

Cite as 2009 Ark. 636

SUPREME COURT OF ARKANSAS

No. 09-587

FOREMOST INSURANCE COMPANY
AND FOREMOST PROPERTY AND
CASUALTY INSURANCE COMPANY,
PETITIONERS,

VS.

MILLER COUNTY CIRCUIT COURT,
THIRD DIVISION, THE HONORABLE
KIRK JOHNSON, CIRCUIT JUDGE
PRESIDING,

RESPONDENT,

Opinion Delivered December 17, 2009PETITION FOR WRIT OF
PROHIBITION.CERTIFIED, SUPPLEMENTAL
RECORD ORDERED; SUBSTITUTED
BRIEF ORDERED.**PER CURIAM**

Petitioners Foremost Insurance Company and Foremost Property and Casualty Insurance Company petition this court for a writ of prohibition to prevent the Miller County Circuit Court from exercising jurisdiction over them in a class-action suit. The plaintiffs in the underlying case filed a responsive brief.

On September 8, 2004, the plaintiffs filed suit on behalf of a proposed nationwide class against Petitioners, as well as several other insurance companies. In their third amended complaint, the plaintiffs, who are customers of the defendants, allege that the defendants improperly profited by wrongfully underpaying certain claims. Specifically, the defendants failed to pay the profit and overhead of general contractors whom the plaintiffs hired in connection with loss or damage to real property insured by the defendants. The plaintiffs

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claim that the defendants conspired to perpetuate an environment wherein insurance customers were deceived about the coverage of these costs by their insurance policies. As a result of the alleged conspiracy, fraudulent concealment, fraud, and constructive fraud, the plaintiffs assert that the defendants were unjustly enriched.

Beginning on November 15, 2004, Petitioners filed a series of motions to dismiss all claims against them pursuant to Rules 8(a), 9(b), 12(b)(1) and 12(b)(6) of the Arkansas Rules of Civil Procedure. Petitioners asserted in the motions that the claims of the only plaintiff with whom Petitioners had a contractual relationship had been dismissed. Based on that assertion, Petitioners argued that the remaining plaintiffs lacked standing to bring suit against Petitioners and no claim existed upon which relief could be granted. The plaintiffs, in turn, responded that ruling on Petitioners' motions would require the circuit court to impermissibly delve into the merits of the plaintiffs' claims before class certification. In particular, the plaintiffs argued below that Petitioners need not have directly insured any of the plaintiffs in order for Petitioners to be guilty of conspiring with the other defendants to defraud insurance customers. In an order entered on April 28, 2009, the circuit court deferred ruling on Petitioners' motions to dismiss until after resolution of the plaintiffs' motion for class certification. The court reasoned that standing is not a jurisdictional issue, and that determining whether the plaintiffs lacked standing would involve delving into the merits of the case, which the court may not do until it addresses the issue of class certification.

In their petition for a writ of prohibition, Petitioners assert that no justiciable matter

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is pending against them in the underlying case. However, we are unable to consider the petition at this time because Petitioners' brief is not in compliance with Ark. Sup. Ct. R. 4-2(a)(5) and (6) (2009).

A party seeking prohibition must produce a record sufficient to show that the writ is clearly warranted. *Sherwood v. Glover*, 331 Ark. 124, 958 S.W.2d 526 (1998). Specifically, a party must include an "abstract or abridgement of the transcript [consisting] of an impartial condensation, without comment or emphasis, of only such material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as are necessary to an understanding of all questions presented to the Court for decision." Ark. Sup. Ct. R. 4-2(a)(5). A party must also provide "an Addendum which shall include true and legible photocopies of the order . . . along with any other relevant pleadings, documents, or exhibits essential to an understanding of the case and the Court's jurisdiction." Ark. Sup. Ct. R. 4-2(a)(6).

The procedure to be followed when a party has provided an insufficient abstract and Addendum is set out in Ark. Sup. Ct. R. 4-2(b)(3):

Whether or not the appellee has called attention to deficiencies in the appellant's abstract or Addendum, the Court may address the question at any time. If the Court finds the abstract or Addendum to be deficient such that the Court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the Court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, Addendum, and brief, at his or her own expense, to conform to Rule 4-2 (a)(5) and (8). Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a

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substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the Court may direct. If after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, Addendum and brief within the prescribed time, the judgment or decree may be affirmed for noncompliance with the Rule.

In the instant case, Petitioners' brief lists five separate motions to dismiss and briefs in support as the basis for the petition for writ of prohibition. Yet, none of these documents is included in the Petitioners' Addendum. Likewise, in their argument in support of the petition, Petitioners rely on, but do not include in the Addendum, the following relevant pleadings and documents: plaintiffs' third amended complaint; Petitioners' notice of removal to the United States Bankruptcy Court, dated March 27, 2008; and Petitioners' Suggestion of Death, dated August 1, 2008. Finally, Petitioners reference a hearing that the circuit court held on June 30, 2009, during which Petitioners made arguments in support of their motions to dismiss. Not only have Petitioners failed to include an abstract of this hearing, but the record also does not contain a transcript of the hearing. The Arkansas Rules of Appellate Procedure—Civil state in relevant part:

If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the circuit court before the record is transmitted to the appellate court, or the appellate court on motion, or on its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary, that a supplemental record be certified and transmitted. All other questions as to form and content of the record shall be presented to the appellate court. No correction or modification of the record shall be made without prior notice to all parties.

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Ark. R. App. P.–Civ. 6(e) (2009). Pursuant to Ark. R. App. P.–Civ. 6(c) and (e), this court can *sua sponte* direct the parties to supply any omitted material by filing a certified, supplemental record. Ark. R. App. P.–Civ. 6(e).

Accordingly, we order Petitioners to file a substituted brief, curing the flagrant deficiencies in the abstract and Addendum, within fifteen days from the date of entry of this order. Petitioners are further ordered to supply this court with a certified, supplemental record that includes the transcript of the hearing held on June 30, 2009, within fifteen days from the date of entry of this order. While examples of deficiencies in the abstract, Addendum, and record are noted above, we encourage Petitioners, prior to filing the substituted brief and supplemental record, to review our rules, the entire record, and their substituted brief to ensure that no additional deficiencies are present. *See Gentry v. Robinson*, 2009 Ark. 345 (per curiam). If Petitioners fail to file a substituted brief and supplemental record within the time period specified, the circuit court's judgment may be affirmed for noncompliance with this Rule. *Erin, Inc. v. Circuit Court of White County*, 368 Ark. 595, 247 S.W.3d 849 (2007). After service of the substituted brief and supplemental record, Respondents shall have an opportunity to file a responsive brief in the time prescribed by the supreme court clerk, or to rely on the brief previously filed in this appeal.

Certified, supplemental record ordered; substituted brief ordered.