

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

MARISA N. PAVAN and TERRAH D. PAVAN,
individually and as parents, next friends, and
guardians of T.R.P., a minor child

PLAINTIFFS

LEIGH D.W. JACOBS and JANA S. JACOBS,
individually, and as parents, next friends, and
guardians of F.D.J., a minor child

COURTNEY M. KASSEL and KELLY L. SCOTT,
individually, and as parents, next friends, and
guardians of A.G.S., a minor child

VS. CASE NO. 60CV-15-3153

NATHANIEL SMITH, MD, MPH,
Director of the Arkansas Department of Health,
in his official capacity, and his successors in office

DEFENDANT

ORDER

On the 23rd day of November, 2015 came on for hearing the pending motions in this matter, and from the pleadings filed herein, together with all materials properly attached to such pleadings, and the argument of counsel, the court doth order as follows:

1. The *Motion for Summary Judgment* of plaintiffs Marisa Pavan and Terrah Pavan, individually, filed on October 1, 2015, is granted in part and denied in part, as set forth more fully in the court's *Memorandum Opinion*. The *Motion for Summary Judgment*, of plaintiffs Marisa Pavan and Terrah Pavan, as parents, next friends, and guardians of their minor child, is denied.

2. The *Motion for Summary Judgment* of plaintiffs Leigh Jacobs and Jana Jacobs, individually, filed on October 1, 2015, is granted in part and denied in part, as set forth more fully in the court's *Memorandum Opinion*. The *Motion for Summary Judgment* of plaintiffs

Leigh Jacobs and Jana Jacobs, as parents, next friends, and guardians of their minor child, is denied.

3. The *Motion for Summary Judgment* of plaintiffs Courtney Kassel and Kelly Scott, individually, filed on October 1, 2015, is granted in part and denied in part, as set forth more fully in the court's *Memorandum Opinion*. The *Motion for Summary Judgment* of plaintiffs Courtney Kassel and Kelly Scott, as parents, next friends, and guardians of their minor child, is denied.

4. Defendant's *Motion for Summary Judgment*, filed on August 13, 2015, is granted in part and denied in part. Summary judgment is granted with respect to the claims of the plaintiffs as parents, next friends, and guardians of their respective minor children, and all causes of action by the plaintiffs in such representative capacities are hereby dismissed with prejudice. Defendant's motion is denied with respect to all other relief requested.

5. Defendant's *Motion for Stay*, filed on November 24, 2015, is denied. The majority of the defendant's arguments are mooted by entry of this written *Order* and accompanying *Memorandum Opinion*. Any other grounds for requesting a stay are specifically rejected and denied. This court has diligently reviewed the pleadings filed in this case, together with all of the relevant case law. The court has made the best legal decision it can make, and has done so in the most judicially efficient manner available—and as promptly as possible—given the complicated nature of the arguments and the quickly evolving law.

It is important that the general public have confidence that decisions issued by the judiciary are based solely on the Rule of Law. This does not mean everyone will agree with any given decision. In fact, a substantial argument can be advanced that in a healthy, flourishing democracy there will always be some citizens who agree—and others who disagree—with every

legal conclusion reached by the courts. This is true whether the subject decision is in a criminal matter, a domestic proceeding, or any type of civil case, including cases involving constitutional issues.

Unnecessary delays in the issuance of opinions, as in the recent case of *Smith v. Wright*, 2015 Ark. 298 (June 26, 2015), do not promote societal confidence in judicial decisions. Such delays provide a breeding ground for speculation of political intrigue or other illegitimate reasons for the delay—whether true or not.

The default during appeal should be in favor of affording all United States citizens their full and complete constitutional protections and rights during the appeal, not the continued deprivation of those rights. As stated by the United States Supreme Court in *Romer v. Evans*, 717 U.S. 620, 623, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), “The United States Constitution ‘neither knows nor tolerates classes among citizens.’ ”

The Supreme Court, in *Obergefell v. Hodges*, 576 U.S. ___ (2015), specifically enumerated “birth and death certificates” as benefits of marital status. The plaintiffs herein, as well as many other Arkansas citizens negatively affected by the present statutory birth certificate language, were deprived for many years of their constitutional right to marriage. Those constitutional rights continued to be unnecessarily denied to them during the lengthy appeal process in *Wright*.

If, upon proper application by the State, the Arkansas Supreme Court desires to issue a stay that deprives the Plaintiffs, and all other similarly situated Arkansas citizens, of their constitutional rights pending the appeal of this matter, the Justices have been elected to judicial positions with the authority to issue such a stay. This court, however, will not allow its authority to be used to deprive these Arkansans any longer of their constitutional rights.

6. The Supreme Court issued the *Obergefell* decision in June of this year, and the full impact of such decision on many areas formerly considered to be established law will not be realized for some time. The Arkansas General Assembly has not yet even had the opportunity to meet in legislative session to begin addressing any revisions to the Arkansas Code that may be required by the *Obergefell* decision. The defendant herein has correctly pointed out that the Arkansas Department of Health, as part of the executive branch, does not have the authority to enact legislation. Further, defendant also correctly states that it is the State Board of Health, not the Department of Health, which has been given the authority by the General Assembly to promulgate rules or regulations concerning certificates of birth.

The court also notes that the judicial branch does not have the authority to legislate. Enactment of legislation is the sole province of the legislative branch. The courts do however have the authority to strike unconstitutional words and phrases from statutes, if the remaining portion makes sense as redacted. That is what the court has attempted to do in its ruling in this case, so that the State Board of Health can revise its rules and regulations concerning birth certificates to meet the constitutional parameters established in *Obergefell*. This would allow the vital statistics relating to original and amended birth certificates to be made in a constitutional and orderly manner until such time as the General Assembly can address changes to the statutory scheme.

7. The court's *Memorandum Opinion* issued on even date herewith is incorporated by reference herein as though set forth word for word.

8. If the defendant has not already complied with the court's oral instruction from the bench, it is ordered to forthwith issue amended birth certificates showing: Marisa N. Pavan and Terrah D. Pavan as the parents of T.R.P., a minor child, Leigh D.W. Jacobs and Jana S.

Jacobs as the parents of F.D.J., a minor child, and Courtney M. Kassel and Kelly L. Scott, as the parents of A.G.S., a minor child.

9. This *Order* and accompanying *Memorandum Opinion* fully and completely resolve all pending issues and causes of action before the court¹ and therefore constitute a final judgment for purposes of any appeal.

IT IS SO ORDERED AND ADJUDGED.



TIMOTHY DAVIS FOX
CIRCUIT JUDGE

12.1.2015
DATE

¹The *Complaint* also requests the award of attorney's fees and costs. The Court has repeatedly stated the award of attorney's fees and costs is a collateral matter that does not affect the finality of a judgment. *See, Midwest Terminals of Toledo, Inc. v. Palm*, 2011 Ark. 81, 378 S.W3d 761, 2011 LEXIS 76, *Nettleton Sch. Dist. v. Owens*, 329 Ark. 367, 948 S.W.2d 94 (1997); *Marsh & McLennan of Ark. v. Herget*, 321 Ark. 180, 900 S.W.2d 195 (1995); and *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991).