

THE ARKANSAS COURT OF APPEALS HOLDS THAT ARKANSAS RULE OF CIVIL PROCEDURE 60 PERMITS A TRIAL COURT TO CORRECT ITS OWN ERROR ONLY WHERE THE ERROR IS CLERICAL IN NATURE OR FALLS UNDER THE SPECIFIC EXCEPTIONS UNDER RULE 60(C) AND IS CORRECTED WITHIN NINETY DAYS OF BEING ENTERED.

In *Pinto v. Sims*,<sup>1</sup> the Arkansas Court of Appeals reversed a lower court's order vacating a dismissal order entered in error, finding that the lower court abused its discretionary power under Arkansas Rule of Civil Procedure 60.<sup>2</sup> Because the error was not clerical in nature, did not fall under one of the specific exceptions in Rule 60(c), and was not corrected within ninety days of being entered, the trial court had no power to set aside its erroneous order.<sup>3</sup>

The Sims entered into a residential construction contract with the Pintos.<sup>4</sup> Under the contract, the Pintos agreed to manage the construction of the Sims' home.<sup>5</sup> The Sims sued the Pintos for breach of contract, alleging that they had paid the Pintos \$60,000 for building materials and labor.<sup>6</sup> According to the Sims, the Pintos had failed to pay for either.<sup>7</sup>

After counsel for both parties withdrew from the case, the trial court sent both parties a letter in December 2009 stating that unless the court received written notification before December 30, the case would be dismissed.<sup>8</sup> Although an attorney filed an entry of appearance on behalf of the Sims on December 17, neither party objected in writing to the December 30 deadline.<sup>9</sup> The court dismissed the case without prejudice on December 30, 2009; neither party was notified of the dismissal.<sup>10</sup>

In February, the Sims moved for summary judgment.<sup>11</sup> The court set a hearing for April 28, 2010, which the Pintos failed to attend.<sup>12</sup> On June 4, the trial court granted summary judgment against the Pintos for

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1. 2011 Ark. App. 609, \_\_\_ S.W.3d \_\_\_.
  2. *Id.* at 1, \_\_\_ S.W.3d at \_\_\_.
  3. *Id.* at 6, \_\_\_ S.W.3d at \_\_\_.
  4. *Id.* at 1, \_\_\_ S.W.3d at \_\_\_.
  5. *Id.*, \_\_\_ S.W.3d at \_\_\_.
  6. *Id.*, \_\_\_ S.W.3d at \_\_\_.
  7. *Pinto*, 2011 Ark. App. 609, at 1, \_\_\_ S.W.3d at \_\_\_.
  8. *Id.* at 2, \_\_\_ S.W.3d at \_\_\_.
  9. *Id.*, \_\_\_ S.W.3d at \_\_\_.
  10. *Id.*, \_\_\_ S.W.3d at \_\_\_.
  11. *Id.*, \_\_\_ S.W.3d at \_\_\_.
  12. *Id.*, \_\_\_ S.W.3d at \_\_\_.

\$83,117.85.<sup>13</sup> After the Sims filed a writ of garnishment on Brandy Pinto's employer to enforce the judgment, the trial court set aside the dismissal order filed on December 30, 2009, stating that it had been "entered in clerical error."<sup>14</sup> Pinto then moved to set aside the order setting aside the court's dismissal of the case, claiming that any proceeding after the dismissal on December 30 was void, including the judgment against her.<sup>15</sup>

On November 23, 2010, the trial court granted Pinto's motion to set aside its order vacating the December 30 dismissal.<sup>16</sup> It also entered a new order setting aside the December 30 dismissal, describing it as accidental.<sup>17</sup> The trial court denied Pinto's motion for reconsideration, and Pinto appealed that decision to the Court of Appeals, claiming that the trial court had abused its discretion.<sup>18</sup>

Under Arkansas Rule of Civil Procedure 60(a), a court may correct an error within ninety days of the error's filing, either on its own motion or the motion of a party. Under section (b), however, a court may correct a "clerical" error at any time.<sup>19</sup> Additionally, section (c) provides for the setting aside of a judgment in the event of misprisions of the clerk or misrepresentation or fraud by an adverse party.<sup>20</sup> A trial court has the discretion to determine when Rule 60 is properly applied.<sup>21</sup>

The Court of Appeals agreed with Pinto that the trial court abused its discretion by setting aside its dismissal order entered December 30, 2009.<sup>22</sup> The court held that Arkansas Rule of Civil Procedure 60(a) is inapplicable because the court's order was beyond the ninety-day limitation.<sup>23</sup> Additionally, section (b) is inapplicable because there was no evidence of clerical mistake, oversight, or omission.<sup>24</sup> Section (c) does not apply because the clerk's failure to close the case does not constitute misprision or constructive fraud; the court's mistake occurred prior to any error by the clerk.<sup>25</sup>

A "clerical" error is "one that arises not from an exercise of the court's judicial discretion but from a mistake on the part of its officers (or perhaps

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13. *Pinto*, 2011 Ark. App. 609, at 2-3, \_\_\_ S.W.3d at \_\_\_.

14. *Id.* at 3, \_\_\_ S.W.3d at \_\_\_.

15. *Id.*, \_\_\_ S.W.3d at \_\_\_.

16. *Id.*, \_\_\_ S.W.3d at \_\_\_.

17. *Id.*, \_\_\_ S.W.3d at \_\_\_.

18. *Id.* at 4, \_\_\_ S.W.3d at \_\_\_.

19. ARK. R. CIV. PRO. 60(b).

20. ARK. R. CIV. PRO. 60(c).

21. *Pinto*, 2011 Ark. App. 609, at 4, \_\_\_ S.W.3d at \_\_\_.

22. *Id.* at 6, \_\_\_ S.W.3d at \_\_\_.

23. *Id.* at 7, \_\_\_ S.W.3d at \_\_\_.

24. *Id.*, \_\_\_ S.W.3d at \_\_\_.

25. *Id.* at 8-9, \_\_\_ S.W.3d at \_\_\_.

someone else).<sup>26</sup> Courts have an inherent power to correct such errors.<sup>27</sup> This power is confined, however, to correcting the record to make it accurately reflect action that was taken.<sup>28</sup> Retroactive changes cannot be made to correct a court's incorrect decision or improper action.<sup>29</sup>

The court rejected the Sims' attempt to draw an analogy between this case and *Gholson v. State*,<sup>30</sup> where a dismissal was held to be clerical error.<sup>31</sup> In *Gholson*, a criminal case was inadvertently dismissed by nolle prosequi order but continued to trial on the State's petition to revoke.<sup>32</sup> The specific error in *Gholson* was the result of a mistake by an officer of the court; the trial court did not intend to dismiss the case.<sup>33</sup> The Arkansas Court of Appeals held that an order entered in error does not contain the truth, thus trial courts are free to correct such errors.<sup>34</sup>

Although in both the instant case and *Gholson* the parties proceeded without knowledge of the error, the court held that this did not make the cases comparable.<sup>35</sup> Instead, as the court in *Pinto* points out, *Gholson* is distinguishable because the trial judge never intended to dismiss the case.<sup>36</sup> In the present case, however, the trial court did intend to dismiss the case if no action was taken by either party.<sup>37</sup> Overlooking the appearance of one party's attorney was not a "clerical" error.<sup>38</sup>

The court also rejected the Sims' argument that the dismissal order resulted from a misprision of the clerk, resulting in constructive fraud.<sup>39</sup> The clerk's continued acceptance of pleadings in June, despite the case's closure the previous December, did not rise to the level of misprision.<sup>40</sup> The clerk

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26. *Id.* at 5, \_\_\_ S.W.3d at \_\_\_ (quoting *Francis v. Protective Life Ins. Co.*, 371 Ark. 285, 293, 265 S.W.3d 117, 123 (2007)) (citations omitted).

27. *Pinto*, 2011 Ark. App. 609, at 5, \_\_\_ S.W.3d at \_\_\_ (quoting *Harrison v. Bradford*, 9 Ark. App. 156, 158, 655 S.W.2d 466, 468 (1983)).

28. *Pinto*, 2011 Ark. App. 609, at 5-6, \_\_\_ S.W.3d at \_\_\_.

29. *Id.* at 6, \_\_\_ S.W.3d at \_\_\_ (quoting *Harrison v. Bradford*, 9 Ark. App. 156, 158, 655 S.W.2d 466, 468 (1983)) (citations omitted).

30. 2009 Ark. App. 373, 308 S.W.3d 189.

31. *Pinto*, 2011 Ark. 609, at 8, \_\_\_ S.W.3d at \_\_\_ (citing *Gholson v. State*, 2009 Ark. App. 373, 8, 308 S.W.3d 189, 193).

32. *Pinto*, 2011 Ark. 609, at 7, \_\_\_ S.W.3d at \_\_\_ (citing *Gholson*, 2009 Ark. App. 373 at 1, 308 S.W.3d at 189).

33. *Pinto*, 2011 Ark. 609, at 7, \_\_\_ S.W.3d at \_\_\_ (citing *Gholson*, 2009 Ark. App. 373 at 4, 308 S.W.3d at 190).

34. *Pinto*, 2011 Ark. 609, at 7, \_\_\_ S.W.3d at \_\_\_ (citing *Gholson*, 2009 Ark. App. 373 at 4, 308 S.W.3d at 191).

35. *Pinto*, 2011 Ark. 609, at 7-8, \_\_\_ S.W.3d at \_\_\_.

36. *Id.* at 8, \_\_\_ S.W.3d at \_\_\_.

37. *Id.* at 8, \_\_\_ S.W.3d at \_\_\_.

38. *Id.*, \_\_\_ S.W.3d at \_\_\_.

39. *Id.* at 8-9, \_\_\_ S.W.3d \_\_\_.

40. *Id.*, \_\_\_ S.W.3d at \_\_\_.

did not realize that the case was closed, and her errors did not affect the normal ninety-day window to correct non-clerical errors.<sup>41</sup>

The Arkansas Court of Appeal's recent decision in *Pinto v. Sims* clarifies that a trial court does not have unfettered discretion under Arkansas Rule of Civil Procedure 60. After ninety days from the date an error was entered, a court can correct its own errors only in specific circumstances.

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41. *Id.*, \_\_\_ S.W.3d at \_\_\_.