Cite as 2019 Ark. 121

SUPREME COURT OF ARKANSAS

No. CV-18-617

Opinion Delivered: April 18, 2019

ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION
V.	[NO. 60CV-17-442]
BRADLEY LEDGERWOOD, LOUELLA JONES, PEGGY SANDERS, MARCUS STROPE, WINNIE WINSTON, DANA WOLF, AND MICHAEL YARRA APPELLEES	HONORABLE WENDELL GRIFFEN, JUDGE REVERSED; DISMISSED.

SHAWN A. WOMACK, Associate Justice

The Arkansas Department of Human Services (DHS) appeals the circuit court's order holding the agency in contempt and the temporary restraining order enjoining its emergency rule. The primary question before us is whether the agency violated the express terms of the circuit court's preliminary injunction order by promulgating the emergency rule. We hold that it did not and therefore reverse the order of contempt. We further dismiss DHS's appeal of the temporary restraining order as moot.

I.

A recitation of the factual history underlying this appeal can be found in our first review of the case. *See Ark. Dep't of Human Servs. v. Ledgerwood*, 2017 Ark. 308, 530 S.W.3d 336 (*Ledgerwood I*). In *Ledgerwood I*, we upheld the circuit court's temporary restraining

order enjoining the 2015 ARChoices Medicaid waiver rule as applied to the named Plaintiffs-Appellees. On remand, the circuit court entered a permanent injunction against the program in its entirety. DHS was permanently enjoined from using the methodology embraced by that rule "unless or until it was properly promulgated." Days after the circuit court entered that order, DHS promulgated an emergency rule utilizing the same methodology. The circuit court entered a temporary restraining order against the rule and held DHS in contempt of its permanent injunction order. The primary basis for both orders was DHS's failure to provide notice and an opportunity for public comment during the adoption of the emergency rule. This appeal ensued.

II.

DHS contends it did not violate the express terms of the permanent injunction order when adopting the emergency rule. It therefore seeks reversal of the circuit court's order holding the agency in contempt. Because we conclude the rule was properly promulgated under the Administrative Procedure Act's (APA) emergency rulemaking provision, we find DHS did not violate the express terms of the circuit court's order. We reverse the order of contempt.

As a threshold matter, we must first determine the character of the contempt order. Contempt may be criminal or civil in nature. *See Johnson v. Johnson*, 343 Ark. 186, 197, 33 S.W.3d 492, 499 (2000). Criminal contempt seeks to preserve the power of the court, vindicate its dignity, and punish those who disobey its orders. *Id.* Civil contempt, on the other hand, is designed to protect the rights of private parties by compelling compliance

with orders of the court made for the benefit of those parties. *See Ivy v. Keith*, 351 Ark. 269, 280, 92 S.W.3d 671, 677 (2002).

While the line between civil and criminal contempt may blur at times, the critical distinction lies in the character of relief ordered by the court: "[C]riminal contempt *punishes* while civil contempt *coerces*." *Id.* (internal quotation omitted) (emphasis in original). In other words, civil contempt seeks only "to coerce compliance with the court's order." *Id.*, 92 S.W.3d at 678. It carries with it a conditional penalty that may be purged once the civil contemnor complies with the underlying order. *Id.* Criminal contempt, by contrast, carries an unconditional penalty that is punitive in nature and cannot be purged. *Id.*

The circuit court did not state whether it was holding DHS in civil or criminal contempt. The record, however, reveals that the circuit court sought to punish DHS's "willful defiance" of its permanent injunction order by imposing a number of sanctions upon the agency. The contempt order required DHS to publish monthly updates relating to assessments of beneficiaries under the ARChoices program. The agency has been required to provide this information on its website and to opposing counsel. It has also been required to provide opposing counsel with monthly updates revealing the identities of persons who have not been reassessed under the program. DHS was not provided any avenue to purge itself of these sanctions; instead, they were to continue indefinitely until the circuit court ordered otherwise. Moreover, the circuit court referred DHS's counsel of record, as well as an agency attorney involved with the emergency rulemaking, to the

Committee for Professional Conduct. The unconditional, unpurgeable penalties indicate that DHS was held in criminal contempt.

The standard of review in a case of criminal contempt is well settled: we view the record in the light most favorable to the circuit court's decision and sustain that decision if it is supported by substantial evidence. *See James v. Pulaski County Circuit Court*, 2014 Ark. 305, at 4, 439 S.W.3d 19, 23. Substantial evidence is that of sufficient force and character to compel a conclusion one way or another, forcing the mind to pass beyond suspicion or conjecture. *Id.* Where one is held in contempt for failure or refusal to abide by the circuit court's order, we will not look behind the order to determine its validity. *Id.*

There is no question that willful disobedience of a valid court order is contumacious conduct. *See, e.g.*, *Johnson*, 343 Ark. at 198, 33 S.W.3d at 499. But before one can be held in contempt for violating a court order, the order must be definite in its terms, clear as to the duties it imposes, and its commands must be express rather than implied. *Id.* When a party does all that is expressly required under an order, it is error to hold it in contempt. *Id.*

The underlying permanent injunction order expressly barred DHS "from using RUGs methodology unless or until it is properly promulgated." DHS subsequently adopted an emergency rule that utilized the methodology under the process established by the APA. The circuit court held DHS in contempt for violating its permanent injunction order because the agency did not provide prior notice and opportunity for public

comment. The question is therefore whether the emergency rulemaking violated the express orders of the circuit court's permanent injunction.

The promulgation process for agency rulemaking generally requires, *inter alia*, a thirty-day notice period and opportunity for comment prior to adopting a new rule. *See* Ark. Code Ann. § 25-15-204 (Repl. 2017). But that provision also contemplates emergent situations requiring swift agency response; specifically, where the agency finds that imminent peril to the public health, safety, or welfare or compliance with a federal law or regulation requires adoption of a rule upon less than thirty days' notice. Ark. Code Ann. § 25-15-204(c). The agency must provide a written statement providing the reasons for that finding. *Id.* It may then proceed without prior notice or hearing to adopt an emergency rule. *Id.* But the rule will not be filed until it has garnered legislative approval and it cannot be effective for longer than 120 days. *Id.*

The record reveals that DHS complied with subsection 204(c)'s requirements when adopting the emergency rule. It provided a written statement explaining its finding of imminent peril to the public health, safety, or welfare absent the emergency rule. To the extent the circuit court disagreed with the stated reasons for the emergency rule, that is not a basis for the contempt order. The statement provided an explanation for the finding and did not merely parrot the statutory language of imminent peril. And the legislature found that explanation meritorious, as it voted to approve the emergency rule and permitted DHS to file it with the Secretary of State. DHS thus "properly promulgated" the emergency rule under the statutorily prescribed process.

To be sure, the permanent injunction was issued because of the circuit court's finding that DHS had failed to substantially comply with the APA's notice and public comment requirements. But the express terms of the permanent injunction order did not preclude the adoption of an emergency rule utilizing the RUGs methodology. It simply required that any such rule be "properly promulgated." DHS did just that when adopting the emergency rule. Because the agency did not violate the express terms of the circuit court's order, we find that the contempt order was in error. It is therefore reversed.

III.

For its second point on appeal, DHS challenges the temporary restraining order enjoining its emergency rule. During the pendency of this appeal, DHS adopted a final rule that supersedes the emergency rule at issue and remains in effect to this day, and the permanent injunction has been dissolved. We must therefore determine whether the doctrine of mootness precludes our review. And we find that it does.

As a general rule, this court will not review issues that are moot. *See Terry v. White*, 374 Ark. 387, 391, 288 S.W.3d 199, 202 (2008). To do so would be to render advisory opinions, which this court will not do. *Id.* A case is moot when any judgment rendered would not have any practical legal effect upon a then existing legal controversy. *Id.* In other words, a moot case presents no justiciable issue for determination by the court. *Id.* But we may elect to consider a moot issue when it falls within one of two exceptions to the mootness doctrine. The first exception involves issues capable of repetition yet evading

review. *See Cotten v. Fooks*, 346 Ark. 130, 133, 55 S.W.3d 290, 292 (2001). The other exception concerns issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation. *See id.*

There is no doubt that the adoption of the new rule rendered the temporary restraining order against the emergency rule moot. DHS nevertheless urges this court to consider the matter under both exceptions to the mootness doctrine. It contends the nature of an emergency rule, which may generally last no longer than 120 days, means it is capable of repetition yet evading review. *See* Ark. Code Ann. § 25-15-204(c). DHS similarly argues that our public interest exception applies because of the periodic necessity of emergency rules. Because our review of the temporary restraining order would necessarily turn on facts unique to this case, we do not believe either exception is applicable. And we accordingly dismiss this issue as moot.

Reversed; dismissed.

KEMP, C.J., and HART, J., dissent.

JOHN DAN KEMP, Chief Justice, dissenting. I agree with the majority's decision to dismiss DHS's appeal of the temporary restraining order as moot. I disagree with the majority's decision to reverse the circuit court's finding of contempt against DHS.

The majority mischaracterizes the circuit court's decision to hold "DHS in contempt for violating its permanent injunction order because the agency did not provide prior notice and opportunity for public comment." The majority then holds that "DHS . . . 'properly promulgated' the emergency rule" under Arkansas Code Annotated section 25-

15-204(c) (Repl. 2017)—an emergency promulgation process that requires neither notice nor public comment.

The key question is not whether DHS properly promulgated an emergency rule, but whether DHS should have promulgated an emergency rule at all. In my view, the circuit court correctly found DHS in contempt because the agency purposely promulgated an emergency rule implementing the exact RUGs methodology from which it had been permanently enjoined. For this reason, I respectfully dissent in part.

I. *Relevant Facts*

The following facts are largely omitted from the majority opinion but are crucial to an understanding of this case. In *Arkansas Department of Human Services v. Ledgerwood*, 2017 Ark. 308, 530 S.W.3d 336, this court unanimously affirmed the circuit court's order enjoining DHS from assessing patients and reducing their attendant-care hours under its new RUGs methodology. After this court's decision, the parties filed cross-motions for summary judgment.

On May 14, 2018, the circuit court entered an order finding that DHS "failed to properly promulgate [DHS's] proposed rule [that implemented its new assessment system]" and "permanently enjoined [DHS] from using the RUGs methodology to determine attendant-care hours unless or until [the rule] is properly promulgated." That day, DHS issued a public statement that it would "promptly seek emergency promulgation of modified ARChoices rules that address the Judge's concerns, which would allow us to continue the program."

On May 17, 2018, DHS presented to the Arkansas Legislative Council Executive Subcommittee an emergency rule with an identical, algorithm-based RUGs methodology. In a document entitled "Justification for Emergency Rule," Rose Naff, director of DHS's Division of Medical Services, stated that "this rule is required to be promulgated on an emergency basis to prevent imminent peril to the public health, safety, and welfare and that adopting this emergency rule is necessary to avoid the potential loss of federal funding or certification." The executive subcommittee approved the emergency rule.

The next day, on May 18, DHS filed a notice of compliance with the circuit court's order. DHS asserted that "to address the deficiencies found by the court in the promulgation process, as well as to be capable of continuing operations of the ARChoices program, while complying with the court's order," it had filed an emergency rule pursuant to the Administrative Procedure Act, codified at Arkansas Code Annotated section 25-15-204(c).

Ledgerwood then moved for a temporary restraining order and for contempt. Ledgerwood contended that DHS had violated the circuit court's order because its "emergency rulemaking [was] a willful violation of the May 14, 2018 order" and that "the RUGs methodology implemented pursuant to emergency rulemaking was not 'properly promulgated.'"

The circuit court conducted a hearing on the matter. From the bench, the circuit court stated,

[W]hat has been missing from the agency's presentation is any evidence that the agency has not assessed since January 2017 persons for attendant care or has been unable to assess persons for attendant care since January 2017 or that the nurse's assessment process that existed between 2013 and the end of 2016 has been declared unacceptable by the––by CMS [Centers for Medicare and Medicaid Services] or any other entity that would approve Medicaid match.

There is no proof that that was assertion––an assertion was made to the legislative council. There is no proof that the agency made any request of CMS for clarification of this. Put simply, the emergency rule is an emergency only because the agency chose to call it that. It's a manufactured emergency, emergency by design.

One does not accidently fail to promulgate a rule with notice where one has been told that lack of notice violates the Administrative Procedures Act for months.

And so one does not promulgate an, quote, emergency rule to comply with the requirement that the agency not utilize RUGs for determining independent attendant care. That is not an accident. This is on purpose. It is deliberate, calculated, devised. There is another word for it, disobedient.

And the court especially emphasizes this point because the title of the pleading filed on May 18, 2018 is Notice of Compliance with Court Order. The agency filed notice that it was complying with this court's order which permanently enjoined it from using RUGs methodology by promulgating an emergency rule that uses RUGs methodology.

That statement not only begs credulity, it is manifestly preposterous. The court, therefore, grants the motion for contempt and will direct the agency to file its notice not less than seven calendar days from this date as to why it should not be sanctioned for that contempt.

Effective immediately, the proposed promulgating emergency rule is hereby enjoined, not based on any new action. It is enjoined as a deliberate and calculated disobedience of the permanent injunction entered by this court on May 14, 2018 based upon an action that began in January of 2017.

. . . .

The so-called emergency rule is a contrivance aimed at evading the plain meaning of a permanent injunction that this court entered after a year-and-a-half of litigation.

> This court knows the meaning of the word, "permanent." In considering the sanctions for contempt, the court will keep that meaning in mind. This concludes this matter.

On June 25, 2018, the circuit court memorialized these findings in its written order:

> The question is whether or not the emergency rule promulgated on May 18, based upon a presentation made by the agency on May 17, 2018 is different in substance from the rule that was the subject of this lawsuit in January 2017. The court finds that it is not. The emergency rule relied upon by DHS is plainly an attempt to circumvent the injunction that has been the subject matter of this lawsuit from its inception. There is no proof that DHS requested the Centers for Medicare and Medicaid Services for clarification on whether it could conduct attendant care reassessments as it did before 2016 until DHS complies with the notice and comment requirements of the Arkansas Administrative Procedures Act concerning changing to the RUGs reassessment method.
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> Put simply, the emergency rule is an "emergency" only because DHS chose to call it that. It is a fabricated and manufactured "emergency" designed by DHS to avoid following the notice and comment requirements [for nonemergency rules] of Arkansas law. That is not an accident. It is purposeful, deliberate, calculated, devised and disobedient of this court's order. The DHS statement that it was complying with this court's order (which permanently enjoined it from using RUGs methodology until it did so pursuant to a rule promulgated in substantial compliance with the notice and public comment requirements for rulemaking in the Administrative Procedures Act) when it promulgated an "emergency rule" that uses RUGs methodology not only begs credulity. It is manifestly preposterous.
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> Effective May 23, 2018, the challenged "emergency rule" is found to be factually baseless, legally invalid, and the result of deliberate and calculated disobedience and defiance by DHS of the May 14, 2018 permanent injunction entered by this court. Accordingly, and pursuant to its bench ruling, the court hereby grants [Ledgerwood's] motion for temporary restraining order, preliminary injunction and contempt.

The circuit court invalidated the temporary emergency rule and found DHS in contempt of its permanent injunction. For the "willful defiance by DHS of the permanent injunction," the circuit court ordered sanctions.

II. *Analysis*

Our constitution and case law make it clear that the courts of this state have inherent power to punish a contemnor for contempt not committed in the presence of the court or in disobedience of process. Ark. Const. art. 7, § 26; *see Carle v. Burnett*, 311 Ark. 477, 845 S.W.2d 7 (1993). Contempt may be established when the offending party willfully disobeyed a valid order of a court. *Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002).

In my view, DHS willfully disobeyed the circuit court's May 14 order in two ways. First, DHS promulgated an emergency rule utilizing the very RUGs methodology from which it had been permanently enjoined. DHS issued a public statement that it would "promptly seek emergency promulgation of modified ARChoices rules that address the Judge's concerns, which would allow us to continue the program." But it did not address those concerns—particularly that the RUGs methodology was, according to the circuit court's May 14, 2018 order, "a clear departure from prior practice of [nurse assessment] having both general applicability and future effect on beneficiaries." Instead of using nonemergency procedures, DHS presented an emergency rule implementing the same RUGs methodology and claimed that a public-health emergency existed for 8,000 beneficiaries of the ARChoices program.

Second, DHS failed to offer any evidence of an "imminent peril to the public health, safety, or welfare" that necessitated an emergency rule pursuant to section 25-15-204(c). At the May 23, 2018 evidentiary hearing on Ledgerwood's motions, Naff testified

that, despite signing the emergency-rule justification, she did not know of any facts establishing imminent peril to public welfare by the court's memorandum order, nor did she know of any person or office at DHS who had knowledge of those facts. She testified that the agency would not lose federal funding for current recipients in the program. Additionally, Mark White, the deputy director of the Division of Aging, Adult, and Behavioral Health Services, testified that he was not aware of any request from DHS to CMS to utilize any non-RUGs assessment tool. He testified that he was not aware of any explicit language indicating that a nurse could not assess or allocate care hours.

Based on the record before this court, DHS appears to have circumvented the circuit court's May 14 order by running to the legislature to promulgate its emergency rule. I agree with the circuit court that DHS acted in "purposeful, deliberate, calculated, devised" disobedience of its May 14 order. Therefore, I would affirm the circuit court's finding of contempt.

HART, J., joins.

David Sterling and *Richard Rosen*, Office of Chief Counsel, for appellant.

Kevin De Liban, Legal Aid of Arkansas, for appellees.