IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
6th DIVISION

JOHNNY RHODA **PLAINTIFF**

V. **DOCKET NO. CV 2010 5667**

**MIKE BEEBE, GOVERNOR OF ARKANSAS;
BILL HALTER, LT. GOVERNOR OF ARKANSAS;
DUSTIN MCDANIEL, ATTORNEY GENERAL OF
ARKANSAS; CHARLIE DANIELS, ARKANSAS
SECRETARY OF STATE; MARTHA SHOFFNER,
TREASURER OF ARKANSAS; JIM WOOD, AUDITOR
OF THE STATE OF ARKANSAS; MARK WILCOX,
COMMISSIONER OF STATE LANDS OF THE STATE OF
ARKANSAS; ROBBIE WILLS, SPEAKER OF THE
ARKANSAS HOUSE OF REPRESENTATIVES FOR
THE STATE OF ARKANSAS** **DEFENDANTS**

**BRIEF IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF
BY PLAINTIFF JOHNNY RHODA**

ARCP Rule 65 provides that where it appears by affidavit or verified complaint that irreparable harm or damage will or might result to the applicant a preliminary injunction or a temporary restraining order may be granted by the Court.

Arkansas Constitution Amendment 70 was enacted in 1992, in the aftermath of expense account abuses that resulted in the conviction of former Attorney General Steve Clark. It was the clear intention of the people to protect the state treasury by limiting the amount of income and expense money that constitutional officers[1] can receive.

[1] Plaintiff Rhoda's complaint also names the speaker of the Arkansas House of Representatives as a defendant. The speaker is "not a constitutional officer and is not a member of the Executive Department." Berry v. Gordon, 376 SW2d 279, 237 Ark. 547 (1964). Nevertheless, the speaker is provided a state-owned car that is used for personal purposes and Section 1(b)

Amendment 70 replaced Amendment 56 which set the salaries of constitutional officers, but did not expressly limit the amount of money that such officers could receive over and above their salaries. Amendment 70 was designed to fix the abuses that developed under Amendment 56.

Amendment 70 sets the amount of salary for each constitutional officer and allows them to seek reimbursement for expenses reasonably connected to their official duties, if those expenses are documented and actually incurred. The amendment then states that the constitutional officers "shall not receive any other income from the State of Arkansas, whether in the form of salaries or expenses." Ark. Const. Amend. 70, §1(a).

In construing constitutional provisions it is the duty of the court to ascertain and give effect to the intent of the framers and to the people who adopted it. The spirit and intention of the constitutional provision should prevail so that the plain purpose of the law will not be defeated. *Berry v. Gordon*, 376 SW2d 279, 237 Ark. 547 (1964). It is to be construed according to the sense of the terms used and the intention of its authors. *Rankin v. Jones*, 224 Ark. 1001, 278 SW2d 646.

On September 30, 2010, Plaintiff Johnny Rhoda filed a taxpayer's suit to enforce Amendment 70, as it applies to the constitutional officers of the state of Arkansas. He contends they are in violation of the Arkansas Constitution because they use state owned vehicles for personal purposes and that such usage amounts to an unlawful income supplement. Rhoda also contends there is no official state policy requiring constitutional officers to contemporaneously record, or otherwise log, the times and mileage that they use the vehicles for personal purposes.

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of Amendment 70 applies the same salary and expense limitations to the speaker as it does to constitutional officers in Section 1(a). Thus, for ease of understanding, in this brief the words "constitutional officer(s)" include the speaker of the House of Representatives.

Moreover, he contends there is no law establishing the amount the officials would owe for each mile they drive state owned vehicles for personal purposes.

On July 16, 2010 three citizen taxpayers filed a similar illegal exaction suit to determine whether or not the constitutional officers (and others) who are provided state owned vehicles for official use must reimburse the State of Arkansas if they use the vehicles for personal purposes. (*Gould, et. al. v. Martha Shoffner, et. al.*; Pulaski County Circuit Court No. 60-CV-10-4111)

The Gould lawsuit, for some reason, did not allege that the constitutional officers, to the extent they used state-owned vehicles for personal purposes, were in direct violation of Amendment 70.

On August 31, 2010 the constitutional officers, and several other defendants, filed Motions to Dismiss the Gould complaint.

The office of Attorney General Dustin McDaniel is representing some of the defendant constitutional officers (and others) and has filed a brief in support of the Motion to Dismiss the Gould complaint. In that brief the attorney general argues, *inter alia*:

a) The statutory law cited as a basis for the claims made in the Gould suit, Ark. Code Ann. § 19-4-903, does not apply to constitutional or elective officials[2]; and,

b) There is no specific factual allegation in the Gould complaint showing that the constitutional officers actually used the vehicles for personal purposes. The attorney general then defends the constitutional officers with the following assertions:

[2] Ark. Code Ann. § 19-4-904 (a) expressly states that it does not apply to constitutional officers or elected officials.

> "The plaintiffs … do not mention even one trip in a state owned vehicle for a personal purpose. Plaintiffs do not say where any of the Defendants have traveled in those vehicles. The Plaintiffs do not say where the Defendants departed or where they arrived. The Plaintiffs do not say when the Defendants departed, when they arrived, or if they ever returned. The Plaintiffs do not say what the Defendants did whenever they supposedly arrived at wherever it was that they supposedly went. Plaintiffs have merely asserted conclusions … based entirely on speculation and supposition …" (Defendants Brief in support of Motion to Dismiss, Gould case, page 6)

The arguments of the attorney general are troublesome. The state has no policy requiring constitutional officers to contemporaneously log or otherwise record the times and miles they use the vehicles for personal purposes. And, the state has no law fixing the amount the constitutional officers owe for each mile they use the car for personal purposes. Now that taxpayers, in both of the pending suits, are trying to do something about a legitimate grievance the chief law enforcement officer of the state is saying to the taxpayers: The burden is on you. Prove it if you can. If you can't your suit must fail.

This is a serious problem because in *Berry v. Gordon*, *supra*, the Arkansas Supreme Court held that in actions to compel a public officer to account for funds alleged to have been wrongfully received, the plaintiff has the burden of proof.

Exactly how can a taxpayer prove the nature, amount, and extent of abuse when there are no records and no state law requiring record-keeping? And, to further complicate matters, there

is no state law fixing the amount per mile that constitutional officers must pay if they use government vehicles for personal purposes.

The plaintiff Johnny Rhoda, noticing the imbroglio caused by legal maneuvering in the Gould case, filed this separate lawsuit seeking a declaratory judgment as to how Amendment 70 affects the personal use of state owned vehicles by constitutional officers. The relief he seeks in this motion for injunctive relief is prospective and will not disturb the other litigation. On the contrary, the relief sought in this motion is in the public interest because it will frustrate the blatant effort of the constitutional officers to avoid liability by not keeping appropriate records. The order sought by this motion will afford immediate protection to the taxpayers of Arkansas and it will rightly enhance the effort of the plaintiffs in the Gould case.

The Gould case is designed to reach all corners of state government. Judging by the avalanche of early pleadings it will take years to litigate the matter to conclusion. In the meantime there will be no protection for the taxpayers who have clearly said, via Amendment 70, that the constitutional officers of this state should not receive supplemental income or expense money (other than those reimbursed for official documented outlays) beyond the salaries that are fixed by law. The people, through Amendment 70, put the highest elected officers of this state in a separate category when it comes to salaries, income and expenses. They are obliged to set a good example for all others in state government, particularly those who also drive state-owned cars. For these reasons this motion for injunctive relief which is limited to the constitutional officers should be resolved as quickly as possible.

Each day that goes by is another day that the constitutional officers will be allowed to drive the vehicles without a requirement to keep records. If they continue to drive the cars for

personal purposes the public will not have the reliable, discoverable records that they will need to seek and prove a case for reimbursement.

Indeed, the Gould case was filed July 16, 2010. Forty-six days later the Attorney General moved to dismiss, contending the plaintiffs had not specifically alleged when and where the constitutional officers had driven the vehicles for personal purposes. It is now October and nothing has been done to insure that the constitutional officers will contemporaneously log or record the details of each trip they make for personal purposes. In the absence of such recordkeeping the taxpayers will have no way to establish the nature and extent of illegal exactions committed by the constitutional officers.

Johnny Rhoda contends that the constitutional officers must reimburse the people for the miles they drive for personal purposes. That is the conclusion Attorney General Dustin McDaniel came to on July 12, 2010 (see attached statement from the Arkansas Times, July 12, 2010). He, however, was forced to estimate the miles he had driven for personal purposes over a three and one half year period because there was no reliable, publicly discoverable record of his personal use; and, since there is no law fixing the amount that constitutional officers owe for each mile they use a vehicle for personal purposes, he assumed that 15 cents per mile was the amount he should have to pay. He reimbursed the state $2,903.19.

If Johnny Rhoda and Dustin McDaniel are right and a constitutional officer does reimburse the taxpayers for personal use of the state owned vehicle then the constitutional officer will have received no income supplement. He or she would not be in violation of Amendment 70 and there would be no need for that constitutional officer to pay income tax on the amount of the benefit, either federal or state.

Some of the constitutional officers who are defendants in this case have publicly stated that they have declared an appropriate amount of income on their tax returns. The appropriateness of such declarations cannot be verified until their income tax returns are examined pursuant to discovery procedures. Plaintiff Johnny Rhoda contends that such estimated declarations and payments of tax do not satisfy the strict requirement of Amendment 70. First because, without reliable record recordkeeping, there is no assurance the estimate is correct; and secondly, because, under such a scenario, the taxpayers of Arkansas are being cheated out of full reimbursement.

Consider this: The Arkansas maximum rate of income tax is 7%. Attorney General Dustin McDaniel estimated that he used his state owned car to drive 19,354 miles for personal purposes. He then assumed a mileage rate of 15 cents. He reimbursed the taxpayers by writing a check to the State of Arkansas for $2,903.19.[3]

If General McDaniel had taken the position of the other constitutional officers -- that he only had to pay tax on the amount of his income supplement -- he would not have written that check to the State of Arkansas. Instead, he would have declared income of $2,903.19 on his tax return. His only obligation to the State of Arkansas for 19,354 miles of personal use of an expensive SUV would have been the 7% maximum rate of Arkansas income tax on the declared income, a sum of $203.22 ($2903.19 X .07%). That would be a very good deal for the constitutional officer, but it is shortchanges the Arkansas taxpayer. The treasury of Arkansas would have lost $2,699.98 ($2903.19 - $203.22).

[3] This calculation assumes, in the absence of appropriate records, that General McDaniel's estimates accurately reflected the actual miles he used the state-owned car for personal purposes; and, of course, it assumes that he only owed the taxpayers 15 cents a mile instead of a greater per mile amount.

Ultimately, a court of law will have to decide between two contentions. Does Amendment 70 require full reimbursement for personal use of state owned vehicles? Or, is it sufficient for the constitutional officers to simply pay tax on the amount of benefit they receive by using state owned vehicles for personal purposes?

Either way, there is an immediate need for the constitutional officers to make and keep a discoverable, contemporaneously written log of the times or miles they use state owned vehicles for personal purposes.[4] Otherwise, they will continue the tradition and practice of driving the state owned vehicles without making such records and then, as they are doing in the Gould lawsuit, claim the absence of records as their defense. In the absence of an order directing constitutional officers to keep appropriate, discoverable records of personal usage, the taxpayers of Arkansas will be unfairly disadvantaged when they attempt to enforce their constitution. There should never be right without a remedy.[5] As it stands now the constitutional officers when sued, can say: I did not keep records. Prove it if you can. If you can't, you lose.

Johnny Rhoda, therefore, seeks an immediate order directing the defendants to stop using the state owned vehicles until such time that there is an official policy in place that will afford taxpayers access to reliable, contemporaneously recorded, documentary proof of the times and mileage that constitutional officers use the vehicles for personal purposes.

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[4] Federal and state tax laws require taxpayers to maintain logs or reports, contemporaneously recorded, of miles that are driven for business and personal use. IRS, Publication 463 (2009), Travel, Entertainment, Gift, and Car Expenses.

[5] " *Ubi jus, ibi remedium.* … where there is a right there must be a remedy. … from Blackstone to the Federalists to Marbury v. Madison … the remedy has been recognized historically as a fundamental right." Thomas, Tracy A, The Fundamental Right to a Remedy Under Due Process. San Diego Law Review, Vol. 41, November 2004.

In the alternative, Johnny Rhoda asks the court to order all constitutional officers, including the speaker of the House of Representatives to stop using the state owned vehicles for personal purposes until the officers consent to an order directing them to maintain a reliable, contemporaneously recorded, discoverable log or other record evidencing the times and mileage that they use state owned vehicles for personal purposes.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the _____ day of _____, 2010 this Brief in Support of Motion for Injunctive Relief by Plaintiff was hand delivered to the offices of Governor Mike Beebe, Room 250, State Capitol; Lt. Governor Bill Halter, Room 270, State Capitol; Attorney General Dustin McDaniel, 323 Center Street, Suite 200; Secretary of State Charlie Daniels, Room 256, State Capitol; Treasurer Martha Shoffner, Room 220, State Capitol; Auditor Jim Wood, Room 230, State Capitol; Land Commissioner Mark Wilcox, Room 109, State Capitol; and Speaker Robbie Wills, House of Representatives, State Capitol, Little Rock, Arkansas.

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Doyle Webb
Attorney at Law