

SUPREME COURT OF ARKANSAS

No. 09-540

IN RE: ARKANSAS SUPREME COURT
AND COURT OF APPEALS RULE 5-2

Opinion Delivered 5-28-09

PER CURIAM

Automation of our State's judicial system is proceeding apace on many fronts. Over time, these improvements will make the system more accessible and more efficient. This Court and the Court of Appeals will soon step into the future: effective July 1, 2009, the electronic version of appellate decisions posted on the Arkansas Judiciary website will be the official report of those decisions. Arkansas will be the first state in the nation to publish and distribute the official report of its appellate decisions electronically.

Publication of the *Arkansas Reports* and *Arkansas Appellate Reports* will end with volume 375 Ark./104 Ark. App. Printing these books has become an increasingly expensive endeavor. The cost of subscriptions has increased, while the number of subscribers has declined. In addition, there is a significant lag between the time an appellate decision is issued and its publication in the books. More and more lawyers, litigants, and citizens are getting copies of our appellate decisions from our website on the same day that they are issued, for which there is no cost. The technology exists to create secure and authenticated electronic

versions of our opinions. Therefore, our Reporter of Decisions will use that technology in creating and maintaining a searchable, electronic database containing the official report of Arkansas appellate decisions. When launched this summer, this database will include all opinions issued after February 14, 2009, which is the closing date for 375 Ark./104 Ark. App. As recently authorized by the General Assembly, we therefore adopt the electronic publication and distribution of the official reports of all Arkansas appellate decisions. See Act of Feb. 25, 2009, No. 221, 2009 Ark. Acts ____.

The adoption of electronic publication and distribution of opinions requires an implementing change in Rule 5-2 of the Rules of the Supreme Court and Court of Appeals. We therefore replace the entire text of the current rule with the new text set out below, which will become effective July 1, 2009. The amended rule sets forth the opinion-related duties of our Clerk and Reporter of Decisions, specifies the form (print or electronic) of the official report of decisions depending on the date that the opinion was issued, prescribes uniform citation rules for all Arkansas appellate decisions, and addresses various miscellaneous matters about opinions.

The amended rule makes another significant change: it abandons the distinction between published and unpublished opinions and makes every Supreme Court and Court of Appeals opinion issued after July 1, 2009, precedent. Pending before the court is the Arkansas Bar Association's petition requesting that we now adopt our Committee on Civil Practice's 2007 recommendation to abandon that distinction, which we declined to adopt at that time. *In re Arkansas Rules of Civil Procedure*, 370 Ark. App'x ____ (2007) (per curiam). Since our

decision, the Committee on Civil Practice has reaffirmed its recommendation, the General Assembly has expressed its view on the matter in Act 162 of 2009, and the Bar Association has petitioned this court to revisit the issue.

In light of our adoption of publication of the official reports of all Arkansas appellate decisions in electronic format, we shall no longer distinguish between “published” and “unpublished” opinions. The official electronic publication and reporting of all decisions eliminates the basis for this distinction. We make this change prospectively. Pursuant to Ark. Const. amend. 80, §§ 3 and 4, we adopt, effective July 1, 2009, Rule 5-2 and republish the rule as set out below. With the adoption of this revised Rule 5-2, Act 162 of 2009 is deemed superseded pursuant to our rulemaking authority under amendment 80.

Rules of pleading, practice and procedure.

The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution.

Ark. Const. amend. 80, § 3.

The particulars of the amended rule are explained in an Explanatory Note at the conclusion of the rule. We encourage all members of the Bench and Bar to familiarize themselves with the amended rule between now and July 1st.

Rule 5-2. Opinions.

~~(a) Supreme court — Signed opinions. All signed opinions of the Supreme Court shall be designated for publication.~~

~~(b) Court of appeals — Opinion form. Opinions of the Court of Appeals may be in conventional form or in memorandum form. They shall be filed with the Clerk. The opinions~~

~~need not contain a detailed statement of the facts, but may set forth only such matters as may be necessary to an understandable discussion of the errors urged. In appeals from decisions of the Arkansas Board of Review in unemployment compensation cases, when the Court finds the decision appealed from is supported by substantial evidence, that there is an absence of fraud, no error of law appears in the record, and an opinion would have no precedential value, the order may be affirmed without opinion.~~

~~(c) *Court of appeals — Published opinions.* Opinions of the Court of Appeals which resolve novel or unusual questions will be released for publication when the opinions are announced and filed with the Clerk. The Court of Appeals may consider the question of whether to publish an opinion at its decision-making conference and at that time, if appropriate, make a tentative decision not to publish. Concurring and dissenting opinions will be published only if the majority opinion is published. All opinions that are not to be published shall be marked "Not Designated for Publication."~~

~~(d) *Court of appeals — Unpublished opinions.* Opinions of the court of appeals not designated for publication shall not be published in the *Arkansas Reports* and shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case). Opinions not designated for publication shall be listed in the *Arkansas Reports* by case number, style, date, and disposition.~~

~~(e) *Copies of all opinions.* In every case the Clerk will furnish, without charge, one typewritten copy of all of the Court's published or unpublished opinions in the case to counsel for every party on whose behalf a separate brief was filed. The charge for additional copies is fixed by statute.~~

(a) *Filing, Notice, and Publication.* The Supreme Court and Court of Appeals shall file every opinion with the Clerk, who shall provide a copy of the opinion to each pro se litigant and all counsel of record for each party in the case without charge. The Reporter of Decisions shall post every opinion on the Arkansas Judiciary's website and maintain a secure and searchable library of opinions on the website, which shall include all opinions issued after February 14, 2009. The Administrative Office of the Courts is authorized to develop an advanced search engine with additional features and to charge subscribers for its use. The Administrative Office of the Courts is also authorized to charge a reasonable fee for providing reports of opinions on disc or other physical medium.

(b) *Official Reports.*

(1) The *Arkansas Reports* and the *Arkansas Appellate Reports* shall contain the official report of decisions of the Supreme Court and Court of Appeals issued before February 14, 2009. The official report of decisions issued after that date shall be an electronic file created, authenticated, secured, and maintained by the Reporter of Decisions on the Arkansas Judiciary website.

(2) After an opinion is announced, the Reporter shall post a preliminary report of the opinion's text on the website. This version is subject to editorial corrections. After the mandate has issued, and any needed editorial corrections are made, the Reporter shall replace the preliminary report with an authenticated and secure electronic file containing the permanent and final report of the decision.

(3) Every report of every decision shall contain an official citation created by the Reporter. This citation shall include the year in which the decision was issued, the abbreviated name of the issuing court, and the sequential appellate decision number for the year. For example, the citation *White v. Green*, 2010 Ark. 171, reflects that the decision was issued in 2010, by the Arkansas Supreme Court, and was the one hundred seventy-first opinion issued by that court that calendar year. The citation *Roe v. State*, 2010 Ark. App. 745, reflects that this decision was made by the Court of Appeals and was the seven hundred forty-fifth appellate opinion issued by that court in calendar year 2010.

(c) *Precedential Value.* Every Supreme Court and Court of Appeals opinion issued after July 1, 2009, is precedent and may be relied upon and cited by any party in any proceeding. Opinions of the Supreme Court and Court of Appeals issued before July 1, 2009, and not designated for publication shall not be cited, quoted, or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case).

(d) *Uniform citation.*

(1) Decisions included in the *Arkansas Reports* and *Arkansas Appellate Reports* shall be cited in all court papers by referring to the volume and page where the decision can be found and the year of the decision. Parallel citations to the regional reporter, if available, are required. Pinpoint citations to specific pages are strongly encouraged. For example:

Smith v. Jones, 338 Ark. 556, 558, 999 S.W.2d 669, 670 (1999).

Doe v. State, 74 Ark. App. 193, 198, 45 S.W.3d 860, 864 (2001).

(2) Published decisions issued between February 14, 2009, and July 1, 2009, and all decisions issued after July 1, 2009, and available on the Arkansas Judiciary website shall be cited in all court papers by referring to the case name, the year of the decision, the abbreviated court name, and the appellate decision number. Arkansas Supreme Court shall be abbreviated "Ark." Arkansas Court of Appeals shall be abbreviated "Ark. App." Parentheticals containing a date or court abbreviation shall not be used. Parallel citations to the regional reporter, if available, are required. If the regional reporter citation is not available, then parallel citations

to unofficial sources, including unofficial electronic databases, may be provided. Pinpoint citations to specific pages are strongly encouraged. A pinpoint citation to the official version of a decision on the Arkansas Judiciary website shall refer to the page of the electronic file where the matter cited appears. For example:

Smith v. Hickman, 2009 Ark. 12, at 1, 273 S.W.3d 340, 343.

Doe v. State, 2009 Ark. App. 318, at 7, 2009 WL 240613, at *8.

White v. Green, 2010 Ark. 171, at 3, 2010 WL 3109899, at *2.

Roe v. State, 2010 Ark. App. 745, at 6, 279 S.W.3d 495, 497.

(3) When an unpublished decision may be cited in continuing or related litigation pursuant to subdivision (c), the opinion's date determines the citation form. Opinions issued before February 14, 2009, shall be cited by referring to the case name, the appellate docket number, the abbreviated name of the issuing court and the complete date of the opinion in the first parenthetical, and including "unpublished" in a second parenthetical. Opinions issued after February 14, 2009, and before July 1, 2009, shall be cited by referring to the case name, the year of the decision, the abbreviated court name, the appellate decision number, and including "unpublished" in a parenthetical. Parallel citations to unofficial sources, including unofficial electronic databases, may be provided. For example:

Holt v. Newbern, No. CA07-345, slip op. at 4, 2008 WL 30117, at *2 (Ark. App. Apr. 16, 2008) (unpublished).

Byrd v. Battle, 2009 Ark. App. 114, at 8, 2009 WL 47129, at *6 (unpublished).

(e) *Opinion Form.* Opinions of the Court of Appeals may be in conventional form or memorandum form.

(f) *Affirmance Without Opinion.* In appeals from decisions of the Arkansas Board of Review in unemployment-compensation cases, when the appellate court finds the decision appealed from is supported by substantial evidence, that there is an absence of fraud, no error of law appears in the record, and an opinion would have no precedential value, the order may be affirmed without opinion.

Explanatory Note. Rule 5-2 has been completely rewritten to reflect the electronic publication of the official reports of appellate decisions. This comprehensive amendment is effective July 1, 2009.

Subdivision (a) reflects, in part, long-standing practice. All opinions are filed with the Clerk, and the Clerk sends a copy to each party or their lawyer if they have one. The Reporter of Decisions (or our Librarian) has been posting opinions on the Arkansas Judiciary website since 1996. As amended, the rule obligates the Reporter to continue doing so and to maintain a secure and searchable library containing all opinions issued after February 14, 2009, on the website. The rule also authorizes the Administrative Office of the Courts to develop and charge for the use of an advanced search engine. The AOC may also charge for providing the official reports in other formats, such as on CD.

Subdivision (b) has three parts. Section (1) defines what constitutes the official report of a decision of the Arkansas Supreme Court and Court of Appeals. For decisions issued before February 14, 2009, the official report is the opinion printed in a volume of the *Arkansas Reports* or *Arkansas Appellate Reports*. For opinions issued after that date, the official report is the electronic file created, authenticated, and maintained by the Reporter on the Arkansas Judiciary website.

Subdivision (b)(2) prescribes the Reporter's responsibilities in releasing and finalizing opinions. The first version of an opinion, the "preliminary report," must be posted on the website after the court announces the decision. The preliminary report is subject to editorial corrections by the Reporter. After the mandate has issued, and any editorial corrections have been made, the "final report" of the decision will be posted on the website in place of the preliminary report. Both the preliminary and final reports are official reports of the decision, which may be cited as otherwise allowed in the rule. All reports will be secure and authenticated.

Subdivision (b)(3) obligates the Reporter to create an official citation, in a new prescribed form, for every appellate decision issued after February 14, 2009. This obligation includes opinions that are not designated for publication between that date and July 1, 2009. The rule contains examples and an explanation of the new citation form—which looks much like a citation to the *Arkansas Reports* or *Arkansas Appellate Reports*. The book volume number has been replaced with the year of the decision. And the page number has been replaced with a "sequential appellate decision number for the year." The Reporter assigns this number, starting with 1 for the first opinion issued by each appellate court each calendar year. This is not a global numbering system covering all opinions of both appellate courts. Instead, there will be one annual list for Supreme Court opinions and one annual list for Court of Appeals opinions.

Subdivision (c) eliminates the distinction between unpublished opinions. All opinions issued after July 1, 2009, are precedent and may be cited in any filing or argument in any court.

Subdivision (d) is entirely new. It prescribes a uniform citation form for all appellate decisions. If a decision appears in the *Arkansas Reports* or *Arkansas Appellate Reports*, then the familiar citation form must be used. The only new requirement is a parallel citation, if one is available, to the regional reporter. Pinpoint citations are strongly encouraged.

All opinions issued after February 14, 2009, will be in the new electronic database of official reports. These opinions must be cited using the new citation form described earlier: case name, year of decision, abbreviated court name, and sequential appellate decision number. The amended rule abandons parentheticals in almost all citations. With the date and issuing court embedded in the citation itself, the parenthetical is rendered superfluous. Parallel cites to a regional reporter, if available, are required. Parallel cites to other unofficial sources, such as electronic databases, are allowed but not required. Pinpoint citations are strongly encouraged in general. The amended rule also prescribes how to do a pinpoint cite to an electronic report (preliminary or final) of an Arkansas case: cite the page of the electronic file where the matter cited appears. The electronic file will be secure, with the pages locked in place so that they are the same no matter what computer they are viewed on.

Subdivision (d)(3) covers citation of unpublished decisions issued before the effective date of this rule (July 1, 2009). The opinion's date determines the citation form. Pre-February 14, 2009, unpublished opinions are cited by case name and docket number, with the abbreviated court name and full date in the first parenthetical and a second parenthetical denoting the unpublished status. Pinpoint cites should use the "slip opinion" designation. Unpublished opinions issued between February 1, 2009, and July 1, 2009, should be cited using the new citation form—year, abbreviated court name, and sequential appellate opinion number—with one additional element: a parenthetical denoting the opinion's "unpublished" status.

Subdivisions (e) and (f) are carry-overs from the old rule. The former authorizes the Court of Appeals to issue opinions in conventional or memorandum form. *In re Memorandum Opinions*, 15 Ark. App. 301, 700 S.W.2d 63 (1985) (per curiam). The latter authorizes unemployment appeals from the Board of Review to be affirmed without an opinion.

CORBIN, J., dissents.