

Cite as 2019 Ark. 28

SUPREME COURT OF ARKANSAS

No. CV-17-873

PROTECT FAYETTEVILLE F/K/A
REPEAL 119; PAUL SAGAN; PETER
TONNESSEN; AND PAUL PHANEUF
APPELLANTS

STATE OF ARKANSAS
INTERVENOR/APPELLANT

V.

THE CITY OF FAYETTEVILLE,
WASHINGTON COUNTY, ARKANSAS;
LIONELD JORDAN, IN HIS OFFICIAL
CAPACITY AS MAYOR OF
FAYETTEVILLE; ADELLA GRAY;
SARAH MARSH; MARK KINION;
MATTHEW PETTY; ALAN LONG;
JUSTIN TENNANT; MARTIN W.
SCHOPPMAYER, JR.; AND JOHN LA
TOUR, IN THEIR OFFICIAL
CAPACITIES AS ALDERMEN OF THE
FAYETTEVILLE CITY COUNCIL
APPELLEES

PFLAG NORTHWEST ARKANSAS;
ANTHONY CLARK; NOAH MEEKS;
AND LIZ PETRAY
INTERVENORS/APPELLEES

Opinion Delivered: January 31, 2019

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. CV-15-1510-1]

HONORABLE DOUG MARTIN, JUDGE

REVERSED AND DISMISSED.

RHONDA K. WOOD, Associate Justice

This interlocutory appeal presents issues of first impression concerning legislative and executive privilege in Arkansas. The State filed the appeal pursuant to Arkansas Rule of Appellate Procedure—Civil 2(f) after the circuit court denied its motion for protective order and motion to quash. Because of our decision in *Protect Fayetteville v. City of Fayetteville*, 2019 Ark. 30, to dismiss the underlying case, the discovery issues presented in this case are moot. Nevertheless, because we find that these first-impression issues are of substantial public interest, we conclude that the mootness exception applies, and we hold that legislative and executive privileges exist in Arkansas.

I. *Background*

In February 2015, the General Assembly passed the Intrastate Commerce Improvement Act. Act of Feb. 24, 2015, No. 137, 2015 Ark. Acts 570 (Act 137). Act 137's stated intent is "to subject entities to 'uniform nondiscrimination laws and obligations.'" *Protect Fayetteville v. City of Fayetteville*, 2017 Ark. 49, at 8, 510 S.W.3d 258, 263. Following the passage of Act 137, the City of Fayetteville passed Ordinance 5781, entitled "An Ordinance to Ensure Uniform Nondiscrimination Protections Within the City of Fayetteville For Groups Already Protected to Varying Degrees Throughout State Law." *Protect Fayetteville* and several city residents sued to invalidate Fayetteville's ordinance because it conflicted with Act 137. Fayetteville filed a motion to dismiss the lawsuit, claiming that no conflict existed or, even if it did, Act 137 violated equal protection. The State intervened to defend the constitutionality of Act 137. The circuit court concluded

that the ordinance did not conflict with state law. Protect Fayetteville and the residents appealed, and we reversed and remanded, holding that Fayetteville's ordinance conflicted with Act 137 and "therefore it cannot stand." *Id.* at 10, 510 S.W.3d at 263.

Following remand, the circuit court permitted PFLAG of Northwest Arkansas, Anthony Clark, Noah Meeks, and Liz Petray (collectively, PFLAG) to intervene and to file a counterclaim that Act 137 violated the Equal Protection Clause. PFLAG then initiated discovery with the State. They sent the State requests for production of documents, which involved the legislative and executive branches. In addition, Fayetteville and PFLAG subpoenaed two state legislators, Senator Bart Hester and Representative Bob Ballinger, for deposition. The parties attempted but were unable to resolve the discovery disputes.

The State filed a motion to quash the subpoenas and for a protective order barring the discovery requests. It claimed that the legislative privilege protected the legislators from deposition and that the legislative and executive privileges protected the State from producing documents held by the legislative and executive branches. Following the submission of briefs and a hearing, the circuit court issued an order concluding that legislative privilege provides "no additional protections for legislators in relation to discovery requests beyond the protection from being questioned about any speech or debate in either house" and that the "executive privileges asserted by the State are not recognized in Arkansas." Therefore, the circuit court denied the State's motions to quash and for a protective order.

In October 2017, the State filed a Rule 2(f) petition requesting permission to appeal to this court and sought a discovery stay pending our review. We granted the Rule 2(f) petition and stayed the discovery.

II. Mootness

A case is moot when a decision would not have any practical legal effect upon a then existing legal controversy. *Dillon v. Twin City Bank*, 325 Ark. 309, 924 S.W.2d 802 (1996). Without question, our decision in this matter would have no effect on the now-resolved controversy as a result of our decision to reverse and dismiss in *Protect Fayetteville v. City of Fayetteville*, 2019 Ark. 31. This alone does not foreclose our consideration of the issues on appeal.

We have recognized two exceptions to the mootness doctrine: matters that are capable of repetition yet evading review and matters involving a substantial public interest that are likely to be litigated in the future. *Ark. Gas Consumers, Inc. v. Ark. Public Serv. Comm’n*, 354 Ark. 37, 118 S.W.3d 109 (2003). In limited cases we have applied one of the exceptions and addressed the issues raised despite completion of the controversy between the parties. See *Nathaniel v. Forrest City Sch. Dist. No. 7*, 300 Ark. 513, 780 S.W.2d 539 (1989); *Owens*, 299 Ark. 373, 772 S.W.2d 596; *Cummings v. Washington Cty. Election Comm’n*, 291 Ark. 354, 724 S.W.2d 486 (1987); *Robinson v. Ark. State Game & Fish Comm’n*, 263 Ark. 462, 565 S.W.2d 433 (1978); *Dotson v. Ritchie*, 211 Ark. 789, 202 S.W.2d 603 (1947); *Carroll v. Schneider*, 211 Ark. 538, 201 S.W.2d 221 (1947).

We have explained that “where considerations of public interest or the prevention of future litigation are present, the choice remains ours as to whether we may elect to settle an issue, even though moot.” *Duhon v. Gravett*, 302 Ark. 358, 360, 790 S.W.2d 155, 156 (1990); *see also Ark. Gas Consumers, Inc.*, 354 Ark. at 47–48, 118 S.W.3d at 115. *Duhon* concerned the constitutionality of the writ of execution statutes. Because this court foresaw future litigation and recognized the substantial public interest involved, it chose to resolve the constitutional issue, even though the judicable controversy was moot. *Id.* This court has applied the substantial-public-interest exception to address moot issues from 1892 to as recently as 2003. *See, e.g., Ark. Gas Consumers, Inc.*, 354 Ark. 37, 118 S.W.3d 109; *Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001); *Wilson v. Pulaski Ass’n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997); *Owens v. Taylor*, 299 Ark. 373, 772 S.W.2d 596 (1989); *Cain v. Carl-Lee*, 171 Ark. 155, 283 S.W. 365 (1926); *Wilson v. Thompson*, 56 Ark. 110, 19 S.W. 321 (1892).

The issues of legislative and executive privilege raised here are of first impression in Arkansas. Guidance is needed for the public in pursuing litigation against the State, for the legislative and executive branches in conducting their business and responding to discovery requests, and for circuit courts when ruling on discovery disputes. This court is mindful that many issues involving privilege will not be resolved completely until a specific factual situation is before us. Nevertheless, the substantial public interest obliges us to decide the threshold issue of whether these privileges exist in Arkansas.

III. *Legislative Privilege*

The legislative privilege is derived from the Speech and Debate Clause of the Arkansas Constitution. It states that “for any speech or debate in either house,” members of the General Assembly “shall not be questioned in any other place.” Ark. Const. art. 5, § 15.

Our primary goal in construing and interpreting a constitutional provision is to ascertain and give effect to the intent of Arkansans. *Martin v. Kohls*, 2014 Ark. 427, 444 S.W.3d 844. We give the language of the constitutional provision its plain and ordinary meaning. *Kelly v. Martin ex rel. State*, 2014 Ark. 217, 433 S.W.3d 896. In addition, when we engage in constitutional construction and interpretation, we look at the history of the provision. *Bryant v. English*, 311 Ark. 187, 193, 843 S.W.2d 308, 311 (1992); *Gatzke v. Weiss*, 375 Ark. 207, 211, 289 S.W.3d 455, 458 (2008). We have also compared prior versions of our constitution to interpret its meaning. See *State v. Brown*, 356 Ark. 460, 469, 156 S.W.3d 722, 728 (2004).

Although this court has not previously construed the Speech and Debate Clause, we do not need to look far to ascertain its objectives. The language in our clause is identical to the Speech and Debate Clause in the United States Constitution. Given the history of the provision, this appears to have been deliberate. The Speech and Debate Clause in our prior constitution of 1868 contained the following language: “And they [Senators and Representatives] shall not be questioned in any other place for remarks made in either House.” Ark. Const. of 1868, art. 5, § 12. In the 1874 Constitution, which contains the

current version of the clause, the people of Arkansas replaced the prior version with the exact language of the United States Constitution's Speech and Debate Clause.

Typically, when this court interprets constitutional provisions that are identical or virtually identical to the federal constitution, we adopt the interpretation of the United States Supreme Court. Compare *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997); *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995), with *Brown*, 356 Ark. 460, 156 S.W.3d 722. For this reason, we conclude, like the Supreme Court, that the Speech and Debate Clause affords legislators privilege from certain discovery and testimony and that the privilege extends beyond statements and acts made on the literal floor of the House. We therefore do not read the Speech and Debate Clause as narrowly as the circuit court did in this case and reverse his interpretation. However, we refuse to further set the parameters of the privilege without more facts before us. This is the more prudent course. The development will occur in future cases based on specific facts before us.

IV. *Executive Privilege*

Next, we address a second issue of first impression—whether executive privilege exists in Arkansas. We conclude that the Arkansas Constitution provides for the privilege.

Our state constitution provides a specific separation-of-powers provision:

§ 1. The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.

§ 2. No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Ark. Const., art. 4, §§ 1, 2. The separation-of-powers doctrine is “a basic principle upon which our government is founded and should not be violated or abridged.” *Fed. Express Corp. v. Skelton*, 265 Ark. 187, 197–98, 578 S.W.2d 1, 7 (1979). Our separation-of-powers jurisprudence closely guards the balance of powers between branches, with each branch being delegated specified powers. “The legislative branch . . . has the power and responsibility to proclaim the law through statutory enactments. The judicial branch has the power and responsibility to interpret the legislative enactments. The executive branch has the power and responsibility to enforce the laws as enacted and interpreted by the other two branches.” *Id.*

The executive privilege was first and perhaps most notably exercised in *United States v. Nixon*, 418 U.S. 683 (1974), when the United States Supreme Court recognized that the executive privilege was necessary to provide the chief executive with access to candid advice in order to explore policy alternatives and reach appropriate decisions. Other state courts have followed *Nixon* because “refusal to recognize the gubernatorial privilege would subvert the integrity of the governor’s decision-making process, damaging the functionality of the executive branch and transgressing the boundaries set by our separation of powers doctrine.” *Freedom Found. v. Gregoire*, 178 Wash. 2d 686 (2013); see *Republican Party of N.M. v. N.M. Taxation & Revenue Dep’t*, 283 P.3d 853 (N.M. 2012); *State ex rel. Dann v. Taft*, 848 N.E.2d 472 (Ohio 2006); *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777 (Del. Super. Ct.

1995); *Hamilton v. Verdow*, 414 A.2d 914 (Md. 1980); *Nero v. Hyland*, 386 A.2d 846 (N.J. 1978). Considering the separation-of-powers doctrine, we hold that the executive privilege also exists in Arkansas. Again, its application and limitations will bear out in future cases. We therefore reverse the circuit court's finding that executive privilege does not exist in Arkansas.

Reversed and dismissed.

Special Justices HUGH FINKELSTEIN and MAUREEN HAZINSKI HARROD join in this opinion.

BAKER and WYNNE, JJ., concur.

GOODSON and HART, JJ., not participating.

ROBIN F. WYNNE, Justice, concurring. I agree with the majority that our decision in *Protect Fayetteville v. City of Fayetteville*, 2019 Ark. 30, renders this interlocutory appeal moot. The issue, in my opinion, with applying the substantial-public-interest mootness exception in this case is that mere recognition of the privileges will not prevent any future litigation. See *Terry v. White*, 374 Ark. 387, 288 S.W.3d 199 (2008) (declining to apply the substantial-public-interest exception where a decision would in no way prevent future litigation). The majority opinion gives no direction to the bench or bar that would permit the privileges to be properly applied, thus requiring the scope of the privileges to be developed entirely in future litigation. Because we cannot delve into the scope of the

applicable privileges in this case, I would wait to address this issue until we are presented with a case that permits us to address what materials are covered by the privileges. Accordingly, I would simply dismiss the appeal as moot.

BAKER, J., joins.

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Marty Garrity, Executive Secretary, Legislative Council; *Steve Cook*, Senate Chief Counsel; *John T. Vines*, House Counsel; and *Frank Arey*, Legal Counsel, Legislative Audit, for the Arkansas Legislative Council, President Pro Tempore of the Senate, and Speaker of the House of Representatives as Amicus Curiae in support of Appellant State of Arkansas.

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