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IN THE SUPREME COURT OF ARKANSAS

ARKANSAS DEPARTMENT OF HEALTH; JOSE' R. ROMERO, MD. in his Official Capacity as Secretary of Health/ARKANSAS DEPARTMENT OF HEALTH; ARKANSAS BOARD OF HEARING INSTRUMENT DISPENSERS; AND STEPHANIE PRATT, in her Official Capacity as Executive Director/ARKANSAS BOARD OF HEARING INSTRUMENT DISPENSERS **APPELLANTS**

v. **No. CV-21-319**

SAMUEL SOLOMON **APPELLEE**

BRIEF OF APPELLEE SAMUEL SOLOMON

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Statement of the Case

The facts of this case are simple. Mr. Solomon was a licensed hearing instrument dispenser for thirteen years. (RP 4) (RT 26). He continuously met every requirement for renewing his license and was in good-standing with the Board during that time. (RP 6-7, 26) (RT 36).

Mr. Solomon's normal license renewal deadline was June 30 of each year. (RT 12, 66). Before 2020 renewal deadline and during the initial spike of the worldwide COVID-19 pandemic, however, the Board sent him a renewal notice stating his renewal date was 2021. (RP 5, 11) (RT 27, 53). The Board acknowledges that Mr. Solomon did not renew by the 2020 deadline, because its notice contained a mistake. (RT 24).

With so many emergency executive orders, state agencies suspending their normal rules, and a lot of confusion at the time due to the pandemic, Mr. Solomon thought nothing of this deadline change from 2020 to 2021. (RT 27-28). He was later informed, however, that he had missed the 2020 deadline. (RP 5) (RT 26).

When Mr. Solomon tried to informally resolve the Board's defective notice, he was told he had to retake all of his written and oral

licensure exams. (RP 7, 18) (RT 28, 60-61). When he attempted to send in his renewal application prior to the June 30, 2021, deadline as directed in the defective notice, it was rejected with the terse comment, "Return to Sender." (RP 6, 15) (RT 30, 58). When he requested a hearing, he was told he could not have one. (RP 6, 16-19) (RT 31, 60-61, 63-64). So, he sued. (RP 3-19).

Mr. Solomon explained to the circuit court the irreparable harm he had suffered and would continue to suffer without a license. (RT 33-35). The circuit court found Mr. Solomon had proven irreparable harm, both past and future, and a reasonable likelihood of success on the merits of his case. (RP 63). The court, therefore, granted him the requested temporary injunctive and declaratory relief and ordered the Board to renew the license upon summitting the required application for it (which he had already done prior to the hearing). (RP 63) (RT 35-36).

The Board could have easily remedied its mistake and resulting confusion by using its discretion and renewing Mr. Solomon's license under *Article VIII, Section 4 of the Board of Hearing Dispenser Rules*. (RP 30) (RT 67). Instead, it chose to litigate and pursue an extraordinary emergency and interlocutory relief before this Court.

Argument

Mr. Solomon was fully qualified to renew his license by the June 30, 2020, deadline. His failure to renew by that date was caused by the Board sending him a defective renewal notice stating the renewal date was June 30, 2021 – one year later. This Court should affirm the circuit court's order denying the Board's oral motion to dismiss and granting Mr. Solomon temporary injunctive and declaratory relief.

I. Standard of Review.

The Board has correctly cited the standards of review for this case. Specifically, the factual findings of the circuit court shall not be set aside unless clearly erroneous. *Appellants' Brief at pp. 18-19.* But a conclusion that irreparable harm will result or that the party requesting the injunction is likely to succeed on the merits is subject to review under an abuse-of-discretion standard. *Appellants' Brief at p. 18.*

Because this appeal involves the Board's legal interpretation of statutes and rules promulgated thereunder, however, the Board has missed an important new line of cases and shift in Arkansas law governing administrative agency appeals. Specifically, last spring,

this Court, without a request by either party, clarified decades of seemingly confusing precedent on when Arkansas' judicial branch should defer to an executive branch on the legal meaning of a statute.

No longer would an administrative agency's view of a statute be given "great deference." No longer would it be judicially embraced unless it was "clearly wrong." An agency's interpretation of a statute would now be reviewed afresh, under a *de novo* standard of review. *Myers v. Yamoto Co., Ltd.*, 2020 Ark. 135, at 4-6, 597 S.W.3d 613, 616-17. *See also Hurd v. Ark. Oil & Gas Comm'n*, 2020 Ark. 210, at 8, 601 S.W.3d 100, 104 (reiterating the standard from *Myers*) and *Am. Honda Motor Co. v. Walther*, 2020 Ark. 349, at 6, 610 S.W.3d 633, 636 (holding that the *Myers* standard applied).

This new review standard makes sense. As one judge has observed, the agency and the courts are not sitting down to the same task when they approach the governing text:

> [I]t seems to me that the agency is not trying to answer the same question as we are. The court tries to find the best objective interpretation of the statute, based on the statutory text. The agency instead asks if there is a colorable interpretation that will support the policy result that the agency wants to reach.

Hon. Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflection After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 319-20 (2017).

II. The Circuit Court Was Correct In Finding It Had Subject Matter Jurisdiction.

The Board argues that the circuit court did not have subject matter jurisdiction of the case. *Appellants' Brief at p. 19.* It bases its argument on the assumption that the circuit court could only have had jurisdiction under the APA. *Id.* This argument is wrong on both points.

It is well settled that subject matter jurisdiction is a court's authority to hear and to decide a particular type of case. *See* David Newburn & John Watkins, *Civil Practice and Procedure* 19 (4th ed. 2006). A court lacks subject matter jurisdiction when it cannot hear the matter "under *any* circumstances" and it is "*wholly* incompetent to grant the relief sought." *Id.* (quoting *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 352-53, 836 S.W.2d 853, 858 (1992)) (emphasis added). A court obtains subject matter jurisdiction "by the Arkansas Constitution, by constitutionally authorized statues, or by court rules." *Id.* at 19-20

The circuit court, as a general jurisdiction trial court, had general subject matter jurisdiction over this matter under *Ark. Const. amend. 80 §6* and specific subject matter jurisdiction under *Ark. Code Ann. §§25-15-207*, *25-15-211*, *25-15-212*, and *25-15-214*. There is no requirement, as the Board seems to argue, that Mr. Solomon's legal citation in his complaint to the APA (as one basis for jurisdiction) somehow limited the circuit court's jurisdiction (on another basis under the totality of the facts pled). *See, e.g., Ark. R. Civ. P. 8 (a)* ("A pleading which sets forth a claim for relief …shall contain (1) a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief.")

Proper notice, of course, is at the *entry level* of fundamental fairness and due process. Mr. Solomon claimed in his complaint that these fundamental rights were violated when the Board sent him a defective renewal notice containing the wrong renewal deadline, and then denied him a hearing when he relied on it. (RP 3-19).

The confusion the Board caused by its defective notice was exacerbated by the fact that it was sent during the COVID-19 pandemic where many emergency pandemic proclamations had been

issued by the Governor concerning the suspension of normal operations and many state agencies had been suspending their normal rules. *(examples available at https://governor.arkansas.gov/our-office/executive-orders/)* (RP 25).

The Board's defective notice, compounded with the confusion of a worldwide pandemic, violated Mr. Solomon's rights to fundamental fairness and due process of the law when he relied on it and then had his license revoked by the Board for doing so.

The Board attempts to escape the circuit court's general jurisdiction to hear constitutional disputes by arguing there was no specific jurisdiction under the APA because "there was no adjudication before the DOH and the validity or applicability of a rule is not being challenged." *Appellants' Brief at p. 19*. Again, this argument is wrong.

Mr. Solomon timely submitted his renewal application as directed in the Board's defective notice. (RP 6, 15) (RT 30, 58). The Board decided to reject it and "revoked his license for non-payment …." (RP 15, 18) (RT 58, 63) (emphasis added). The use of "revoked" is the Board's own word, and it is curious that it now argues this revocation was not an "adjudication." Mr. Solomon thus requested a

hearing on the Board's revocation, but the Board then made an adjudication that he could not have one. (RP 6, 16-19) (RT 31, 60-61, 63-64).

Under the Board's theory, a licensing Board could affirmatively mislead a current licensee about a licensing requirement, but not renew the license when the licensee relies on the misrepresentation, and then argue the licensee has no legal remedy. Surely, this cannot be the law. *See, e.g., Arkansas Model Jury Instructions (Civil) 402* and *2444* and *Arkansas Constitution, Article 2, Section 13.*

Mr. Solomon exhausted any remedy he had at the agency level. (RP 7). The agency insisted its interpretation of the *Board of Hearing Dispenser Rules Article VIII* was the law, that was its final disposition, and "revoked his license for non-payment …." (RP 15, 18-19) (RT 58, 63). As a consequence, the *Arkansas Administrative Procedure Act* was implicated in numerous sections.

First, *Ark. Code Ann. §25-15-207*, states:

> (a) The validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that the rule, or its threatened application, injures or threatens to injure the plaintiff in his or her person, business, or property.

***

> (d) A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

(emphasis added).

To be clear, Mr. Solomon did not even have to ask for the Board to pass upon the applicability of the renewal licensing rule, but he did. The Board refused his overtures and, in essence, ruled it could send him a defective renewal notice and then revoke his license after he relied on it. Importantly for the Board's argument, the statute does not even mention the need for an adjudication to obtain the circuit court's jurisdiction.

Second, *Ark. Code Ann. §25-15-212*, states:

> (a) In cases of adjudication, any person, except an inmate under sentence to the custody of the Division of Correction, who considers himself or herself injured in his or her person, business, or property by final agency action shall be entitled to judicial review of the action under this subchapter. Nothing in this section shall be construed to limit other means of review provided by law.

(emphasis added).

Even if the Board argues there was no adjudication under the above section because it refused to process Mr. Solomon's application,

grant him a hearing, and then admittedly "revoked his license for non-payment …," its actions were at least a *de facto* adjudication. *See Black's Law Dictionary* (5th ed) at p. 375 (a State action that must be accepted for all practical purposes but is illegal or illegitimate).

Moreover, Mr. Solomon made timely and sufficient application for the renewal of his license under the defective notice sent to him by the Board. (RP 6, 15) (RT 30, 58). This fact is undisputed. The Board cannot argue there was no final adjudication on the one hand, but then on the other hand contend Mr. Solomon's license has expired. *See Ark. Code Ann. §25-15-214* ("When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license **shall not expire** until the application has been **finally determined** by the agency….") (emphasis added).

Third, *Ark. Code Ann. §25-15-214*, states:

> In any case of rulemaking or adjudication, if an agency shall unlawfully, unreasonably, or capriciously fail, refuse, or delay to act, any person who considers himself or herself injured in his or her person, business, or property by the failure, refusal, or delay may bring suit in the circuit court of any county in which he or she resides or does business, or in Pulaski County Circuit Court, for an order commanding the agency to act.

(emphasis added).

Under the above section, the Board argues it refused to "adjudicate" Mr. Solomon's renewal request, while *simultaneously arguing* that it "revoked his license for non-payment …," so he was entitled to apply to circuit court for an order commanding the Board to act. *Appellants' Brief at p. 20* and (RP 15, 18) (RT 58, 63).

Finally, the Board argues that the circuit court was not entitled to "determine that Solomon was actually entitled to receive a license…." *Appellants' Brief at p. 22*. The problem with this argument is that the circuit court did not make that determination. The circuit court's order states the Board was to issue the license when it was satisfied Mr. Solomon had made "payment of the proper licensing fee and presenting the required application for issuance of a license…." (RP. 63).

This circuit court order requirement was in response to the Board's claim that the renewal license application that Mr. Solomon had attempted to submit prior to the June 30, 2021, deadline (which was rejected with a "Return to Sender" note), was somehow deficient, which it was not. (RP 63) (RT 35-36). It is undisputed that the Board

has now issued the license after its re-review of Mr. Solomon's attempted license renewal. Since the facts were undisputed and the circuit court had already determined that the Board had violated the law, there was no need to remand the case for the Board to interpret the law. *Myers v. Yamoto Co., Ltd.*, 2020 Ark. 135, at 4-6, 597 S.W.3d 613, 616-17. *See also Hurd v. Ark. Oil & Gas Comm'n*, 2020 Ark. 210, at 8, 601 S.W.3d 100, 104 (reiterating the standard from *Myers*) and *Am. Honda Motor Co. v. Walther*, 2020 Ark. 349, at 6, 610 S.W.3d 633, 636 (holding that the *Myers* standard applied). All the Board needed to do, which it has now done, was make sure Mr. Solomon was qualified to have a license but for the Board's defective notice.

In view of the foregoing, the circuit court's had subject matter jurisdiction to issue temporary relief and that relief should be affirmed as set forth in the next section.

III. The Circuit Court Was Correct When It Entered A Preliminary Injunction.

The Board acknowledges that the standards for granting a preliminary injunction under Arkansas law are well established and straightforward: "Under Arkansas law, a circuit court must consider

two issues when issuing a preliminary injunction under *Ark. R. Civ. R. 65*: (1) whether irreparable harm will result in the absence of an injunction or restraining order, and (2) whether the moving party has demonstrated a likelihood of success on the merits." *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 175, 72 S.W.3d 95, 100 (2002). The Arkansas Court of Appeals explained the standard of appellate review when a circuit court grants a preliminary injunction:

> This court reviews the grant of a preliminary injunction under an abuse-of-discretion standard. The standard of review is the same for the two essential components of a preliminary injunction: irreparable harm, and likelihood of success on the merits. There may be factual findings by a circuit court that lead to conclusions of irreparable harm and likelihood of success on the merits, and those findings shall not be set aside unless clearly erroneous. But a conclusion that irreparable harm will result or that the party requesting the injunction is likely to succeed on the merits is subject to review under an abuse-of-discretion standard.

Baptist Health v. Murphy, 365 Ark. 115, 121, 226 S.W.3d 800, 806 (2006).

As a consequence, Mr. Solomon is not required to show he is certain to prevail on the merits – only that the odds of him prevailing are greater than 50/50: "The test for determining the likelihood of success is whether there is a reasonable probability of success in the

litigation." *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 175, 72 S.W.3d 95, 100 (2002).

Based on the facts set forth in Mr. Solomon's complaint and developed at the hearing, and the applicable law, he has not just shown that he is likely to succeed on the merits – he has shown he is highly likely to succeed on the merits.

In an attempt to avoid this conclusion, the Board argues that the circuit court's temporary order somehow "effectively awarded final and conclusive relief to Solomon." *Appellants' Brief at p. 23*. The Board then argues it did not receive proper notice that the circuit court would grant the preliminary relief requested by Mr. Solomon in his complaint. *Appellants' Brief at p. 24*.[1]

To be clear, the circuit court's order stated that it was granting "temporary" relief. (RP 63). The reason a final hearing has not been held, presumably making it "effectively final" in the eyes of the Board,

[1] The Board intertwines this argument with an argument that a separate, formal motion was required to have a hearing on Mr. Solomon's request for temporary relief. That is not the law. Mr. Solomon specifically requested temporary relief in his complaint (RP 9) and served a notice on the Board stating his specific request for preliminary relief was set for an expedited hearing (RP 49-50). *See, e.g., Ark. R. Civ. R. 7 (b)(1)* (the requirement of a writing is fulfilled if the motion is stated in a written notice of hearing of the motion) and *Ark. R. Civ. R. 65 (a)(1)* (court may issue preliminary injunction upon notice).

is because the Board chose to apply to this Court for immediate and extraordinary relief two days after the circuit court issued its order. (RP 64-66). After that, the circuit court no longer had jurisdiction to set a final hearing on the full merits of the case, which the Board has never requested or even given the circuit court the opportunity to schedule. *See, e.g., Gore v. Heartland Cmty. Bank*, 356 Ark. 665, 158 S.W.3d 123 (2004) (Once the record is lodged in the appellate court, the circuit court "no longer exercises jurisdiction over the parties and the subject matter.")

The Board is also wrong in arguing that it did not receive proper notice of the hearing below. Indeed, the proof of hearing notice is in the record (RP 33-62) and its lawyer entered an appearance, attended the hearing, put on evidence, and made the same arguments the Board is making here. (RP 63) (RT 4, 10, 37, 41).

Moreover, and perhaps more importantly, the Board never raised an issue about notice at the circuit court hearing. (RT 10-15, 48-49). *See Kimbell v. Ass'n of Rehab Indus. & Bus. Companion Prop. & Cas.*, 366 Ark. 297, 235 S.W.3d 499 (2006); *Johnson v. Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989) (when an issue was not raised below,

it is not preserved for appellate review). So, the issue of notice is not properly before this Court.

The same is true for Board's argument that the circuit court's temporary order was not specific enough. The order is reasonably specific enough to comply with *Ark. R. Civ. P. 65 (d)(1)*. Again, the Board never even asked for an amendment or clarification of the order under *Ark. R. Civ. P. 52 (b)* before depriving the circuit court of the opportunity and jurisdiction to do so.

In view of the foregoing, the circuit court's temporary relief should be affirmed.

IV. The Circuit Court Was Correct In Denying The Motion To Dismiss On Sovereign Immunity Grounds.

Mr. Solomon did not request any monetary relief in his complaint, only declaratory and injunctive relief, because his harm cannot be adequately compensated by money damages or redressed in a court of law. (RP 3-19); *Mounce v. Jeronimo Insulating, LLC*, 2021 Ark. App. 195. The *Arkansas Constitution, Article 2, Section 13,* provides that "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive."

Here, Mr. Solomon cannot go to the Arkansas State Claims Commission for declaratory and injunctive relief because it only offers monetary relief. *Ark. Code Ann. §19-10-208 (4)* and *General Rules of Practice and Procedure before the Arkansas State Claims Commission Rule 1.5 (e).*

The Board argues that Mr. Solomon has not alleged any unconstitutional, illegal, or ultra vires conduct by the Board, but the facts and law set forth above, and a fair reading of his complaint along with the facts presented at the circuit court hearing, belie that claim. *Appellants' Brief at p. 26;* (RP 3-19) (RT 26-47, 53-67). The Board makes this argument in the face of its own admissions that it "revoked" Mr. Solomon's license and then denied him a hearing because that was not an "adjudication." (RP 18) (RT 63). Using the Board's own admissions demonstrates it cannot prevail on this argument, as it has conceded that sovereign immunity does not apply to illegal acts or refusing to do an act. *Appellants' Brief at p. 27.*

In a last ditch effort to defend its illegal actions, the Board attempts to distance itself from its defective notice relied upon by Mr. Solomon. Specifically, the Board argues that it did not have a duty to

send Mr. Solomon a notice about the renewal of his license and any such notice was simply a courtesy. *Appellants' Brief at p. 28.*

The issue is not whether the Board had a duty to send a renewal notice. The issue is the Board did send a defective renewal notice.

This Court has discussed the above assumption of duty by the Board, stating:

> "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."

See Chatman v. Millis, 257 Ark. 451, 464, 517 S.W.2d 504, 512 (1975) (quoting *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275, 276 (1922)).

Thus, even if the Board argues it had no duty to notify Mr. Solomon of his license renewal deadline, once the Board undertook that duty by sending him a renewal notice it had to do so carefully and not negligently as they did so here by sending him a defective one. *See Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297 (1997); *Keck v. Am. Emp't Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983). This failure to act carefully, compounded with the confusion of a spiking worldwide pandemic, violated Mr. Solomon's rights to fundamental fairness and due process of the law.

Simply put, sovereign immunity does not apply to this case.

Request for Relief

The circuit court's preliminary decision was correct and should be affirmed. The appellants have not demonstrated a reason to disrupt it, and their request to reverse and dismiss it should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on September 24, 2021, I electronically filed the foregoing via the eFlex electronic filing system, which shall send notification of the filing to any participants. I also certify that I will serve a paper copy of the brief within five calendar days upon the following:

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Certificate of Compliance with Administrative Order No. 19, Administrative Order No. 21, and With Word-Count Limitations

I hereby certify that the foregoing Brief complies with Administrative Order No. 19 in that that all "confidential information" has been excluded from the "case record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

I hereby certify that the foregoing Brief does not contain hyperlinks to external papers or websites.

Further, the undersigned states that the foregoing Brief conforms to the word-count limitation identified in Rule 4-2(d) and said Brief contains 4744 words.

Identification of paper documents not in PDF format: The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None.

M. Darren O'Quinn