Arkansas Law Review

Volume 74 | Number 4 Article 8

January 2022

Recent Developments

Silas Heffley
University of Arkansas, Fayetteville

RECENT DEVELOPMENTS

MORNINGSIDE CHURCH, INC. v. RUTLEDGE[1]

In a case involving a Missouri televangelist, a purported COVID-19 cure, and state officials from Arkansas and California, the Eighth Circuit Court of Appeals affirmed the lower court's dismissal for lack of personal jurisdiction.

Jim Bakker is the lead pastor at Morningside Church in Stone County, Missouri and the host of the Jim Bakker Show—a nationally broadcast television program produced in conjunction with Morningside Church and Morningside Church Productions (collectively, "Morningside"). Bakker is a resident of Stone County, and both Morningside entities are headquartered there.

In February 2020, Bakker began advertising a product named "Silver Solution" on the Jim Bakker Show as a "proven" COVID-19 remedy. This attracted scrutiny from law enforcement officials across the country. Los Angeles, California City Attorney Mike Feuer; Arkansas Attorney General Leslie Rutledge; Merced County, California District Attorney Kimberly Lewis; and San Joaquin County, California District Attorney Tori Verber Salazar opened investigations into Bakker's advertisements for potential violations of California's false advertising law, Arkansas's deceptive trade practices law, and California's Business and Professions Code, respectively.

Bakker and Morningside filed suit against the four officials in the Western District of Missouri, alleging the investigations violated their constitutional rights and that the relevant state statutes were unconstitutional. The district court dismissed for lack of personal jurisdiction. Morningside appealed.

Reviewing the decision de novo, the Eighth Circuit reasoned that due process requires a defendant have minimum contacts with a forum state for that state to exercise specific personal jurisdiction. The court then enumerated the Eighth Circuit's five-

1. Morningside Church, Inc. v. Rutledge, 9 F.4th 615 (8th Cir. 2021).

factor test to assess the sufficiency of a defendant's contacts: "(1) the nature and quality of contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) [the] convenience of the parties."[2]

The court additionally evaluated specific jurisdiction using the 'effects test' set forth in *Calder v. Jones*,[3] which extends specific personal jurisdiction to nonresident defendants who commit intentional torts when their effects are "felt primarily within the forum state."[4] The contacts that Bakker and Morningside alleged were sufficient to establish personal jurisdiction over the defendants in the Western District of Missouri were the letters and telephone calls that the defendants had directed toward them requesting information related to the Silver Solution advertisements.

Using the five-factor test, the court held that the first two factors in this instance "weigh[ed] heavily against personal jurisdiction."[5] It reasoned that the communications at issue occurred in Missouri merely because Bakker lived there and Morningside was headquartered there; therefore, Bakker and Morningside were "the only link between defendant[s] and the forum."[6] The court likewise held that the third factor disfavored personal jurisdiction, as the communications failed to demonstrate contacts with the forum itself. Regarding the fourth and fifth "less important" factors, the court held that "while Missouri has an interest in establishing a forum for its residents, that forum is an inconvenient one for the defendants, who are not from Missouri and have no business in the state."[7]

2. *Id.* at 619 (quoting Federated Mut. Ins. Co. v. FedNat Holding Co., 928 F.3d 718, 720 (8th Cir. 2019)).

3. *See id.* at 620 (citing Calder v. Jones, 465 U.S. 783 (1984)).

4. *Id.* (citation omitted). *Walden v. Fiore* refined the effects test, adding two limitations: (1) the defendant must have created the contacts with the forum state himself; and (2) the contacts must go to the defendant's relationship with the forum itself and not merely to persons who happen to reside there. 571 U.S. 277, 284-85 (2014).

5. *Morningside Church, Inc.*, 9 F.4th at 620-21.

6. *Id.* at 620 (quotation omitted).

7. *Id.* at 621 (quoting Whaley v. Esebag, 946 F.3d 447, 453 (8th Cir. 2020)).

MYERS v. FECHER[8]

According to this December 2021 decision from the Arkansas Supreme Court, the Arkansas Freedom of Information Act ("FOIA") requires that communications between a state employee and another on a cloud-based messenger application that are of a mixed public and private nature must be sorted to determine which messages qualify as "public records" under the Act and are therefore "open to inspection and copying."[9]

In December 2019, the Arkansas Democrat-Gazette renewed a 2017 FOIA request seeking correspondence between former Department of Information Systems ("DIS") Director Mark Myers and any representatives of Cisco Systems since January 2015. The requested records included emails, text messages, and communications saved on Blackberry Messenger, a private, third-party cloud-based application. Myers and Jane Doe, an employee of a technology company that did business with DIS, contested the release of the three thousand-some-odd Blackberry Messenger messages on grounds that they were not entirely public records; rather, they comprised of private, "deeply personal exchanges, musings and information" unrelated to the performance of official functions.[10]

The Democrat-Gazette argued the messages were public records because they were connected to public business and were stored on a server belonging to DIS. The circuit court agreed, stating that "the business and personal matters were so intertwined that all of the messages were 'public records[.]'"[11] The Arkansas Supreme Court granted a stay of the judgment pending appeal.

The Court considered two issues on appeal: (1) whether "the circuit court erred in finding that the [messages] were 'public records' pursuant to FOIA;" and (2) whether "the circuit court erred in finding that the public interest outweighed privacy rights."[12] Addressing the first issue, the Court found that:

---

8. Myers v. Fecher, 2021 Ark. 230, at 1, 635 S.W.3d 495.
9. *Id.* at 8, 635 S.W.3d at 499 (quoting ARK. CODE ANN. § 25-19-105(a)(1)(A)).
10. *Id.* at 4, 635 S.W.3d at 497.
11. *Id.* at 5, 635 S.W.3d at 498.
12. *Id.* at 6, 635 S.W.3d 498.

> [B]ecause these messages are individual, sent on different days, and sent at different times, the messages are not all interrelated and inextricably intertwined as found by the circuit court. Rather, the messages in this case are capable of being sorted into private-and public-record categories. Therefore, the circuit court clearly erred by not determining whether each individual message met the definition of a "public record."[13]

The Court did not reach Myers and Doe's remaining arguments on appeal, and instead, opined that "once the circuit court has determined which, if any, individual messages are 'public records,' Myers and Doe may raise their right-to-privacy arguments [at which time] the circuit court must conduct the appropriate weighing test for each item before ordering disclosure."[14]

SLUYTER v. WOOD GUYS, LLC[15]

The Arkansas Court of Appeals considered the recently amended mechanics'- and materialmen's-lien statutes in this November 2021 decision involving a dispute between homeowners and a contractor over the refinishing of hardwood flooring in a private residence.

Aaron and Cheryl Sluyter orally contracted with Wood Guys, LLC ("Wood Guys") for the replacement and refinishing of hardwood flooring in their Rogers home. After Wood Guys completed the work in March 2019, a dispute arose regarding the quality of the work performed and the amount owed by the Sluyters. In response to their refusal to pay the demanded amount, Wood Guys filed a mechanics' and materialmen's lien on the property and then filed a complaint to foreclose on the lien, ultimately seeking damages for breach of contract or, alternatively, recovery under the theory of quantum meruit for work done on the Sluyters' property. The Sluyters argued that Wood Guys was barred from bringing any claims because it did not provide the necessary preconstruction lien notice.

13. *Myers*, 2021 Ark. 230, at 11, 635 S.W.3d at 500-01.
14. *Id.* at 11, 635 S.W.3d at 501.
15. Sluyter v. Wood Guys, LLC, 2021 Ark. App. 442, at 1, ___ S.W.3d ___, ___.

The circuit court found that Wood Guys was exempt from the notice requirement under Arkansas Code Annotated § 18-44-115 (requiring a "residential contractor" to give preconstruction lien notice) because it was a "home improvement contractor," not a "residential contractor."[16] The court reasoned that the term "residential contractor" used in §18-44-115 was synonymous with the term "residential building contractor" defined in Arkansas Code Annotated § 17-25-502(3). Because the former term is not defined in the statute, but the latter term is, Wood Guys did not fall within the definition of a "residential building contractor."

On appeal, the court agreed that Wood Guys was not a residential building contractor but disagreed that the two terms are interchangeable. The court opted for a broader definition of residential contractor, opining that Wood Guys was assuredly a "contractor" as that term is defined in the statute—Wood Guys directly contracted with the Sluyters, who were owners of a single-family residence, for the repair and replacement of wood flooring on the property. "[C]ommon usage of the word 'residence' refers to a place or dwelling in which a person or people live[,]" and the Sluyters' home certainly fit that description.[17] Ergo, the Court held that Wood Guys was a residential contractor subject to the statutory requirement to provide lien notice prior to the commencement of work.

Furthermore, the appellate court agreed with the circuit court's finding that Wood Guys was a "home improvement contractor," but it held that this characterization barred the contractor from being a lien claimant under the direct-sale exception to the notice requirement. This exception provides that the lien notice requirement does not apply if the transaction is a direct sale. A direct sale is a transaction in which: (1) "[t]he property owner orders materials or services from the lien claimant;" and (2) "[t]he lien claimant is *not* a home improvement contractor . . . or a residential building contractor[.]"[18] The appellate court opined that the plain language of the statute

16. *Id.* at 3, ___ S.W.3d at ___.

17. *Id.* at 7, ___ S.W.3d at ___.

18. *Id.*, ___ S.W.3d at ___ (emphasis added) (citing ARK. CODE ANN. § 18-44-115(a)(8)(B)).

stipulates that a contractor that *is* a home improvement contractor *may not* avail itself of the direct-sale exception. Since Wood Guys was a home improvement contractor, the preconstruction-lien-notice requirement was undisturbed.

At bottom, because Wood Guys was a residential contractor and a home improvement contractor, it was required to provide the Sluyters with lien notice prior to commencing the work on the wood floors in their home under Arkansas Code Annotated § 18-44-115(a). Wood Guys did not give notice, so it was barred from bringing an action to enforce its contractual and quantum meruit claims.

The Court concluded by noting that the General Assembly amended the statute in 2021 to remove the bar against equitable claims for residential contractors who fail to provide preconstruction lien notice. "While this legislative amendment comes too late to aid Wood Guys, it now provides a way for residential contractors to seek redress, even when they fail to execute and deliver preconstruction lien notice."[19]

SILAS HEFFLEY

19. *Id.* at 9, ___ S.W.3d at ___.