

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION**

NO: 60CV-15-2921

STACEY JOHNSON,
JASON McGEHEE,
BRUCE WARD,
TERRICK NOONER,
JACK JONES,
MARCEL WILLIAMS,
KENNETH WILLIAMS,
DON DAVIS, and
LEDELL LEE

PLAINTIFFS

v.

WENDY KELLEY, in her official capacity as
Director, Arkansas Department of Correction, and
ARKANSAS DEPARTMENT OF CORRECTION

DEFENDANTS

**MEMORANDUM ORDER GRANTING DEFENDANTS' MOTION TO DISMISS
SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF**

Introduction

Wendy Kelley (hereafter “Director Kelley” or “Kelley”) and the Arkansas Department of Correction (hereafter “ADC”) have moved for dismissal of the Second Amended Complaint for Declaratory and Injunctive Relief filed on behalf of Plaintiffs Stacey Johnson, Jason McGehee, Bruce Ward, Terrick Nooner, Jack Jones, Marcel Williams, Kenneth Williams, Don Davis, and Ledell Lee (hereafter “Plaintiffs”). In their Second Amended Complaint, Plaintiffs attempt to continue their longstanding challenge to the constitutionality of Act 1096 of 2015 (hereafter “Act 1096”), the method-of-execution (MOE) statute that governs persons convicted of the crime of capital murder and sentenced to death, and specifically contend that the statute’s provisions concerning the lethal-injection method of execution violate various provisions of the Constitution of Arkansas.

Plaintiffs are prisoners on Death Row in the ADC. The Governor of Arkansas has issued death warrants and set execution dates for all of them, except Terrick Nooner, as follows:

| <u>Name</u> | <u>Date of Execution</u> |
|------------------|--------------------------|
| Don Davis | April 17, 2017 |
| Bruce Ward | April 17, 2017 |
| Stacey Johnson | April 20, 2017 |
| Ledell Lee | April 20, 2017 |
| Jack Jones | April 24, 2017 |
| Marcel Williams | April 24, 2017 |
| Jason McGehee | April 27, 2017 |
| Kenneth Williams | April 27, 2017 |

On March 16, 2017, Defendants filed their motion to strike or dismiss Plaintiffs Second Amended Complaint. That motion contends that Plaintiffs' constitutional challenges to Act 1096 are barred by sovereign immunity, by the law-of-the case doctrine, by the principles of *res judicata* and collateral estoppel, and for failure to state a cognizable claim as prescribed by Rule 12(b)(1) and 12(b)(6) of the Arkansas Rules of Civil Procedure. Defendants alternatively contend that the Court should strike the Second Amended Complaint as provided by Rule 15(a) of the Arkansas Rules of Civil Procedure. In either event, Defendants argue that the Second Amended Complaint must be dismissed with prejudice.

Plaintiffs filed a motion, on March 17, 2017, urging the Court to enter final judgment under Rule 54(b) of the Arkansas Rules of Civil Procedure concerning their claims that Act 1096 violates the separation-of-powers and ex post facto provisions of the Arkansas Constitution. For the reasons set forth below, the Court cannot rule on that motion.

Procedural History of this Litigation

Plaintiffs are, in each instance, persons who have been convicted of the crime of capital murder. Each plaintiff was sentenced to death by a jury. Each plaintiff has challenged his conviction and sentence through appeals in state and federal courts. In all but one instance, their

appellate challenges have been unsuccessful. However, in 2012 the Arkansas Supreme Court affirmed this Court's decision which invalidated an earlier method-of-execution statute because it delegated too much discretion to the ADC concerning the lethal drugs to be used in the method-of-execution. *See Hobbs v. Jones*, 2012 Ark. 293, 412 S.W.3d 844 (2012).

The Arkansas General Assembly later enacted Act 1096. Plaintiffs challenged that statute on constitutional grounds as well. This Court entered an order that enjoined the executions that had been set for Plaintiffs based on Act 1096. After Defendants took an interlocutory appeal of that ruling, the Arkansas Supreme Court vacated the ruling on the ground that this Court lacks jurisdiction to enjoin an execution. The Arkansas Supreme Court then entered an order staying all executions pending resolution of this lawsuit.

The parties then filed cross motions for summary judgment. Defendants based their summary judgment motion entirely on sovereign immunity. However, Defendants also moved to dismiss the Plaintiffs' complaint for failure to sufficiently plead facts that establish cognizable constitutional claims that the MOE prescribed by Act 1096 violates the Arkansas constitutional ban against "cruel or unusual punishment, or that it violates substantive and procedural due process." Plaintiffs challenged the provisions of Act 1096 that prohibit disclosure of the identity of the supplier(s) and manufacturer(s) of lethal injection drugs, and Plaintiffs challenged the lethal injection protocol prescribed by Act 1096 as violating substantive and procedural due process as provided by the Arkansas Constitution.

This Court denied Defendants' motion to dismiss. It later entered a memorandum opinion and order, on December 3, 2015, that granted summary judgment for Plaintiffs on their disclosure claims, but denied the cross-motions for summary judgment on the substantive and

procedural due process claims because the Court found that genuine issues of material fact precluded summary judgment in favor of either side.

Defendants then appealed to the Arkansas Supreme Court. On June 23, 2016, the Arkansas Supreme Court reversed this Court, in all respects, holding that the decision of the United States Supreme Court in *Glossip v. Gross*, 135 S.Ct. 2726 (2015) governs Plaintiffs' challenge to Act 1096 and its method-of-execution protocol.

In *Glossip v. Gross*, the Supreme Court of the United States established a two-part test for evaluating MOE constitutional challenges. First, prisoners must show that the method of execution involves a "demonstrated risk of severe pain." Secondly, prisoners must also plead and prove that "a known and available alternative exists that would substantially reduce the demonstrated risk of severe pain." When the Arkansas Supreme Court applied the two-part test in *Glossip v. Gross* to the Plaintiffs First Amended Complaint in this case, it held that Plaintiffs had failed to sufficiently plead that an alternative execution method exists that would substantially reduce the risk of severe pain in the lethal injection protocol.

Remarkably, when the Arkansas Supreme Court reversed this Court's decision that denied Defendants' motion to dismiss it did not address Plaintiffs' assertion that the MOE prescribed by Act 1096 subjected them to an objectively discernible and unreasonable risk of severe pain. The decision reversing this Court skirted Plaintiffs' assertion on that point altogether. Instead, the Arkansas Supreme Court held that Plaintiffs' failed to adequately plead and prove that a known and available alternative exists that would substantially reduce the demonstrated risk of severe pain. This Court is, of course, obliged to follow that ruling.

However, this Court will not ignore the obvious, and apparently deliberate, effort by the Arkansas Supreme Court to deny Plaintiffs an evidentiary hearing on their urgent contention that

Midazolam, the first of the three drugs that Act 1096 mandates be administered in the lethal injection MOE, is incapable of rendering someone insensate to pain while in an unconscious state. Plaintiffs made that allegation in their lawsuit and supported it with a sworn affidavit from an expert witness (Dr. Craig Stevens, Ph.D. who is a professor of pharmacology at Oklahoma State University – Center for Health Sciences), who asserts that Midazolam is incapable of rendering a person insensate to pain or suffering at even the maximum level of sedation. Defendants disputed that assertion, relying on a sworn affidavit from another expert witness (Dr. Daniel E. Buffington, PharmD, MBA who is on faculty at the University of South Florida Colleges of Medicine and Pharmacy), and who opines that Midazolam is capable of rendering a person insensate to severe pain “upon the timely rapid administration of the second and drugs” (vencuronium bromide and potassium chloride) mandated by the Act 1096 MOE protocol.

This Court will not skirt the obvious truth that the Arkansas Supreme Court deliberately refused to address. Plaintiffs and Defendants pled and presented diametrically opposing positions regarding the first of the two factors courts are to consider in evaluating the constitutionality of method of execution protocols (whether the method of execution involves a demonstrated risk of severe pain). That is why this Court denied Defendants’ motion to dismiss Plaintiffs’ first amended complaint.

When the Arkansas Supreme Court reversed this Court’s decision, it did not even mention that the parties had pled and presented conflicting affidavits on this threshold issue of constitutional importance. It dismissed the litigation, with prejudice, despite decades of case law in Arkansas stating that when a complaint is dismissed under subdivision 12(b)(6) of the Arkansas Rules of Civil Procedure for failure to state facts upon which relief can be granted, the dismissal should be without prejudice in order to allow a plaintiff to plead further. *See, Ark.*

Department of Environmental Quality v. Brighton Corp., 352 Ark. 396, 102 S.W.3d 458 (2003); *Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 846 S.W.2d 176 (1993); *Hubbard v. Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993).

This Court also will not skirt another blatant discrepancy in the *Kelley v. Johnson* decision. Plaintiffs have at all times in the past challenged Act 1096 as a violation of the separation-of-powers and ex post facto provisions of the Arkansas Constitution. When the Arkansas Supreme Court dismissed their case, with prejudice, in *Kelley v. Johnson*, it did not address that challenge because those issues were not appealed by either side. *Defendants took an interlocutory appeal from this Court's decision, as those contentions had not been reduced to final judgment.*

Nevertheless, the Arkansas Supreme Court reversed this Court's "decision *in toto* and dismiss[ed] the [Plaintiffs'] amended complaint." *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346 (2016) (emphasis added). The mandate putting that ruling into effect was issued thereafter. Plaintiffs' Second Amended Complaint was filed afterwards, which led to the pending motions from Defendants that are the subject of this memorandum order. When the Arkansas Supreme Court dismissed the amended complaint, with prejudice, its decision rendered this Court powerless to even enter judgment on the separation-of-power and ex post facto contentions so that Plaintiffs could seek appellate review on them. Hence, Plaintiffs have not obtained, and will never get, an appellate review concerning whether Act 1096 violates the separation-of-powers and ex post facto provisions of the Arkansas Constitution.

Conclusion

This Court has no alternative but to grant Defendants' motion to dismiss the Second Amended Complaint. Simply put, when the Arkansas Supreme Court reversed this Court's

previous ruling it also dismissed Plaintiffs' amended complaint, with prejudice, despite longstanding law requiring that such a dismissal should be without prejudice. That dismissal effectively ended this Court's jurisdiction over all claims and contentions asserted in the lawsuit that led to the dismissal.

The Second Amended Complaint must be dismissed because it is barred by the decision that dismissed its predecessor. This Court has no power to consider challenges to Act 1096 that were raised in the lawsuit that was dismissed by the Arkansas Supreme Court ruling in *Kelley v. Johnson*.

Because the Arkansas Supreme Court dismissed Plaintiffs' lawsuit when it reversed this Court, this Court also has no power to act on Plaintiffs' Motion for Certification of Partial Final Judgment under Rule 54(b) of the Arkansas Rules of Civil Procedure.

Simply put, the Arkansas Supreme Court has decided and declared that Plaintiffs are not entitled to a trial on their contention that Midazolam, the drug mandated by the Act 1096 MOE for anesthetizing persons sentenced to death by lethal injection in Arkansas, is incapable of rendering a person insensate to severe pain. The Arkansas Supreme Court also decided that Defendants may conceal the identity of the supplier(s) and manufacturer(s) of the lethal injection drugs.

The Arkansas Supreme Court has decided, in a ruling that is both plain and troubling, that Plaintiffs are not entitled to a trial on their contention that the three-drug protocol prescribed by Defendants pursuant to Act 1096 will cause each of them severe pain and suffering. This Court cannot entertain pleadings concerning those allegations. No other trial court can do so in Arkansas.

This Court must and will abide by the ruling issued by the Arkansas Supreme Court, as must every other state court in Arkansas. However, the undersigned is troubled that the Plaintiffs have alleged, and supported their allegations with sworn affidavits from an expert witness, that the method of execution protocol prescribed by Act 1096 will subject them to deaths that are unnecessarily painful, if not tortuous. It is troubling that a judge may not even hold a trial in this situation. It is troubling that a judge may not evaluate the proof that Plaintiffs seek to offer in support of those allegations. It is troubling that a judge may not evaluate the proof Defendants would offer to counter any proof Plaintiffs might introduce.

In the first of Sir Arthur Conan Doyle's stories about Sherlock Holmes, titled *A Scandal in Bohemia*, Holmes uttered the following statement to his friend Dr. Watson. "It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts." The decision in *Kelley v. Johnson* not only shows how such a "capital mistake" can occur. It ironically, and tragically, presents that "capital mistake" in a case involving the administration of capital punishment in Arkansas for eight condemned murderers in this instance, but also for every other execution in which the MOE mandated by Act 1096 will be administered in the future.

Before now, courts and judges in Arkansas have understood that the legal process requires that determinations about the probative weight and legal consequences arising from disputed facts surrounding competing claims and contentions must be made by conducting trials, not by pretending there are no facts worth trying, let alone by allowing parties to conceal evidence that may be relevant to a dispute. Until now, courts and judges in Arkansas have treated evidentiary hearings and trials as fundamental to fairness in matters that involve all kinds of rights and relationships.

Every attorney admitted to practice before the Arkansas Supreme Court and every judge in Arkansas is bound by an oath taken the day they are admitted to practice law in this state. That oath concludes with the following pledges:

I will not reject, from any consideration personal to myself, the cause of the impoverished, the defenseless, or the oppressed.

I will endeavor always to advance the cause of justice and to defend and to keep inviolate the rights of all persons whose trust is conferred upon me as an attorney at law.

In view of that oath, it is troubling, to say the least, that the legal process is unwilling to follow this process because the people who seek it are condemned to die because they are convicted murderers. At worst, such unwillingness undermines confidence in the willingness of courts and judges to accord unpopular parties a fair and impartial hearing on their claims. It is more than troubling that Arkansas judges must now deny persons sentenced to death by lethal injection a fair and impartial evidentiary hearing concerning their allegations that the State of Arkansas intends to subject them to an execution process which they allege will involve demonstrable risk of severe pain. It is an affront to, and dereliction of, the very oath every lawyer and judge swore before being admitted by the Supreme Court of this state.

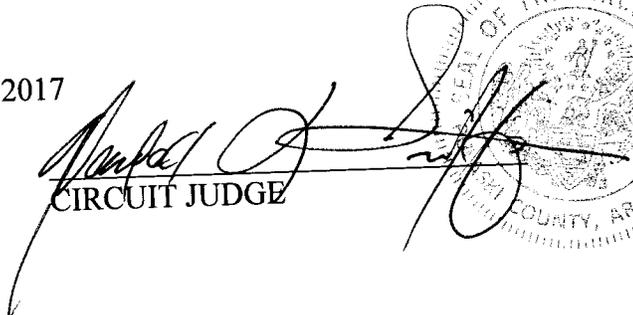
As such, it is more than troubling, and more than shameful. It amounts to theft of the rights guaranteed by the Constitution of this state and the Constitution of the United States to a trial. To think that the highest court in Arkansas would compel every other court in Arkansas to steal the last right condemned persons have to challenge the constitutionality of their execution illustrates the travesty of justice, and the damnable unfairness, this Court is powerless to prevent.

For the reasons stated herein, Defendants' Motion to Dismiss the Second Amended Complaint is GRANTED.

Defendants' alternative Motion to Strike the Second Amended Complaint is DENIED.

Plaintiffs' Motion for Certification of Partial Final Judgment is MOOT.

ORDERED THIS 28 day of March, 2017


CIRCUIT JUDGE

