CV-15-227

IN THE ARKANSAS SUPREME COURT

NATHANIEL SMITH, M.D., et al. **APPELLANTS**

vs. **NO. CV-15-227**

M. KENDALL WRIGHT AND JULIA E. WRIGHT, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, G.D.W. AND P.L.W., ET AL. **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, SECOND DIVISION

THE HONORABLE CHRIS PIAZZA, CIRCUIT JUDGE

STATE APPELLANTS' BRIEF

LESLIE RUTLEDGE
Arkansas Attorney General

By: Colin R. Jorgensen (2004078)
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201-2610
(501) 682-3997
colin.jorgensen@arkansasag.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND RULES

BOOKS AND TREATISES

STATEMENT OF THE CASE

The Plaintiff-Appellees ("Appellees") challenge the constitutionality of Amendment 83 to the Arkansas Constitution ("Amendment 83") and certain Arkansas laws regarding the definition of marriage. Amendment 83 and the marriage statutes codify the traditional man-woman definition of marriage and prohibit the recognition of same-sex marriages of other jurisdictions under Arkansas law. On May 9, 2014, the circuit court entered an order declaring Amendment 83 unconstitutional. (Add. 786-98; R 1431-43).[1] After this Court dismissed the initial appeal filed by the State Defendant-Appellants (the "State") for lack of a final order, the circuit court entered subsequent orders granting injunctive relief to Appellees. (Add. 818; R 1463). The defendant-appellants filed timely notices of appeal of the circuit court's orders (Add. 825, 828, 831; R 1470, 1484; 1504), and the appeal was docketed as Case No. CV-14-427.

The parties filed their appellate briefs, and the Court held oral argument on November 20, 2014, in Case No. CV-14-427. On January 23, 2015, the State filed a motion requesting a second oral argument, noting that the composition of the Court has changed due to the election of Associate Justice Rhonda Wood and Associate Justice Robin Wynne, whose terms on the Court began in January 2015.

[1] References to the Addendum and Record refer to the Addendum and Record in Case No. CV-14-427.

Appellees responded in opposition to the State's request for a second oral argument. On February 5, 2015, the Court entered a per curiam order in which the Court noted that "the parties have taken competing positions regarding the justices who will serve on this case" and directed the parties "to advise this court by formal response, within thirty days of this order, of any authority supporting their respective positions regarding the justices who will preside over this case." *Id*. Appellees filed their response on February 17, 2015, and the State and separate county defendant-appellants filed their responses on March 6, 2015.

On April 2, 2015, the Court entered a second per curiam order providing: "Responses to the court's per curiam order of February 5, 2015, are taken as a new case. Simultaneous briefing due in ten days. Danielson, J., dissents. New Case No. is CV-15-227." The State submits this brief in response to the Court's April 2, 2015 per curiam order.

ARGUMENT

I. Introduction

In their initial response to the Court's February 5, 2015 per curiam in Case No. CV-14-427, Appellees stated that "[t]here is no authority that Appellees can find directly on point in a search of all state and federal courts" and "[t]he issue presented is novel." *Id*., ¶ 3. Although Appellees conceded that they offered no authority to support their position, Appellees asked that the appeal in CV-14-427 "move forward for decision by the Justices under whom it was previously submitted." *Id*., ¶ 9. On April 8, 2015, in the instant case, Appellees filed a "Motion to Withdraw their February 17, 2015 Response to Per Curiam, 2015 Ark. 38 and to Dismiss CV 15-227 as Moot." In their April 8 motion, Appellees "withdraw their response to the Court's February 5, 2015 per curiam, 2015 Ark. 38, requesting briefs on which justices should decide the case." *Id*. at 1. Appellees now "believe that the Justices that presently constitute the Court should decide the case[.]" *Id*. According to Appellees, their motion renders this case moot. *Id*. at 2. The State agrees that the appeal in CV-14-427 should be decided by the seven Justices who are currently serving terms on the Court, because only the Justices currently serving terms on the Court possess the constitutional authority to decide cases in 2015. Although the parties apparently agree about the question presented in this case, the State submits this brief as requested by the Court.

Amendment 80 to the Arkansas Constitution provides that "[t]he judicial power is vested in the Judicial Department of state government, consisting of a Supreme Court and other courts established by this Constitution." *Id*., § 1. "The Supreme Court shall be composed of seven Justices, one of whom shall serve as Chief Justice." *Id*., § 2(A). "Justices of the Supreme Court . . . shall serve eight-year terms." *Id*., § 16(A). Amendment 80 provided that Supreme Court Justices in office at the time the Amendment took effect "shall continue in office until the end of the terms for which they were elected or appointed." *Id*., § 19(A)(1).

II. Associate Justice Wood, and not Special Justice McCorkindale, should participate in the Court's decision in Case No. CV-14-427.

In its January 23, 2015 motion requesting a second oral argument in Case No. CV-14-427, the State noted the following:

> Former Associate Justice Cliff Hoofman recused from this case and was replaced on this case by Special Justice Robert W. McCorkindale, appointed by former Governor Mike Beebe. Justice Hoofman's term on the Court has ended, and on or about January 6, 2015, Associate Justice Rhonda K. Wood replaced Justice Hoofman on the Court. Justice Wood was not present at the oral argument on November 20, 2014.

Id., ¶ 3. In its March 6, 2015 response to the Court's February 5 per curiam, the State contended that Associate Justice Wood should participate in deciding Case No. CV-14-427.

Amendment 80 provides that "[i]f a Supreme Court Justice is disqualified or temporarily unable to serve, the Chief Justice shall certify the fact to the Governor, who within thirty (30) days thereafter shall commission a Special Justice. . ." *Id*., § 13(A). Amendment 80 provides further that "Special and retired Justices and Judges selected and assigned for *temporary* service shall meet the qualifications of Justices or Judges on the Court to which selected or assigned." *Id*., § 13(E) (emphasis added). Taken together, these provisions of Amendment 80 indicate that the appointment of a Special Justice is "temporary," and the purpose is limited to filling a vacancy created by the disqualification of a sitting Justice for only so long as that sitting Justice is disqualified. Taken together, these provisions indicate that the appointment of a Special Justice expires when the disqualification of the sitting Justice expires. Ordinarily, when a Special Justice is appointed due to the recusal of a sitting Justice from a specific case, the appointment would expire at the end of that case. However, where, as in this case, the disqualification is mooted prior to a decision because the recusing Justice is replaced by a newly elected Justice, the provisions of Amendment 80 indicate that the newly elected Justice should replace the previously appointed Special Justice, because the recusing Justice is no longer on the Court and there is no longer a disqualification that warrants the service of a Special Justice. If former Associate Justice Hoofman had not recused, he would now be replaced on the Court by Associate Justice

Wood. There is no longer a disqualification warranting Special Justice McCorkindale's service in Case No. CV-14-427. Under the provisions of Amendment 80, Associate Justice Wood should participate in the decision in Case No. CV-14-427.

The State has not found a statute or rule that specifically governs the question whether Special Justice McCorkindale or Associate Justice Wood should participate in deciding Case No. CV-14-427. Rule 1-7 of this Court's Rules calls for any decision that is not governed explicitly by statute or rule to be made in accordance with "existing practice," but the State is unaware of any existing practice regarding whether a Special Justice appointed to hear a case in the place of a former Associate Justice, or the sitting Associate Justice who has now replaced the former Associate Justice on the Court, should decide a case that is submitted during the former Justice's term, but not decided until the new Justice's term. In the absence of any existing practice, the State believes that the question should be resolved in favor of duly-elected and sitting Associate Justice Wood, who undeniably has the constitutional authority to participate in deciding cases during her term.

In *Henry v. Powell*, 262 Ark. 763, 561 S.W.2d 296 (1978), this Court considered "whether the regular judge of a chancery court can, within 90 days after the entry of an order made by a special judge in the regular judge's absence, vacate

the special judge's order and set the matter down for reconsideration." 262 Ark. at 764. The Court held that "the regular judge does have that power." *Id*. The Court explained:

> As we have said, the power to act *during the term* exists to avoid the necessity for an appeal when a judge decides upon further reflection that he has made a mistake. *That power to act should be vested in someone*. If the judge who made the order retires or becomes disabled or dies, *or if his authority as a special judge comes to an end, the corrective power must logically and reasonably pass to his successor, else we have a government by individuals rather than by a continuing system of law*.

262 Ark. at 766 (emphasis added). Although the procedural posture of *Henry v. Powell* was not identical to the procedural posture of Case No. CV-14-427, the Court's ruling in *Henry v. Powell* strongly indicates that Special Justice McCorkindale's authority in Case No. CV-14-427 concluded at the end of 2014, and that authority passed to former Associate Justice Hoofman's successor, Associate Justice Wood. If the Court denies Associate Justice Wood her "power to act during the term," then the Court will endorse "a government by individuals rather than by a continuing system of law." *Id*. *See also* 48A *C.J.S. Judges* § 372 ("The appearance of the regular judge to resume his or her duties ordinarily operates to vacate the office of the special or substitute judge, without any order to that effect, and any decree rendered thereafter by the special or substitute judge is void.") (citing *People v. De Puy*, 32 Misc. 2d 917 (N.Y. County Ct. 1962); *Atlanta*

Coach Co. v. Cobb, 174 S.E. 131 (Ga. 1934); and *Cates v. Wunderlich*, 210 Ark. 724, 197 S.W.2d 482 (1946)); *Fernwood Mining Co. v. Pluna*, 136 Ark. 107, 205 S.W. 822 (1918) (holding that the authority of a special circuit judge, who was elected by attorneys in attendance at court upon the regular judge's failure to appear on the opening day of the term, ceased upon the regular judge's appearance).

Amendment 80 requires the concurrence of at least four Justices of this Court for a decision in any case. *Id*., § 2(C). Quorum requirements generally must be satisfied as of the date on which the opinion is filed, regardless of whether an opinion is filed after one member leaves the panel. *See*, *e.g.*, *Jackson v. State*, 969 A.2d 277 (Md. 2007) (three-judge panel opinion was valid where one of the three judges died before the case was decided, but the two remaining judges agreed on the reasoning and result and filed a 2-0 opinion); *Wildwood Medical Ctr., LLC v. Montgomery County*, 954 A.2d 457 (Md. 2008) (holding that where the nominal author of the opinion of a three-judge panel passed away before the final opinion was filed and the remaining judges split over the result, the opinion was invalid). If the quorum requirement is determined on the date of the Court's opinion, then the composition of the Court on the date that the Court files its opinion is the correct composition of the Court.

In summary, when the Court files its opinion in Case No. CV-14-427, the participating Justices should consist of the Court's seven duly elected and sitting Justices on the date of the opinion. Former Associate Justice Hoofman's recusal is now moot, because his term has ended and he has been replaced on the Court by Associate Justice Wood. Associate Justice Wood, and not Special Justice McCorkindale, should participate in the Court's decision in Case No. CV-14-427.

III. Associate Justice Wynne, and not former Associate Justice Corbin, should participate in the Court's decision in Case No. CV-14-427.

In their initial response to the Court's per curiam, which Appellees have now withdrawn, Appellees presumed that this case was fully and finally considered and decided by the Court in 2014, but the Court has not filed an opinion, nor has the Court announced that it has ever reached a final opinion in Case No. CV-14-427. Presumably, if the 2014 Court finalized a decision prior to former Associate Justice Corbin's retirement,[2] the Court would have filed the opinion months ago. In any event, the Court continues to grapple with Case No. CV-14-427 and consider issues in the case, months after former Justice Corbin's retirement. And the Court has yet to file an opinion. Under these circumstances, former Associate Justice

[2] As noted in the State's oral argument motion in Case No. CV-14-427, former Associate Justice Corbin retired at the end of 2014 and Associate Justice Wynne now holds that seat on the Court.

Corbin should not participate in the Court's ongoing consideration of issues in the case, nor should he participate in the Court's final opinion in Case No. CV-14-427.

In *Cates v. Wunderlich*, *supra*, a duly elected chancery judge, Judge Cherry, entered the armed forces in 1944, but he did not resign from the bench and, in fact, returned and reassumed his duties as chancellor on December 1, 1945. During his absence, Judge Westbrooke acted as chancellor. 210 Ark. at 725. Evidentiary proceedings were completed in the case of *Cates v. Wunderlich* in September 1945, "when Judge Westbrooke took the case under submission." *Id*. at 726. In November 1945, Judge Westbrooke "reached a mental conclusion as to what the decree should be," and he asked the attorney for Cates to draw and present to Judge Westbrooke a decree favorable to Cates. On December 20, 1945 (after Judge Cherry returned and reassumed his duties as chancellor on December 1, 1945), Judge Westbrooke received the requested decree from Cates' attorney, signed the decree, and dated the decree November 30, 1945. The decree was entered by the clerk on December 26, 1945. When the attorneys for Wunderlich received Judge Westbooke's decree, they questioned the authority of Judge Westbrooke to enter a decree after December 1, when Judge Cherry reassumed his duties, and they filed a motion to have the decree set aside. *Id*. The court (Judge Cherry) set aside the decree rendered by Judge Westbrooke, stating on the record: "I think the decree will have to be vacated and set aside, for the specific reason –

and I wish the order would show this – that the special chancellor's decree is effective as of the date he signs it, and the date he signed the decree was after he had ceased to be chancellor and I had taken over the office." *Id*. at 727.

On appeal, this Court affirmed Judge Cherry's decision, holding that "the Westbrooke decree was coram non judice and void." 210 Ark. at 727. This Court found that "[t]he purported decree by Judge Westbrooke was not rendered until December 20, 1945, which was the date that Judge Westbrooke signed the decree and sent it to the clerk and to opposing counsel." *Id*. The Court rejected the argument that Judge Westbrooke's mental determination in November was equivalent to a decree because "there was never a pronouncement by the chancellor from the bench . . . and there was never any notation on the judgment docket until December 26th." *Id*. at 728. The Court summarized its reasoning:

> [T]he facts are clear in this case, to wit: that the decree of Judge Westbrooke was not rendered until he signed it on December 20, 1945; and, even if otherwise valid, *the decree was not effective until December 26, 1945 (the date it was entered by the clerk)*. Each of these dates was after Judge Cherry had resumed his duties as regular chancellor.
>
> *Judge Westbrooke's power to act in this case ceased on December 1, 1945.*

Id. at 728-29 (emphasis added). The Court also dismissed the argument that Judge Westbrooke's decree should be recognized due to the fact that he dated it November 30: "We emphatically state that there was no attempt to 'back-date' the

paper to circumvent the return of Judge Cherry. The utmost of good faith and professional ethics prevails in all respects." *Id*. at 728. *See also*, *Daley v. Boroughs*, 310 Ark. 274, 282-83, 835 S.W.2d 858 (1992) ("We note in this regard that had the special judge signed an order after [the duly elected judge] returned to the bench, the order would have been subject to challenge.").

Cates v. Wunderlich is instructive for several reasons. First, it clearly stands for the proposition that former Associate Justice Corbin has no authority to rule in Case No. CV-14-427 after the date of his retirement, and only Associate Justice Wynne can participate in any decision by the Court at this time. Second, *Cates v. Wunderlich* indicates that Special Justice McCorkindale should not participate in any decision at this point, because former Associate Justice Hoofman would lack the authority to rule now that his term has concluded, and only Associate Justice Wood has the authority to now rule. Third, *Cates v. Wunderlich* undercuts Appellees' (now withdrawn) contention that the 2014 Court should issue the Court's decision in this case because the case was submitted in 2014 and the 2014 Court allegedly conferenced and voted in the case prior to the end of 2014. Even assuming Appellees' alleged facts are true, it is clear that former Justices whose terms have ended cannot participate in any decision rendered in 2015, because the date the opinion is filed with the Clerk controls, and the Justices who participate in the opinion must be duly sitting Justices of the Court on the date the opinion is

rendered. Under *Cates v. Wunderlich*, former Associate Justice Corbin cannot participate in a decision in Case No. CV-14-427. Any participation by former Associate Justice Corbin would render the Court's opinion "coram non judice and void." 210 Ark. at 727. In accordance with *Cates v. Wunderlich*, the 2015 Court should decide Case No. CV-14-427.

Because federal judges are appointed for life with no specific terms, they remain qualified to handle cases after retirement, so federal judges can and sometimes do participate in decisions handed down after retirement. However, federal judges typically participate in decisions handed down post-retirement only where consideration of the case and any internal vote of the court occurred prior to retirement. Where deliberation regarding a case occurs after a judge's retirement, even a federal judge who remains qualified for life typically does not participate in the court's decision. *See*, *e.g.*, *Gupta v. McGahey*, 737 F.3d 694, n.* (11th Cir. 2013) ("As an active judge of this Court at the time the en banc poll was conducted, Judge Barkett participated in this case. Because she retired from service on September 30, 2013, she did not participate in the consideration of this case after that date."); *Jackson v. Sedgwick Claims Mgmt. Servcs.*, 731 F.3d 556, n.* (6th Cir. 2013) ("The Honorable Boyce F. Martin, Jr., who was a member of the en banc court who heard this case, retired on August 16, 2013, and did not participate in the decision."); *U.S. v. Wyatt*, 672 F.3d 519, n.* (7th Cir. 2012)

("Circuit Judge Coffey retired on January 1, 2012, and did not participate in the decision on this petition for rehearing."); *U.S. v. McDaniel*, 433 Fed. Appx. 701, n.* (10th Cir. 2011) ("The Honorable Deanell Reece Tacha, who participated in the panel decision regarding this appeal, retired from service on June 1, 2011. As a result, she did not participate in the reissuance of this opinion. The remaining two judges are in agreement with respect to this disposition."); *U.S. v. Page*, 542 F.3d 257, n.* (1st Cir. 2008) ("Judge Cyr retired from the Court on March 31, 2008, and did not participate in consideration of this matter."); *Virginia Vermiculite v. W.R. Grace & Co.*, 156 F.3d 535, n.* (4th Cir. 1998) ("Senior Judge Merhige participated in the hearing of this case at oral argument but retired before the decision was filed. The decision is filed by a quorum of the panel.").

Of course, this is not a federal court, and the Justices of this Court are elected to serve specified terms, not appointed for life. A former Justice of this Court lacks the authority to participate in consideration of a case after the end of the Justice's term under any circumstances, and a newly elected Justice is vested with the authority to participate in cases and decide cases upon commencement of the new Justice's term. *See Henry v. Powell*, *supra*; *Cates v. Wunderlich*, *supra*. The State has found no authority to the contrary, and Appellees have offered none. The citizens of Arkansas have now elected Associate Justice Wynne to decide cases before this Court, commencing in January of 2015. Associate Justice Wynne

should participate in the Court's opinion in Case No. CV-14-427, and former Associate Justice Corbin should not.

III. Conclusion

The Justices of the 2015 Court should decide Case No. CV-14-427, including Associate Justice Rhonda Wood and Associate Justice Robin Wynne.

The State respectfully requests that if it would be helpful to the Court, the Court schedule a second oral argument in Case No. CV-14-427. *See Polasek v. State*, 16 S.W.3d 82, 84 (Tex. App. 2000) ("The purpose of oral argument is to help the court. Therefore, it must be the court that decides what it thinks would be helpful. At any point in the process, the court can always stop and hold oral arguments, if a majority of the court thinks it would be helpful.").

Respectfully Submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

By: /s/ Colin R. Jorgensen
Ark. Bar #2004078
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-3997
(501) 682-2591 (facsimile)
colin.jorgensen@arkansasag.gov

Attorneys for the State

CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, Assistant Attorney General, certify that on this 13th day of April, 2015, I have served the foregoing upon the following via electronic mail attachment:

Cheryl K. Maples
ckmaples@aol.com

Jack Wagoner III
jack@wagonerlawfirm.com

David M. Fuqua
dfuqua@fc-lawyers.com

Jason E. Owens
owens@rainfirm.com

/s/ Colin R. Jorgensen

CERTIFICATE OF COMPLIANCE

I, Colin R. Jorgensen, do hereby certify that I have submitted and served on opposing counsel an unredacted PDF document that complies with the Rules of the Supreme Court and the Court of Appeals of Arkansas. The PDF document is identical to the corresponding parts of the paper document from which it was created as filed with the Court. To the best of my knowledge, information, and belief formed after scanning the PDF document for viruses with an antivirus program, the PDF document is free from computer viruses. A copy of this certificate has been submitted with the paper copies filed with the Court and has been served on all parties.

/s/ Colin R. Jorgensen