THE SUPREME COURT OF ARKANSAS HOLDS THAT AN ISSUE IS NOT RIPE FOR APPEAL WHEN A TRIAL COURT'S ORDER DOES NOT EXPRESSLY RULE ON THE ISSUE.

In *Arkansas Lottery Commission v. Alpha Marketing*,[1] Appellant Arkansas Lottery Commission ("Commission") brought an interlocutory appeal from the trial court's order denying its motion to dismiss an amended complaint of the appellee, Alpha Marketing ("Alpha").[2] The Supreme Court of Arkansas held that the trial court had not expressly ruled on the issue of sovereign immunity in its order, and, therefore, the appeal based on sovereign immunity was precluded.[3]

On March 18, 2010, Alpha filed a complaint for declaratory judgment against the Commission "and seeking a determination that its trademarks, 'Arkansas Lottery,' 'Arkansas Lotto,' and 'Lottery Arkansas,' [were] valid and that it was entitled to the exclusive use of those marks."[4] Alpha claimed that it was involved in advertising, promotion, and sale of goods and services in various media outlets in Arkansas and that those trademarks had been used it its ordinary course of trade.[5] Alpha also asserted "that the Arkansas Secretary of State had recorded and issued to it Certificates of Trademark Registration for each of the marks."[6]Alpha also alleged that a Senior Assistant Attorney General sent a cease-and-desist letter in May 2009, which threatened legal action if it did not stop using those trademarks.[7] Alpha detailed correspondence with the Attorney General's Office that ended in August 21, 2009, when the Attorney General's Office stated it was not taking any further action and would refer the matter to the Commission.[8]

The Commission answered the complaint with an affirmative defense that the registration of trademarks was contrary to law and should be cancelled.[9] Alpha amended its complaint on August 30, 2010, again requesting a declaratory judgment and adding a trademark infringement claim against the Commission.[10] For the trademark infringement claim, Alpha stated that the Commission used the trademarks with its goods and services, without

1. 2012 Ark. 23, 386 S.W.3d 400.
2. *Id.* at 1, 386 S.W.3d 401.
3. *Id.*
4. *Id.*
5. *Id.* at 2, 386 S.W.3d 401.
6. *Id.*
7. *Arkansas Lottery*, 2012 Ark. 23, at 2, 386 S.W.3d 401.
8. *Id.*, 386 S.W.3d 402.
9. *Id.*
10. *Id.*

Alpha's consent, and that it sought damages for lost profits as well as an injunction to prohibit the Commission's use of the trademarks.[11]

The Commission filed a motion to dismiss the amended complaint in September 21, 2010 and stated that Alpha's declaratory judgment claim should be dismissed because the trademarks were improperly granted and not entitled to protection.[12] The Commission relied on a decision from the Minnesota Court of Appeals and argued that the trademarks were obtained prior to lotteries being legal in Arkansas and that the trademarks "were deceptive and implied an illegal purpose."[13] The Commission also argued the trademarks falsely suggested a connection between Alpha's business and the Arkansas Scholarship Lottery, thus the trademarks were improperly granted, invalid, and deceptively misdescriptive.[14] The Commission asserted that Alpha would not be entitled to relief even if the trademarks were valid because the trademarks did not have secondary meaning and were descriptive only.[15] Next, the Commission asserted the complaint did not state facts regarding trademark infringement for which relief could be granted.[16] Further, the Commission stated that Alpha's request for damages and injunctive relief were barred by sovereign immunity.[17]

Alpha responded that the trademarks were not deceptive or deceptively misdescriptive and that the Minnesota decision was inapposite.[18] Alpha also claimed that the trademarks did not draw a connection to the Arkansas Scholarship Lottery and that the trademarks did have secondary meaning.[19] Finally, Alpha asserted that its claim had alleged sufficient facts to withstand the motion to dismiss and "that the claim was not barred by sovereign immunity because the cease-and-desist letter sent from the Attorney General's Office was an act of inverse condemnation of its intellectual property."[20]

The circuit court entered an order on March 11, 2011, and stated that the complaint was sufficient to state a claim for trademark infringement.[21] The court rejected the Commission's argument that the trademarks were deceptive and held that reliance on opinions from other jurisdictions was

11. *Id.*
12. *Id.* at 3, 386 S.W.3d 402.
13. *Arkansas Lottery*, 2012 Ark. 23, at 3, 386 S.W.3d 402 (citing to *State by Anderson v. Reward Corp.*, 482 N.W.2d 815 (Minn.Ct.App.1992)).
14. *Id* at 3, 386 S.W.3d 402.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 4, 386 S.W.3d 402.
19. *Arkansas Lottery*, 2012 Ark. 23, at 4, 386 S.W.3d 402.
20. *Id.*, 386 S.W.3d 403.
21. *Id.*

unpersuasive.[22] Therefore, the circuit court denied the motion to dismiss, and the Commission filed a timely notice of appeal and brought the interlocutory appeal.[23]

The Court stated that appeals must, without question, be from a final judgment or decree from the circuit court.[24] However, "Rule 2(a)(10) of the Arkansas Rules of Appellate Procedure—Civil permits an appeal from an interlocutory 'order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official.'"[25] Though the Court recognized that the Commission had argued sovereign immunity and the circuit court had noted that argument, it held that the circuit court did not rule on that argument and, therefore, there could not be an interlocutory appeal on that issue.[26]

Relying on previous decisions in which it had similarly ruled, the Court found its decision in this case to be supported by ample precedent.[27] The Court also held that the circuit court's silence on an issue did not allow it to presume what the court had or would have ruled on that issue.[28] The Court then went into a discussion of one of its previous decisions regarding the requirement that the circuit court make a ruling on an issue, which held that an issue was not preserved for appeal when such a ruling had not been made.[29] The Court found that it was without jurisdiction to hear the appeal because no ruling from the circuit court regarding the issue of sovereign immunity had been entered.[30] Therefore, the Court dismissed the appeal without prejudice so that the Commission could "return to circuit court to obtain a ruling for this court to review on an interlocutory basis."[31]

Chief Justice Hannah, Justice Brown, and Justice Baker dissented.[32] Justice Hannah found that the issue of sovereign immunity had been decided by the circuit court and was, therefore, ripe for review.[33] The circuit court's order stated that the decision denying the motion dismiss was based on the

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22. *Id.*
23. *Id.* at 5, 386 S.W.3d 403.
24. *Id.* at 5, 386 S.W.3d 404.
25. *Arkansas Lottery*, 2012 Ark. 23, at 6, 386 S.W.3d 404.
26. *Id.*
27. *Id.* at 6–7, 386 S.W.3d 404 (citing to *Carquest of Hot Springs, Inc., v. General Parts, Inc.*, 361 Ark. 25, 204 S.W.3d 53 (2005); *Malone & Hyde, Inc., v. West & Co. of La., Inc.*, 300 Ark. 435, 780 S.W.2d 13 (1989)).
28. *Id.* at 7, 386 S.W.3d 404.
29. *Id.* at 7–8, 386 S.W.3d 405 (discussing *White v. Davis*, 352 Ark. 183, 187, 99 S.W.3d 409 (2003) and *McDonald v. Wilcox*, 300 Ark. 445, 780 S.W.2d 17 (1989)).
30. *Id* at 8, 386 S.W.3d 405.
31. *Arkansas Lottery*, 2012 Ark. 23, at 9, 386 S.W.3d 405.
32. *Id.*
33. *Id.*, 386 S.W.3d 405 (Hannah, C.J., dissenting).

documents prepared by the parties and the arguments presented by each.[34] Because sovereign immunity was argued in both the pleadings and in oral argument, Chief Justice Hannah found that it had been decided by the circuit court's order.[35] "The majority decision ignores what the circuit court did and improperly restricts our ability to reach issues presented on appeal and decide cases on their merits."[36]

Justice Brown presented a similar argument in his dissenting opinion, finding that the majority opinion failed to recognize that the circuit court obviously denied the motion to dismiss based on sovereign immunity.[37] The Court has previously held "that sovereign immunity is jurisdictional immunity from suit,"[38] and by denying the motion to dismiss, the circuit court "effectively determined that the Commission 'was not entitled to immunity from suit, as the right of immunity from suit is effectively lost if a case is permitted to go to trial.'"[39] Justice Brown stated that requiring "magic words from the circuit judge" would impede trials and create traps in the practice of law.[40] "Procedures for the practice of law need not be so arcane and rigid but must employ a reasonable and practical standard."[41]

Justice Baker also dissented on a similar argument, finding that the issue of sovereign immunity was preserved for appeal because it was raised as a ground for dismissal in the motion that the circuit court denied, which distinguished the present case from the ones that the majority cited.[42] Justice Baker also found that the majority erred by its reliance on the *Wilcox* and *White* cases because in the present case there were no "'off the record' proceedings regarding sovereign immunity" like there were in those cases.[43] Because the issue of sovereign immunity was argued to the circuit court and the court's order denying the motion to dismiss stated it considered the issue, it was ripe for appellate review.[44]

In *Arkansas Lottery Commission v. Alpha Marketing*, the Supreme Court of Arkansas refused to consider an issue of sovereign immunity in an interlocutory appeal because the circuit court's order did not expressly state that it had ruled on that issue. In doing so, the Court ignored the fact that the

34. *Id.*
35. *Id.*
36. *Id.*, 386 S.W.3d 405–06.
37. *Arkansas Lottery*, 2012 Ark. 23, at 9, 386 S.W.3d 406 (Brown, J., dissenting).
38. *Id.* at 10, 386 S.W.3d 406.
39. *Id.* (citing *Helana-West Helena School Dist. v. Monday*, 361 Ark. 82, 84, 204 S.W.3d 514, 516 (2005)).
40. *Id.*, 386 S.W.3d 406.
41. *Id.*
42. *Id.* at 11–12, 386 S.W.3d 407 (Baker, J., dissenting).
43. *Arkansas Lottery*, 2012 Ark. 23, at 12–13, 386 S.W.3d 407.
44. *Id.*

order stated that the circuit court had considered everything that had been presented to it, which included the issue of sovereign immunity, when it denied the motion to dismiss. By ruling as such, the Court has limited the ability of parties to bring appeals to the Court without some very specific wording from the circuit courts. With the change in justices that has occurred this year, another challenger to this issue might be successful in clarifying exactly what is needed in an order to make an interlocutory appeal possible.

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