered an order extending the time for an appeal until September 28, 1998.[208] On September 10, 1998, Reaves filed her notice of appeal.[209] On December 10, 1998, the Supreme Court Clerk refused the tender of the appellate record as untimely.[210] Reaves filed a motion for rule on the clerk.[211]

The Arkansas Supreme Court denied the motion.[212] It held that a notice of appeal filed 205 days after the order for summary judgment was entered was well more than the thirty days for a timely appeal or the sixty days under what was then known as Rule 4(a).[213] Citing *Miller*, it stated the appellant was responsible for staying abreast of the proceedings and timely filing a notice of appeal.[214] Because the sixty day period in Rule 4(a) had

202. Reaves v. Farm Bureau Mut. Ins. Co. of Ark., 336 Ark. 269, 984 S.W.2d 447 (1999).
203. *Id.* at 270, 984 S.W.2d at 448.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Reaves*, 336 Ark. at 270, 984 S.W.2d at 448.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Reaves*, 336 Ark. at 270, 984 S.W.2d at 448.
213. *Id.*
214. *Id.*

expired, the trial court lacked jurisdiction to enlarge the time for appeal.[215] In a footnote, the Court observed that even if it applied the newly amended rule, the motion to file a belated appeal was untimely, as Reaves' motion to enlarge time was not filed within 180 days of the summary judgment order.[216]

In the following year, the Arkansas Supreme Court again addressed the timeliness of a motion to extend the time to file a belated appeal.[217] In *General Accident Insurance Co. v. Jaynes,* the Court found that the 180 day limit in Rule 4(b)(3) applied to the filing of the motion for an extension of the time to file a notice of appeal, not the trial court's order granting the motion.[218] The Court upheld as timely extension motions by the intervenor insurer who asserted it had no notice of the orders approving a settlement after it had intervened in the wrongful death action and related probate case to claim a statutory worker's compensation subrogation lien on the settlement recovery by the decedent's estate, specifically where the extension motion in the civil case was filed 173 days after an order approving the settlement contingent on its approval by the probate court, and the extension motion in the probate case was filed eighty-five days after the order approving the settlement in the probate case.[219] Accordingly, the Court affirmed the circuit court's granting of the motion, and denied the motion by the estate to dismiss the insurer's appeal as untimely because both extension motions were filed within 180 days of the orders from which an appeal was sought.[220]

F. 2001 Amendments and Decision

In 2001, Arkansas courts were still addressing the implementation of Amendment 80.[221] The amendments to Rule 4 effective July 1, 2001, made stylistic changes to replace "trial court" with "circuit court," reflecting the passage of Amendment

215. *Id.*
216. *Id.* at 270 n. 1, 984 S.W.2d at 448 n. 1.
217. Gen. Accident Ins. Co. v. Jaynes, 343 Ark. 143, 149, 33 S.W.3d 161, 164 (2000).
218. *Id.*
219. *Id.* at 147-49, 33 S.W.3d at 164.
220. *Id.* at 149, 33 S.W.3d at 164.
221. ARK. CONST. amend. 80.

80 of the Arkansas Constitution which made the circuit court the trial court of original jurisdiction and unified the previous division between circuit and chancery courts.[222]

In 2001, the Arkansas Court of Civil Appeals also decided the case of *Oak Hill Manor v. Arkansas Health Services Agency.*[223] There, Oak Hill Manor appealed the decision of the Arkansas Health Services Commission permitting Beverly-Enterprises-Arkansas, Inc. to open a facility on adjacent land.[224] The parties attended a hearing on February 26, 1999, at which the circuit court took the appeal under advisement.[225] In March 1999, the circuit court decided the case and asked Beverly's counsel to prepare a memorandum opinion and precedent order affirming the Commission's decision.[226] Beverly's counsel prepared and submitted the documents to the trial judge without providing a copy to Oak Hill Manor's counsel.[227] The trial court entered the order on March 29, 1999, and neither party was aware that the trial court had entered an order.[228] In October 1999, counsel for Oak Hill Manor learned of the entry of the decree and requested a hearing, at which the trial court indicated that it intended to vacate the initial order and re-enter a duplicate order to permit the parties the opportunity to appeal.[229] Oak Hill Manor then appealed.[230]

Beverly asserted the notice of appeal was not timely filed under Rule 4(b)(3) because the 180 day period had expired.[231] Oak Hill Manor responded pointing to the Reporter's Note to Rule 58, which detailed the right of opposing counsel to have an opportunity to approve the form of a proposed judgment or decree, and to Rule 60(c)(4) which permits the trial court to modify an order for misrepresentation or fraud, asserting the

222. ARK. R. APP. P. CIV. 4 addition to reporter's note to July 2001 amendment.

223. Oak Hill Manor, LLC v. Ark. Health Servs. Agency, 72 Ark. App. 458, 37 S.W.3d 681 (2001).

224. *Id.* at 459, 37 S.W.3d at 681-2.

225. *Id.*

226. *Id.* at 459-60, 37 S.W.3d at 682.

227. *Id.* at 460, 37 S.W.3d at 682.

228. *Oak Hill Manor*, 72 Ark. App. at 460, 37 S.W.3d at 682.

229. *Id.*

230. *Id.* at 460, 37 S.W.3d at 682.

231. *Id.* at 460-61, 37 S.W.3d at 682.

circumstances constitute constructive fraud.[232] The Court rejected Oak Hill's argument, relying on federal authorities holding specific federal rules addressing the lack of notice foreclosed the use of Rule 60 for relief.[233] It, therefore, dismissed the appeal finding the trial court lacked jurisdiction to enter its second order, so the notice of appeal was untimely.[234]

G. 2003 Amendments and Decisions

In 2003, the Arkansas Supreme Court adopted Administrative Order Number 2(b) to govern the entry of final judgments and orders.[235] While Administrative Order Number 2 had been rewritten in 1999, the text of Rule 4(b)(3) was not updated. The 2003 changes reflected an effort to make Rule 4(d) consistent with Administrative Order Number 2.[236]

In 2003, Arkansas appellate courts also issued several decisions interpreting what is now Rule 4(b)(3).[237] The first decision by the Court of Appeals is significant because it was the impetus for subsequent amendments to Rule 4(b)(3).[238] More important for our purposes, however, is the decision by the Arkansas Supreme Court interpreting Rule 4(b)(3) as containing a requirement of reasonable diligence in addition to the other requirements necessary to obtain relief.[239] In the other unreported decisions, the Arkansas Court of Appeals disposed of appeals.[240]

First, in February 2003, the Arkansas Court of Appeals issued its decision in *Barnett v. Monumental General Insurance*

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232. *Id.* at 461-62, 37 S.W.3d at 683 (citing Davis v. Davis, 291 Ark. 473, 725 S.W.2d 845 (1987)).

233. *Oak Hill Manor,* 72 Ark. App. at 462-63, 37 S.W.3d at 683-84 (discussing Zimmer St. Louis, Inc. v. Zimmer Co., 32 F.3d 357 (8th Cir. 1994)).

234. *Id.* at 459, 37 S.W.3d at 682.

235. *See supra* notes 30-40 and accompanying text.

236. ARK. R. APP. P. CIV. 4 addition to reporter's note to 2003 amendment.

237. *See, e.g.*, Arnold v. Camden News Publ'g. Co., 353 Ark. 522, 110 S.W.3d 268 (2003); Barnett v. Monumental Gen. Ins. Co., 81 Ark. App. 23, 24-25, 97 S.W.3d 901, 902 (2003).

238. *Barnett,* 81 Ark. App. at 24-25, 97 S.W.3d at 902, *appeal dismissed on other grounds*, 354 Ark. 692, 128 S.W.3d 803 (2003).

239. *Arnold*, 353 Ark. at 527-28, 110 S.W.3d at 271-72.

240. Williams v. Blissard Mgmt. & Realty, Inc., 2003 WL 22053063, at *2 (Ark. Ct. App. Sept. 3, 2003).

Co.[241] There, in 1996, the trial court held a hearing on a summary judgment motion but did not enter the order granting summary judgment until May 25, 2000.[242] Neither party was aware of entry of the order.[243] After Barnett discovered the order was entered, the time for filing a notice of appeal had expired, so Barnett moved to vacate the judgment based on misprision of the clerk.[244] The trial court granted the motion, vacated the judgment, and entered a new order granting summary judgment on July 20, 2001, from which Barnett appealed.[245] The Arkansas Court of Civil Appeals dismissed the appeal, relying on *Oak Hill Manor*, finding that issues related to the lack of notice were controlled solely by Rule 4(b)(3) and Rule 60 was inapplicable, so the trial court lacked jurisdiction to vacate the original order and enter the duplicate order.[246]

The result and the appropriate rationale, however, divided the Arkansas Court of Appeals. Judge Pittman concurred to say the case should be certified to the Arkansas Supreme Court, while Judge Bird concurred arguing that Rule 60 permitted relief, just not on the facts presented.[247] On the other hand, Judge Griffen dissented arguing *Oak Hill Manor* was wrongly decided, and that the trial court properly vacated the judgment but erred in granting summary judgment.[248] Similarly, Judge Roaf also dissented joined by Judge Hart,[249] stating that while she did not feel *Oak Hill Manor* was wrongfully decided, she would have affirmed on cross-appeal, rather than dismissed the appeal.[250] Ultimately, while the case would lead to further amendments in the text of the

241. *Barnett*, 81 Ark. App. at 24-25, 97 S.W.3d at 902.
242. *Id.* at 24, 97 S.W.3d at 902.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Barnett*, 81 Ark. App. at 25, 97 S.W.3d at 902.
247. *Id.* at 25, 97 S.W.3d at 902 (Pittman, J., concurring); *Id.* at 27, 97 S.W.3d at 903 (Bird, J., concurring).
248. *Id.* at 27, 33-34, 97 S.W.3d at 903-04, 908 (Griffen, J., dissenting).
249. *Nota bene,* now Associate Justice Hart of the Arkansas Supreme Court.
250. *Barnett,* 81 Ark. App. at 34, 97 S.W.3d at 908-09 (Roaf, J., dissenting).

Rule,[251] in November 2003, the Arkansas Supreme Court granted review and dismissed the appeal on a separate procedural issue.[252]

In May 2003, the Arkansas Court of Appeals issued its decision in *Estate of Coleman v. LTB Land and Timber Co.*,[253] and dismissed an appeal as lacking jurisdiction based on the appellants' failure to file an effective notice of appeal.[254] There, the Court of Appeals noted that the appellants argued that neither they nor their counsel were notified of the entry of the final order, and thus they were denied due process.[255] In dismissing the appeal, the court stated "[w]hile we recognize the problem, our rules of civil procedure do not currently address this issue."[256] So, this opinion confirms that the proper procedure is to seek to extend the period for filing a notice of appeal in the circuit court, rather than asserting an argument to that effect on appeal.

More significantly, in June 2003, in *Arnold v. Camden News Publishing Co.,* the Arkansas Supreme Court issued its seminal decision requiring "diligence" as a condition to obtaining an extension of time to file a belated notice of appeal.[257] There, the Arkansas Supreme Court affirmed the chancery court's denial of a motion to extend the time to file a notice of appeal.[258] In the underlying suit, all parties had filed summary judgment motions at the close of discovery.[259] After a hearing on the motions, the chancery court issued a letter stating it intended to grant summary judgment to the Camden News Publishing Co., deny Arnold's motion for partial summary judgment, and asked Camden's counsel to prepare the precedent and provide Arnold's counsel five days to review the precedent and provide comments.[260] On

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251. *See infra* notes 279-82 and accompanying text.

252. Barnett v. Monumental Gen. Ins. Co., 354 Ark. 692, 695, 128 S.W.3d 803, 805 (dismissing for failure to provide adequate record after noting absence of order).

253. Coleman v. LTB Land & Timber Co., 2003 WL 21227355 (Ark. Ct. App. May 28, 2003).

254. *Id.* at *1.

255. *Id.*

256. *Id.* (noting "problems relating to lack of notice that an order has been filed are controlled entirely by Rule 4(b)(3) of the Rules of Appellate Procedure-Civil and that Rule 60 of the Arkansas Rules of Civil Procedure is simply inapplicable.").

257. *See* Arnold v. Camden News Publ'g. Co., 353 Ark. 522, 110 S.W.3d 268 (2003).

258. *Id.* at 524, 110 S.W.3d at 269.

259. *Id.*

260. *Id.*

November 13, 2000, Camden's counsel faxed the precedent to the court and Arnold's counsel, who responded on November 20, 2000, reserving the right to appeal the findings and conclusions but informing the chancery court that counsel had no comments on the precedent.[261] The decree was signed by the circuit judge on November 22, 2000, but was not entered until five days later, November 27, 2000.[262] Arnold's counsel did not learn of the entry of the decree until January 26, 2001, when he inquired of the clerk regarding the status of the decree.[263] He asserted that neither he nor Arnold's Washington D.C. attorney received a copy of the decree nor were they aware of the entry of the decree.[264]

Eight days after learning of the entry of the decree, and seventy-three days after the entry of the decree, on February 8, 2001, Arnold moved to extend the time to file a notice of appeal under Rule 4(b)(3), asserting no prejudice would result from the extension, the motion was timely filed, and providing affidavits from both Arnold and her attorney that they had not received the decree, they had thought the trial court would notify them upon entry of the decree, and they simply thought the court was taking time to consider the precedent.[265] The trial court denied the motion because it was filed more than thirty days after the entry of the ruling from which appeal was sought, and granting the extension would violate the integrity of the rule.[266] The trial court also found that "[t]he burden of diligence is on all parties to stay informed about the status of a case as a matter of Arkansas case law."[267] The trial court concluded that Arnold was aware, as of November 20, 2000, that entry of the decree could occur at any time but failed to exercise reasonable diligence by monitoring the docket afterward.[268]

On appeal, Arnold asserted that the chancery "court erred [by] engrafting a due diligence requirement onto Rule 4(b)(3) . . .

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261. *Id.*
262. *Arnold*, 353 Ark. at 524, 110 S.W.3d at 269.
263. *Id.* at 525, 110 S.W.3d at 270.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Arnold*, 353 Ark. at 525, 110 S.W.3d at 270 (internal quotations omitted).
268. *Id.*

to foreclose the granting of a motion to extend the time for filing a notice of appeal where" all the rule's conditions were satisfied.[269] She asserted that the trial court was required to have granted her motion once she showed she did not receive notice of the order and her motion was timely, in other words, "filed within 180 days of [the] entry of the order."[270] The Arkansas Supreme Court disagreed.[271] It stated that Arnold should "have been aware that the order could then be entered at any time."[272] After observing the diligence standard required of attorneys under the Model Rules of Professional Conduct Rule 1.3, the Court rejected the notion that the trial judge was attempting to engraft a new diligence standard onto the rule and held that the trial court instead applied an interpretation of Rule 4 made by the Arkansas Supreme Court, but which had become part of the rule.[273] The Court then observed that Rule 4(a)(6) of the Federal Rules of Appellate Procedure permitted an extension of time "regardless of diligence" but rejected the notion that the 1999 amendment to Rule 4 was intended to make them consistent because, under the federal rule, the clerk is required to send entered precedents to counsel of record—the obligation of which does not exist under Arkansas law.[274] Instead, the Court noted that the duty to remain informed of the status of cases lies with the parties, "particularly when . . . counsel . . . [is] aware that the order could be entered by the court at any time." [275] Accordingly, the Court affirmed the denial of Arnold's motion to extend time to file notice of appeal.[276]

Finally, a few months later, in September 2003, the Arkansas Court of Appeals applied the diligence standard in an unreported

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269. *Id.*

270. *Id.* at 527, 110 S.W.3d at 271.

271. *Id.*

272. *Arnold*, 353 Ark. at 527, 110 S.W.3d at 271.

273. *Id.* at 528, 110 S.W.3d at 272 (citing Chickasaw Chem. Co. v. Beasley, 328 Ark. 472, 944 S.W.2d 511 (1997)). Interestingly, the *Arnold* court relies on *Chickasaw Chem. Co*., as support for the proposition "that a lawyer and litigant must exercise reasonable diligence in keeping up with the docket." *Id.* Nothing in the *Chickasaw Chemical Co.* opinion, however, specifically raises or addresses this point. *See generally Chickasaw Chem. Co.*, 328 Ark. at 472, 944 S.W.2d at 511.

274. *Arnold*, 353 Ark. at 528, 110 S.W.3d at 272.

275. *Id.*

276. *Id.*

decision to uphold the circuit court's rejection of a motion for belated appeal. There, the proposed order entered was drafted by the appellants counsel, approved by appellee's counsel, and the parties were aware of its submission to the circuit court.[277] As a result, the Court of Appeals discussed *Arnold* and found the appellants "were obligated to exercise some modicum of diligence in determining the ongoing status of the case," so the circuit court did not err in denying the appellants' motion for belated appeal.[278]

H. 2004 Amendments and Decisions

In 2004, apparently motivated by the two decisions interpreting Rule 4(b)(3) issued in 2003, the Arkansas Supreme Court adopted two small, but significant changes to Rule 4(b)(3). First, the Court replaced the word "may" with "shall."[279] In doing so, an extension by the circuit court under Rule 4(b)(3) became mandatory—effectively changing the rule to avoid the conclusion reached by the *Arnold* Court that, if the other requirements of Rule 4(b)(3) were met, granting the extension of time to file a notice of appeal was discretionary with the trial court.[280] Second, the Court added a third sentence to Rule 4(b)(3) to make clear that, while "an extension of time is no longer possible because more than 180 days have passed, the circuit court retains its authority to take action under" Rule 60 of the Arkansas Rules of Civil Procedure.[281] This language changed the text of Rule 4(b)(3) to effectively avoid the conclusion the Court reached in *Barnett*.[282] Accordingly, the ultimate impact of the 2004 amendments was to essentially change the rule to abrogate two 2003 decisions interpreting Rule 4(b)(3).

On December 22, 2004, the Arkansas Supreme Court decided the case of *Arkco Corp. v. Askew*.[283] There, the Court

277. Williams v. Blissard Mgmt. & Realty, Inc., 2003 WL 22053063, at *2 (Ark. Ct. App. Sept. 3, 2003).

278. *Id.*

279. *In re* Ark. Rules of Civ. Proc., 355 Ark. 725, 733 (2004).

280. *Id.*

281. *Id.*

282. *Id.*

283. Arkco Corp. v. Askew, 360 Ark. 222, 200 S.W.3d 444 (2004).

reaffirmed the diligence requirement—noting that the amendments to Rule 4(b)(3) did not remove the requirement of reasonable diligence, which was considered part of the rule.[284] Although the facts of the *Arkco* decision are somewhat laborious, the case merits a brief review.

Arkco Corp. filed suit against its former counsel, Askew, asserting legal malpractice for failing to timely perfect an appeal.[285] Askew had represented Arkco in a lawsuit filed against W.T. Paine in Phillips County Chancery Court.[286] In mid-December 1996, the trial court announced that it intended to rule against Arkco, but before judgment was filed, Arkco filed a petition in bankruptcy court on December 24, 1996.[287] At 8:15 a.m. on December 31, 1996, a notice of removal to bankruptcy court was filed in the state court case, approximately three hours before the state court entered a judgment at 11:15 a.m.[288] On January 15, 1997, Askew filed "protective" post-trial motions in the state court noting that the judgment was invalid because of the removal to bankruptcy court, but they were filed to "protect the record."[289]

On March 12, 1997, Askew timely filed a notice of appeal from the December 31, 1996 order, making the appellate record due on June 10, 1997.[290] In March 1996, the Arkco bankruptcy case was dismissed, although the bankruptcy court did not immediately remand the case to state court.[291] For reasons the opinion did not disclose, on June 6, 1997, the eighty-sixth day after filing the notice of appeal, Askew filed a motion to extend the time to lodge the record on appeal.[292] The circuit court signed an order extending the time on June 9, 1997, but the order was not entered until June 12, 1997, two days after the deadline for filing the record.[293] Accordingly, on September 12, 1997, the Arkansas

284. *Id.* at 228, 200 S.W.3d at 449.
285. *Id.* at 224, 200 S.W.3d at 446.
286. *Id.* at 223, 200 S.W.3d at 445.
287. *Id.* at 223-24, 200 S.W.3d at 445.
288. *Arkco Corp.*, 360 Ark. at 224, 200 S.W.3d at 445.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* at 224, 200 S.W.3d at 446.
293. *Arkco Corp.*, 360 Ark. at 224, 200 S.W.3d at 446.

Supreme Court Clerk rejected the tender of the record as untimely.[294]

The following month, on October 3, 1997, the bankruptcy court entered its order remanding the case to "state court effective from the date of the earliest decree of the state court" and "*nunc pro tunc* [to] December 30, 1996."[295] Apparently, the bankruptcy court intended to remand the case to circuit court and validate the state court judgment entered after the removal of the case to the bankruptcy court.[296]

On May 20, 2002, Arkco filed suit against Askew asserting that he failed to timely appeal the case and, as a result, Arkco had lost its right to appeal.[297] Askew sought summary judgment on Arkco's claims asserting that any failure to appeal the order was immaterial because the judgment, having been entered after removal of the case to bankruptcy court, was void.[298] At a December 12, 2003, hearing, the circuit court granted Askew partial summary judgment on Arkco's claim, and advised the parties that the court would be in recess for the holidays from December 19, 2003, until January 5, 2004.[299]

After the hearing, on December 16, 2003, Arkco's new attorney requested the proposed order granting partial summary judgment be revised to include a Rule 54(b) certificate, so his client could pursue an interlocutory appeal.[300] The attorneys submitted the precedent to the circuit court on December 18, 2003.[301] The order was filed December 19, 2003.[302] Arkco failed to timely appeal from the final order, and sought relief under Rule 4(b)(3) on January 26, 2004, which the circuit court granted, over Askew's objection.[303]

On appeal, Askew contended that if Arkco was unaware of the filing of the order, that ignorance resulted from Arkco's

294. *Id.*
295. *Id.* (internal quotations omitted).
296. *Id.*
297. *Id.*
298. *Arkco Corp*., 360 Ark. at 224-25, 200 S.W.3d at 446.
299. *Id.* at 225, 200 S.W.3d at 446.
300. *Id.*
301. *Id.*
302. *Id.*
303. *See Arkco Corp*., 360 Ark. at 225-27, 200 S.W.3d 446-47.

failure to monitor the status of the case, given that it knew the order had been signed by the judge before December 19, 2003.[304] Even if Arkco believed, as it suggested, that the order would not be entered until January 5, 2004, Askew argued its failure to check on the docket until January 26, 2004, was not diligence.[305] Askew therefore, asked that Arkco's appeal be dismissed, because the reasonable diligence requirement of Rule 4(b)(3) was not satisfied.

The Arkansas Supreme Court agreed with Askew.[306] The Court observed that it had "consistently interpreted" Rule 4(b)(3) as containing a diligence requirement, and its interpretation subsequently became part of the Rule.[307] It then noted that the 2004 amendments to Rule 4(b)(3) did not remove the diligence requirement placed on attorneys, but instead, changed only the trial judge's duty by making an extension mandatory where the trial court found an attorney acted diligently, but did not receive notice of a final order.[308] The court observed that Arkco's counsel failed to exercise due diligence in keeping up with the court's docket to determine whether the December 19, 2003 order was entered.[309] Had he followed up on the entry of the order and shown that he met the other requirements of Rule 4(b)(3), the Court noted that the trial court would have had an absolute duty to grant his motion for extension.[310] Arkco's new counsel, however, offered no proof he had acted diligently, so the Arkansas Supreme Court held the trial court erred by granting Arkco's Rule 4(b)(3) motion.[311] Because its notice of appeal was untimely, and an untimely notice of appeal deprives the appellate courts of jurisdiction, the Court dismissed Arkco's appeal.[312]

304. *Id.* at 226, 200 S.W.3d at 447.
305. *Id.*
306. *Id.* at 228, 200 S.W.3d at 448.
307. *Id.*
308. *Arkco Corp*., 360 Ark. at 228, 200 S.W.3d at 448-49.
309. *Id.* at 229, 200 S.W.3d at 449.
310. *Id.*
311. *Id.*
312. *Id.*

I. 2006 Amendments

In 2006, the Court amended Rule 4(b)(3) to expressly incorporate the diligence requirement as part of the conditions to be satisfied by a party seeking to reopen the time to file a notice of appeal.[313] The 2006 amendment essentially conformed the text of Rule 4(b)(3) to the Court's holding in *Arnold* and *Arkco Corp.* by making the diligence requirement under the Court's decisions unambiguously part of the text of Rule 4(b)(3).[314] So, in addition to satisfying the Rule's other conditions, a party seeking to reopen the time to file a notice of appeal must demonstrate diligence itself, or by his or her counsel, in attempting to find out if the circuit court had entered the judgment, decree, or order from which appeal is sought.[315]

J. Decisions Between 2005 and 2010

In the period after the 2006 amendments, the Arkansas appellate courts rejected several requests for relief under Rule 4(b)(3), but upheld two extensions.[316] These opinions establish some consistency in the treatment of requests for relief under Rule 4(b)(3) because each opinion denying relief turned on the question of diligence.

In *Moody*, an unpublished decision, the Arkansas Court of Appeals affirmed the denial of a motion for belated appeal.[317] After an appeal was dismissed because the summary judgment order disposed of only one claim, William Waddell, counsel for three defendants Southern Farm Bureau Casualty Insurance Co., Southern Farm Bureau Life Insurance Co. and Farm Bureau

313. *See* ARK. R. APP. P. CIV. 4 addition to reporter's note to 2006 amendment.

314. *Id.*

315. *Arkco Corp.*, 360 Ark. at 229, 200 S.W.*3d at* 449.

316. *See* Tissing v. Ark. Dep't of Human Servs., 2009 Ark. 166, at 8, 303 S.W.3d 446, 448 (denying relief under Rule 4(b)(3)); Francis v. Protective Life Ins. Co., 371 Ark. 285, 295, 265 S.W.3d 117, 124 (2007) (same); Sloan v. Ark. Rural Med. Practice Loan & Scholarship Bd., 369 Ark. 442, 445, 255 S.W.3d 834, 837 (2007) (same); Moody v. Farm Bureau Mut. Ins. Co. of Ark., 2006 WL 557102, at *3 (Ark. Ct. App. Mar. 8, 2006) (same). *But see* Kidwell v. Rhew, 371 Ark. 490, 491 n.1, 268 S.W.3d 309, 310 n.1 (2007) (allowing relief under Rule 4(b)(3)); Anderson v. Holada, 2010 Ark. App. 143, at 2-3, *opinion after rebriefing* 2010 Ark. App. 425 (same).

317. *Moody*, 2006 WL 557102, at *3.

Mutual Insurance Co. submitted to the circuit court a proposed order on the summary judgment motions to dispose of all claims as against his clients on December 16, 2004.[318] Brooks Gill, the plaintiff's attorney, responded by objecting to the form of order, and asking for permission to file an amended response to the summary judgment motion.[319] On February 21, 2005, Richard Watts, counsel for the remaining defendants Arkansas Farm Bureau Federation, Inc. and Sebastian County Farm Bureau, Inc., submitted to the circuit court a proposed order disposing of all claims against his clients.[320] Mr. Gill again objected to the form of order, and asked for permission to file an amended response to the summary judgment motion.[321] On February 28, 2005, the circuit court entered both orders.[322] Plaintiff then sought to extend the time to file a notice of appeal.[323]

At the hearing on his motion, Mr. Gill testified that he received no email, fax, or mail notifying him the orders were entered, and the first suggestion he received was an April 6, 2005 e-mail from Mr. Waddell asking if plaintiff had elected not to appeal the orders.[324] He could not reach Mr. Waddell but spoke to Mr. Watts by telephone and Mr. Watts had confirmed entry of the orders and faxed him a copy of the order and an email from Mr. Waddell, dated February 28, 2005, that advised an order of summary judgment was entered as to his clients and he assumed as to Mr. Watt's clients, too.[325] Mr. Gill testified that he did not receive Mr. Waddell's February 28, 2005 e-mail message, and he had asked his secretary to check the clerk's office twice in January 2005 to see if any order was entered.[326] His secretary also testified that she checked e-mails daily or at least every other day and she did not locate any e-mails from Messrs. Watts or Waddell in February or March 2005, that she had received complaints of unreceived e-mail in the period of time, and that the firm's

318. *Id.* at *1.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Moody*, 2006 WL 557102, at *1.
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.* at *2.

internet service provider had installed a spam blocker to intercept junk e-mails and delete them after several days so she could not say whether any e-mails by Messrs. Watts or Waddell were intercepted because she was infrequently monitoring the spam blocker.[327] Finally, Mr. Gills' spouse and law partner testified her husband expected a response regarding his request to file supplemental responses and, while the firm commonly sent and received documents by e-mail, she was not aware of any mail from the court or clerk.[328] Mr. Watts testified he had sent an e-mail to Messrs. Gill and Waddell on March 1, 2005, advising of his receipt of a signed order related to his clients the day before, and that e-mail contained Mr. Waddell's prior February 28th e-mail.[329] The Pulaski County Circuit Court denied the motion without comment.[330]

On appeal, plaintiff contended the circuit court erred by denying the motion for belated appeal.[331] The Court of Appeals affirmed, noting that while the record showed transmittal of the e-mails giving notice of the entry of the orders, even if it could not say plaintiff's counsel received either e-mail, it could not say the denial was in error because the attorney failed to act diligently in keeping up with the status of the case since, despite being aware of the submission of the orders to the circuit court as of February 21, 2005, counsel had neglected to ascertain if the orders were entered for over a month.[332]

Similarly, in *Tissing*, the Arkansas Supreme Court dismissed the appeal filed by Sandy Tissing, the administratrix of an estate, who had sought to discharge a DHS lien against a probate estate.[333] After DHS refused Tissing's request at the agency level, Tissing filed only a notice of appeal, and not a petition, with the circuit court.[334] Because Tissing failed to serve a petition and

327. *Moody*, 2006 WL 557102, at *2.
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Moody*, 2006 WL 557102, at *3.
333. Tissing v. Ark. Dep't of Human Servs., 2009 Ark. 166, at 1-2, 303 S.W.3d 446, 446-47.
334. *Id.* at 2, 303 S.W.3d at 447.

summons, DHS sought dismissal for improper service.[335] Tissing sought summary judgment arguing that service of her notice of appeal was sufficient and that DHS had failed to timely file the administrative record.[336] On March 7, 2007, the circuit court heard the parties' motions, but took them under advisement to consider the parties' briefs and arguments.[337] On August 31, 2007, the circuit court entered a letter opinion stating it was granting DHS's motion to dismiss.[338] It then entered a formal order of dismissal on February 21, 2008.[339]

Unaware of the February 21 order, Tissing obtained entry of a second order of dismissal on April 1, 2008.[340] Tissing then filed a notice of appeal on April 28, 2008, served it on DHS, and asked that DHS look through its records for the original order.[341] On May 5, 2008, DHS then sent the February 21 order to the clerk and asked that the order be filed.[342] The clerk filed the order (again) on May 6, 2008.[343]

Tissing then filed a motion for relief under Rule 4(b)(3) asserting that the clerk had not provided a copy of the February 21 order, and that the May 6 filing rendered her notice of appeal untimely.[344] After holding a telephone conference, the trial court granted her motion finding no prejudice to DHS and the facts in her motion to be true.[345]

On appeal, the Arkansas Supreme Court found that the entry of the extension order was an abuse of discretion because the attorney was not diligent.[346] The Court based its conclusion on four facts: first, Tissing's attorney saw the order that was prepared in the trial court's office on September 14, 2007; second, he ordered the March 7, 2007 hearing transcript on September 25, 2007; third, he sent DHS a letter dated January 23, 2008, that

335. *Id.* at 3, 303 S.W.3d at 447.
336. *Id.*
337. *Id.*
338. *Tissing*, 2009 Ark. 166 at 3-4, 303 S.W.3d at 448.
339. *Id.* at 4, 303 S.W.3d at 448.
340. *Id.*, 303 S.W.3d at 448.
341. *Id.*, 303 S.W.3d at 448.
342. *Id.*
343. *Tissing*, 2009 Ark. 166 at 4, 303 S.W.3d at 448.
344. *Id.*
345. *Id.* at 5 n.2, 303 S.W.3d at 448.
346. *Id.* at 5-6, 303 S.W.3d at 448.

recited he had seen the signed order, but it had never been filed; and finally, he waited until March 31, 2008 to ask the circuit court to sign the order which was filed April 1, 2008.[347] Based on these facts, the Court held the attorney failed to monitor the status of the case and did not act diligently.[348] It, therefore, reversed the trial court.[349]

In *Sloan*, two doctors who had accepted medical school scholarships in exchange for an agreement to practice medicine in Corning, Arkansas upon graduation[350] sought a declaratory judgment and judicial review by the circuit court of a decision by the President of the University of Arkansas to affirm the Arkansas Rural Medical Practice Loan & Scholarship Board's finding that the doctors had failed to comply with their agreement.[351] In an order dated June 23, 2006, the circuit court held that no appellate review of the President's decision was available under either the Rural Practice Act or the Arkansas Administrative Procedures Act, and denied their appeal and complaint for declaratory judgment.[352]

On September 29, 2006, the doctors filed their notice of appeal.[353] They also filed a Rule 4(b)(3) motion seeking an extension of time to file a notice of appeal, asserting the Circuit Clerk failed to serve a copy of the June 23 order on the Sloans or their attorneys until September 7, 2006.[354] The circuit court granted their motion for an extension of time without a hearing, so their allegation was the only "evidence" in the record to support their request.[355] While the Sloans had submitted an

347. *Id.* at 8, 303 S.W.3d at 449.

348. *Tissing*, 2009 Ark. 166 at 8, 303 S.W.3d at 449.

349. *Id.*

350. Common in the 1990s, this arrangement was designed to help rural areas attract doctors—by agreeing to subsidize a doctor's education, the municipality, usually a rural and underserved area, would obtain the services of a local doctor, but the students participating in the program received certain preferences in admissions criteria. *See, e.g.*, *Northern Exposure* (CBS) (portraying a recently graduated physician who is sent to a rural town in Alaska to repay the debt he incurred while in medical school).

351. Sloan v. Ark. Rural Med. Prac. Loan & Scholarship Bd., 369 Ark. 442, 443, 255 S.W.3d 834, 836 (2007).

352. *Id.* at 443-44, 255 S.W.3d at 836.

353. *Id.* at 444, 255 S.W.3d at 836.

354. *Id.*

355. *Id.* at 444-45, 255 S.W.3d at 836-37.

affidavit to the appellate court detailing their actions in checking the circuit court's docket, the affidavit was not presented to the circuit court, so it could not be considered on appeal.[356] Quoting from *Arkco Corp.*, the Court held that the Sloans had not shown diligence because parties had some obligation to keep up with the status of their case.[357] The Court observed that there was a lack of evidence from which to find diligence and, therefore, found the Sloans' appeal untimely.[358]

In *Francis*, the Arkansas Supreme Court dismissed an appeal for lack of jurisdiction in a case involving a fax filing.[359] There, the judgment containing a handwritten rate of six percent was faxed to the clerk on November 3, 2005, and filed, but a hard copy of the judgment with a rate of ten percent was entered on November 10, 2005 with the handwritten note "Replaces fax filed 11-3-05."[360] Plaintiff filed her notice of appeal on December 9, 2005, but the Court held it was untimely as, under Administrative Order Number 2, the fax-filed order controlled the appellate deadlines, and she could not show prejudice because the correct interest rate was ten percent.[361] To show prejudice from the change, plaintiff asserted that the notice of appeal was late because the court failed to keep counsel informed about the filings in the case, and through no fault of plaintiff as her counsel had no way of knowing about the November 3 judgment because he did not receive it, and the copies of the November 10 judgment he received did not include the handwritten note.[362] Citing *Arkco Corp.*, the Court rejected this argument noting that if plaintiff and her counsel had exercised reasonable diligence, they would have known of the November 3 judgment and the note on the November 10 judgment.[363]

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356. *Sloan*, 369 Ark. at 445 n.3, 255 S.W.3d at 837 n.3.

357. *Id.* at 444-45, 255 S.W.3d at 836-37.

358. *Id.* at 444-46, 255 S.W.3d at 836-38. The *Sloan* decision also placed the timeliness of filing a notice of appeal above finality and appealability. *See, e.g.*, Flow v. Turner, 2015 Ark. App. 413, at 4.

359. Francis v. Protective Life Ins. Co., 371 Ark. 285, 288, 265 S.W.3d 117, 119 (2007).

360. *Id.* at 290, 265 S.W.3d at 121.

361. *Id.* at 290, 292, 294, 265 S.W.3d at 121-22, 124.

362. *Id.* at 294-95, 265 S.W.3d at 124.

363. *Id.* at 295, 265 S.W.3d at 124.

In 2007, the Arkansas Supreme Court also decided *Kidwell v. Rhew*,[364] one of the few reported decisions permitting relief under Rule 4(b)(3). Unfortunately, the opinion only discusses the extension of time in a footnote.[365] There, the circuit court entered an order on March 13, 2007, rejecting the argument by Renda Kidwell to determine whether Arkansas' pretermitted-heir statute applied to a revocable *inter vivos* trust, where the decedent settlor had failed to execute a will and died intestate.[366] On May 28, 2007, Kidwell sought an extension of time to file a notice of appeal under Rule 4(b)(3).[367] "In that motion, she alleged that, despite repeated phone calls to the White County Clerk's office, she was never notified that the circuit court's order had been entered; she did not receive word that the order had been filed until May 16, 2007."[368] On May 25, 2007, the circuit court granted her motion finding that neither Kidwell nor her attorney had received notice of the signing or entry of the court's order, that less than 180 days had elapsed, and no party would be prejudiced by the extension.[369] Kidwell filed her notice of appeal on May 31, 2007, and the Arkansas Supreme Court addressed the appeal, mentioning the extension only in a footnote after observing that "Kidwell filed a timely notice of appeal."[370]

In a 2008 decision, the Arkansas Supreme Court held that, even where a court has failed to observe a mandatory obligation set forth in the Rules of Civil Procedure, an attorney is not relieved of his duty to act diligently.[371] In *Watson v. Connors*, on March 3, 2005, the trial court dismissed the case for failure to prosecute without the mandatory notice to the parties required by Rule 41(a) of the Arkansas Rule Civil Procedure.[372] After learning of the dismissal after seeking a trial setting, on

364. Kidwell v. Rhew, 371 Ark. 490, 268 S.W.3d 309 (2007).

365. *Id.* at 491 n.1, 268 S.W.3d at 310 n.1.

366. *Id.* at 491, 268 S.W.3d at 310.

367. *Id.* at 491 n.1, 268 S.W.3d at 310 n.1.

368. *Id.*

369. *Kidwell*, 371 Ark at 491 n.1, 268 S.W.3d at 310 n.1.

370. *Id.* at 491, 268 S.W.3d at 310.

371. Watson v. Connors, 372 Ark. 56, 61-62, 270 S.W.3d 826, 830 (2008) (finding lack of diligence based on attorney's inaction, despite circuit court's failure to observe Rule 41(b)'s mandatory notice requirement).

372. *Id.* at 57, 270 S.W.3d at 827.

November 6, 2006, plaintiff sought to vacate the order of dismissal under Rule 60(b) of the Arkansas Rule Civil Procedure as a clerical error that could be corrected at any time.[373] The Court rejected this argument, finding that an order entered by the trial court in error was not a clerical error subject to correction after the expiration of ninety days.[374] Citing *Arkco Corp.*, it also rejected plaintiff's argument that the failure to notify the plaintiff of the dismissal order took away any opportunity to contest its entry until he learned of the dismissal, noting that even rules mandating the trial court to act did not relieve the attorney of his obligation to act diligently and noting that after filing the complaint, the plaintiff and his attorney failed to contact the court for over three years, and were not diligent.[375]

Finally, in 2010, in *Anderson v. Holada*, the Arkansas Court of Appeals issued two opinions.[376] The first opinion noted that the order extending the time to file a notice of appeal was missing from the appendix submitted by the appellant, and ordered re-briefing.[377] Afterwards, apparently neither the appellate court nor the parties raised the issue of diligence. [378] Like *Kidwell*, the *Anderson* opinion represents one of the rare opinions where an Arkansas appellate court upheld relief under Rule 4(b)(3).

K. 2012 Amendments

In 2012, amendments to Rules 2(b) and 3(a) of the Arkansas Rules of Appellate Procedure–Civil made clear that Rules 2(b)

373. *Id.*

374. *Id.*

375. *Id.* at 61-62, 270 S.W.3d at 830.

376. Anderson v. Holada, 2010 Ark. App. 143 *opinion after rebriefing* 2010 Ark. App. 426.

377. *Anderson*, 2010 Ark. App. 143, at 2-3.

378. *See Anderson*, 2010 Ark. App. 426. Indeed, the docket confirms the appellees did not seek to dismiss the appeal, as the only motion to dismiss was a motion to dismiss the prior request for oral argument. The docket for the appeal is available on the worldwide web at https://perma.cc/R59Q-KNYW. Upon rebriefing, the appellate court did not raise the issue of jurisdiction but, instead, decided the appeal on its merits. *Anderson*, 2010 Ark. App. 426, at 1; *but see* River Valley Homes, Inc. v. Freeland-Kauffman & Fredeen, Inc., 2010 Ark. App. 682, at 5-6 ("Although *Sloan*, *Arkco Corp.*, and *Arnold* each involved an appellee's motion to dismiss the appeal and there has not been a motion to dismiss the present appeal, this is a matter that goes to our jurisdiction and must be raised by this court if not raised by the parties.").

and 3(a) were intended to limit the post-judgment motions that permit appellate review of either the original judgment or intermediate orders to the post-judgment motions listed in Rule 4(b)(1), and to exclude motions under Rule 4(b)(3).[379] Until that amendment, Rules 2(b) and 3(a) contained identical language stating, "[a]n appeal from an order disposing of a postjudgment motion under Rule 4 brings up for review the judgment and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from."[380] Accordingly, a logical reading of Rules 2(b) and 3(a) suggested the denial of any post-judgment motion under Rule 4(b)(3) would bring up for appellate review either the original judgment or an intermediate order.[381] Because Rule 4(b)(3) permits motions to be filed within 180 days of the entry of the order from which an appeal is sought, courts might have read this language as creating a 180-day appellate period for the original judgment or an intermediate order.[382] The 2012 amendment, therefore, resolved this ambiguity in Rules 2(b) and 3(a) by specifically limiting appellate review of the original judgment or intermediate orders to only those post-judgment motions listed in Rule 4(b)(1).[383]

L. 2014 Amendments and After

Although there were several subsequent amendments in 2014, none were related to subparagraph (b)(3), so we need not discuss them.[384]

In 2016, the Arkansas Supreme Court denied the request for a belated appeal by Carl Davis, Jr., a prisoner who had filed a petition seeking a declaratory judgment regarding the calculation of his parole eligibility date, but who did not receive notice of the trial court's April 17, 2015 order denying his petition until September 2, 2015, when the clerk responded to his August 31,

379. ARK. R. APP. P. CIV. 2 addition to reporter's notes to 2012 amendment.

380. ARK. R. APP. P. CIV. 2 addition to reporter's notes to 2012 amendment (internal quotations omitted); See ARK. R. APP. P. CIV. 2(b), 3(a) for amended rules.

381. ARK. R. APP. P. CIV. 2 addition to reporter's notes to 2012 amendment.

382. ARK. R. APP. P. CIV. 2 addition to reporter's notes to 2012 amendment.

383. ARK. R. APP. P. CIV. 2 addition to reporter's notes to 2012 amendment.

384. *See In re* Amendments to Rules of Civ. Procedure, 2014 Ark. 119.

2015 motion requesting a status update.[385] The Court noted that this lack of notice occurred despite the mandatory requirement of Rule 37.3(d) of the Arkansas Rules of Criminal Procedure, which requires the circuit court to provide prompt notice to the petitioner of an order entered on a Rule 37.1 petition.[386] Although noting that he had filed his notice of appeal within 149 days of the April 17, 2015 order, the Court took issue with the fact that Davis failed to timely file a motion seeking an extension of time under Rule 4(b)(3), or to show cause for why he did not seek the extension.[387] The Court had no sympathy for his pro se status, noting that both lawyers and litigants have to "exercise reasonable diligence to keep up with the status of their cases, and pro se litigants are held to the same standard as licensed attorneys."[388] The Court dismissed the case, finding that had Davis been diligent in checking on the status of his case or otherwise met Rule 4(b)(3)'s requirements, a mandatory extension was available, but Davis had neither "provided an excuse for his failure to file a timely notice of appeal that would constitute good cause for the omission," nor had he shown compliance with the procedural rules.[389]

V. CONCLUSION

While Rule 4(b)(3) has traversed a great distance from its omission from the initial Rules of Appellate Procedure in 1979, room for growth remains. The Rule was adopted initially to remedy the perceived injustice of a party having lost its appeal rights because that party did not receive an order or judgment. Yet, few decisions have upheld relief under Rule 4(b)(3). Recently, the requirement that a litigant demonstrate diligence has in practice become the death knell for requests for relief under Rule 4(b)(3). The Arkansas Supreme Court created the diligence requirement, then added it to the text of the Rule. Since adopting the requirement, Arkansas appellate courts have been content to

385. Davis v. State, 2016 Ark. 47, at 1-2, 481 S.W.3d 764, 765-66.

386. *Id.* at 3, 481 S.W.3d at 766.

387. *Id.* at 3, 481 S.W.3d at 766.

388. *Id.*

389. *Id.* at 4, 481 S.W.3d at 766-67. *Accord* McClain v. Norris, 2009 Ark. 428, at 1-2 (denying motion for belated appeal in similar circumstances).

administer Rule 4(b)(3) on an *ad hoc* basis, reviewing decisions of circuit courts to ascertain whether the litigants or their counsel acted with diligence.

The reality of the current legal practice, where Arkansas attorneys routinely handle actions across the state, suggests that the notion of a practitioner stopping by the courthouse daily to review the status of all of his or her cases is outmoded and impractical. While the spread of electronic filing may help this matter by making dockets readily available and making it easier to ascertain whether an order was entered, it is not a consistent cure.[390] The reported decisions establish a failure to monitor the status of a case following the submission of an order on a dispositive motion or on the merits is difficult to overcome.[391]

One reading of these decisions remains troubling because it consists of entirely circular logic: a party is not entitled to relief merely because, had it been diligent, that party would have known of the entry of the judgment, decree, or order from which it now seeks a belated appeal.[392] Litigants use the reported decisions to argue against motions for belated appeals on this basis.[393] Were that the appropriate inquiry, then Rule 4(b)(3) would be merely illusory and not a viable remedy for the most common circumstances in which an order is entered without notice to a party or attorney. A better reading of the cases on diligence appears to be that the duty to monitor the case exists, but firmly attaches when the case is finally submitted *and* the parties have actual notice of the submission of proposed orders to resolve the action, or awareness of some reason to be monitoring the docket. This obligation, however, should be finite. Where the court does

390. *See supra* note 83 and accompanying text (discussing cases presenting similar issues in the federal system despite federal courts having fully embraced electronic filing).

391. *See, e.g.*, Sloan v. Ark. Rural Med. Practice Loan & Scholarship Bd., 369 Ark. 442, 444-45, 255 S.W.3d 834, 836-37 (2007).

392. *See, e.g.*, *id.* at 445 n.3, 255 S.W.3d at 837 ("Even if this court could consider these affidavits, it raises the question of why, if the two affiants were closely monitoring the progress of this case and its appeal, did the Sloans fail to discover when it was filed and wait almost three months to request an extension for their appeal?").

393. *See, e.g.*, Response to Plaintiff's Motion to Extend Time to File Notice of Appeal, Ocwen Loan Servicing, LLC v. Smith, No. 72CV-12-1822 (Cir. Ct. Wash. Cty. Mar. 24, 2014); Brief in Response to Plaintiff's Motion to Extend Time to File Notice of Appeal at 3-4, Ocwen Loan Servicing, LLC v. Smith, No. 72CV-12-1822 (Cir. Ct. Wash. Cty. Mar. 24, 2014).

not promptly enter an order after its submission, there should be a time when it is reasonable for the parties to believe that the court does not intend to use a proposed order submitted in the case. This reading gives effect to the diligence requirement but balances it against Rule 4(b)(3), which must exist to provide relief, even if in limited factual circumstances.

Whatever view was intended, in addressing requests under Rule 4(b)(3) Arkansas appellate courts could offer litigants and the bar more meaningful analysis regarding what is necessary to show diligence, rather than merely an *ad hoc* conclusion as to whether the episodic conduct rises to the level of diligence.

While the construction of what Rule 4(b)(3) intended is an opportunity for the courts to determine policy, the issue might be better addressed by changes to Arkansas law or procedural rules to place the responsibility for the service of final orders on someone. This approach would address the root cause and make Arkansas's practice more consistent with the practices of other states and federal courts.[394] For example, by amending section 16-20-304 of the Arkansas Code, the legislature could direct the circuit clerk or a deputy to serve copies of all orders in a civil case from which an appeal might lie on all parties that have appeared in an action. Another approach might be the adoption of a court rule requiring the circuit clerk or the parties to serve copies of such orders.[395] Such a requirement would hopefully remove the underlying root cause for most of the cases involving requests for belated appeals by better ensuring that litigants actually receive the intended notice.

Absent action by the court or legislature, it seems unlikely that Rule 4(b)(3) or its application by Arkansas courts will change significantly. Accordingly, litigants and the bar will be left to examine the facts of each case to ascertain whether they can marshal enough evidence of diligence to have any hope of obtaining relief.

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394. *See supra* notes 73-78 and accompanying text.

395. Adoption of such a requirement by rule might avoid any argument that such an amendment constitutes a rule of "pleading, practice, and procedure," and therefore is constitutionally suspect under Arkansas' separation of powers doctrine. *See generally* Austin A. King, *A Problematic Procedure: The Struggle for Control of Procedural Rulemaking Power*, 67 ARK. L. REV. 759, 760-61 (2014).