

ARKANSAS COURT OF APPEALS

DIVISIONS IV & I

No. CA11-780

LES MARLOW, BROOKS “CHIP”
MEADOWS, CARY MARLOW, CHAD
MARLOW, and LEIGH CARSON
APPELLANTS

V.

UNITED SYSTEMS OF ARKANSAS,
INC., and GLENN PETKOVSEK
APPELLEES

Opinion Delivered February 13, 2013

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIRST DIVISION,
[NO. CV-08-2078]

HONORABLE LEON JOHNSON,
JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellants Les Marlow, Brooks “Chip” Meadows, Cary Marlow, Chad Marlow, and Leigh Carson appeal the May 11, 2011 order of the Pulaski County Circuit Court that granted appellee Glenn Petkovsek’s motion for attorneys fees and costs.¹ Petkovsek was granted \$164,758.90 for his defense in the lawsuit initiated by appellants.² Appellants argue that Petkovsek is not a prevailing party because the breach-of-contract claim was against United Systems of Arkansas, not Petkovsek. Alternatively, appellants argue that if this court does determine that Petkovsek is a prevailing party, the award of attorneys fees should still be

¹We note that subsequent to the trial court’s order, several appellants have had this debt discharged completely by filing Chapter 7 bankruptcy. This opinion only applies to those appellants who have not completely discharged this debt under Chapter 7.

²Appellee United Systems of Arkansas, Inc., also requested fees and costs; however, the order only granted fees and costs to Petkovsek.

reversed because attorneys fees and costs are not available to a prevailing party in a wrongful-discharge case. We find no error and affirm.³

This case commenced with a complaint filed in 2008 by Les Marlow against Glenn Petkovsek and United Systems of Arkansas, Inc., for breach of contract and breach of the duties of good faith and fair dealing implied within that contract. Les, Chad, and Cary Marlow, along with Chip Meadows and Leigh Carson, each filed wrongful-termination-in-violation-of-public-policy claims against Glenn Petkovsek and United Systems. Various counterclaims were filed against appellants, including breach of contract, breach of fiduciary duty, and conversion. The jury entered verdicts in favor of United Systems on its claims but awarded zero damages. The jury found that none of the plaintiffs' claims were proved, entering defense verdicts for Petkovsek and United Systems. Upon consideration of a motion for attorneys fees and costs submitted by United Systems and Petkovsek, the trial court found that both were entitled to fees and costs, but only awarded Petkovsek \$164,758.90 for his successful defense.⁴

For their first point on appeal, appellants argue that Petkovsek was not a prevailing party under Arkansas Code Annotated section 16-22-308.⁵ More specifically, appellants

³This is the second time this case is before us. This court initially ordered rebriefing due to numerous deficiencies. *See Marlow v. United Sys. of Arkansas, Inc.*, 2012 Ark. App. 265.

⁴This amount was exactly one-half of the total amount of fees and costs requested.

⁵(Repl. 1999). It provides as follows:

In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract,

contend that Petkovsek cannot recover fees and costs as a prevailing party because he did not have a contract with appellants. We are precluded from addressing this argument because it is raised for the first time on appeal. It is axiomatic that this court will not consider arguments raised for the first time on appeal.⁶ Moreover, a party cannot change the grounds for an objection or motion on appeal, but is bound by the scope and nature of the arguments made at trial.⁷ Accordingly, we do not reach the merits of this argument on appeal.

Next, appellants argue that attorneys fees and costs are not available to a prevailing party in a wrongful-discharge-against-public-policy case. We disagree. In Arkansas, the general rule is that “when the term of employment in a contract is left to the discretion of either party, or left indefinite, or terminable by either party, either party may put an end to the relationship at will and without cause.”⁸ Stated another way, an employer may terminate the employment of an at-will employee without cause.⁹ However, an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state.¹⁰ The public-policy exception presents an exclusive contract cause

unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney’s fee to be assessed by the court and collected as costs.

⁶*Boellner v. Clinical Study Ctrs., LLC*, 2011 Ark. 83, 378 S.W.3d 745.

⁷*Id.*

⁸*City of Huntington v. Mikles*, 96 Ark. App. 213, 240 S.W.3d 138 (2006).

⁹*Id.*

¹⁰*Id.*

of action.¹¹ The exception is limited and not meant to protect merely private or proprietary interests.¹²

Here, appellants' claims were based on breach of contract and wrongful discharge against public policy. Section 16-22-308 allows for attorneys fees to be awarded in the actions filed by appellants against Petkovsek. Our supreme court has stated that when an employee brings a wrongful-discharge action in violation of public policy, there is an exclusive contract cause of action. Therefore, attorneys fees are allowable in this case. Accordingly, we affirm.

Affirmed.

GLADWIN, C.J., and PITTMAN, WALMSLEY, and WOOD, JJ., agree.

HIXSON, J., dissents.

KENNETH S. HIXSON, Judge, dissenting. Appellants, Les Marlow, Chad Marlow, Cary Marlow, Brooks Meadows, and Leigh Carson were employed by appellee, United Systems of Arkansas, Inc. (hereinafter referred to as "United Systems"). Appellee, Glenn Petkovsek, president of United Systems, terminated the appellants. The appellants filed a lawsuit against United Systems and Petkovsek alleging, *inter alia*, wrongful termination of employment in violation of a well-established public policy of this state. The jury found that Chad Marlow, Cary Marlow, Brooks Meadows, and Leigh Carson were not wrongfully terminated.¹³

¹¹*Id.* (citing *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988)).

¹²*Sterling Drug, Inc., supra.*

¹³Appellant, Les Marlow, withdrew his claim for wrongful termination at trial.

Appellees filed a joint motion for attorney fees against all the appellants claiming they were prevailing parties in the litigation and entitled to attorney fees on the premise that the wrongful-termination causes of action sounded exclusively in contract and that Ark. Code Ann. § 16-22-308 provides that a prevailing party in a breach-of-contract action may recover reasonable attorney fees. The appellees requested attorney fees and expenses in the total amount of \$329,517.80.

The trial court found that United Systems and Petkovsek were prevailing parties in the wrongful-termination causes of action; that these causes of action sound exclusively in contract; hence, United Systems and Petkovsek were entitled to reasonable attorney fees pursuant to Ark. Code Ann. § 16-22-308. The trial court then awarded \$164,758.90 in attorney fees and costs to Glenn Petkovsek.

On appeal, the appellants contend that the trial court erred when it awarded attorney fees to Petkovsek for the successful defense of the wrongful-termination claims. The majority affirmed the award of attorney fees to Petkovsek citing *Sterling Drug v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), and the application of Ark. Code Ann. § 16-22-308. The majority adopted the reasoning of the trial court that a cause of action for termination of an employee in violation of public policy sounds exclusively in contract, and that Ark. Code Ann. § 16-22-308 provides for attorney fees to the prevailing party for breach-of-contract actions. I respectfully dissent.

The appellants argue in their brief that awarding attorney fees under these circumstances would “drastically change the landscape of employment law”; that this is an

issue of first impression; and that such an award invokes substantial public interest. In essence, the appellants contend that by awarding an employer attorney fees in a case where the employee alleges that his or her termination was in violation of a well-established public policy of this state, this will unnecessarily deter well-intentioned employees from availing themselves of our judicial system for relief.

It is my opinion that the application of *Sterling* as supportive of an award of attorney fees in this instance is beyond the scope and intention of the holding in *Sterling*. *Sterling* was the first time our supreme court recognized a cause of action for wrongful termination in violation of a well-established public policy of this state. The supreme court remanded in *Sterling* to determine whether the jury awarded its judgment based on the tort of outrage (which was wrongfully submitted to the jury) or on the wrongful-discharge claim and to determine proper damages sounding in contract. The *Sterling* opinion does not discuss an award of attorney fees resulting from such a cause of action.

The appellees cite four cases in support of their position that Ark. Code Ann. § 16-22-308 provides for attorney fees in this matter. Each of those four cases is easily distinguished. *Love v. Smackover School District*, 329 Ark. 4, 7, 946 S.W.2d 676, 678 (1997), involved a breach of a written employment contract between a teacher and school district. In *Northport Health Services, Inc. v. Owens*, 356 Ark. 630, 158 S.W.3d 164 (2004), the issue of attorney fees was not raised on appeal. In *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1084–85 (8th Cir. 2000), attorney fees were awarded under both the Fair Labor Standards Act and Ark. Code Ann. § 16-22-308, and the opinion did not distinguish the source of the attorney fees. And,

in *Crain Industries, Inc. v. Cass*, 305 Ark. 566, 569, 810 S.W.2d 910 (1991), the jury found that a contract existed by virtue of a written employee manual.

Accordingly, there are no cases on point where attorney fees have been awarded to a prevailing party under Ark. Code Ann. § 16-22-308 solely for a cause of action of wrongful termination in violation of a well-established public policy of this state. To rely on *Sterling* to support an award of attorney fees based upon a statute that allows for attorney fees in breach-of-contract actions is beyond the scope of that holding and an extension of Arkansas law. While the award of attorney fees under these circumstances may well be a logical extension of *Sterling*, if such an extension or declaration is to be made, it should be done by our supreme court or legislature but not this court.

This appeal should be heard by the Arkansas Supreme Court as an issue of first impression, an issue of substantial public interest, and a significant issue needing clarification or development of the law. Ark. Sup. Ct. R. 1-2(b)(1), (4), & (5) (2012). In the alternative, I dissent from the majority's opinion to the extent that it affirms the trial court's decision to award attorney fees to appellee Petkovsek in his successful defense against the claims of wrongful termination in violation of public policy.

The Brad Hendricks Law Firm, by: Lloyd W. "Tré" Kitchens and Caroline C. Lewis, for appellants.

Newland & Associates, PLLC, by: Joel F. Hoover and Elizabeth C. Abney, for appellees.