

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

CITY OF LITTLE ROCK, ARKANSAS

PLAINTIFF

V.

NO.: 60CV-18-379

ARKANSAS ETHICS COMMISSION;
WARWICK SABIN; SABIN FOR MAYOR
EXPLORATORY COMMITTEE; FRANK
SCOTT, JR.; NEIGHBORS FOR FRANK
SCOTT, JR.

DEFENDANTS

**BRIEF IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS WARWICK
SABIN AND SABIN FOR MAYOR EXPLORATORY COMMITTEE**

Comes now Defendants Warwick Sabin and Sabin for Mayor Exploratory Committee, by and through counsel, and for their Brief in Support of Motion to Dismiss, state as follows:

I. INTRODUCTION

The present case arises from a Complaint filed by the Plaintiff on January 18, 2018. The Complaint was filed by the City of Little Rock, an Arkansas city of the First Class as defined by Ark. Code Ann. §14-37-104. The Plaintiff municipality has filed suit against two of its residents, individually, the exploratory campaign committees of these two Little Rock residents, and the Arkansas Ethics Commission. In its Complaint, the Plaintiff seeks relief in the form of a declaratory judgment recognizing that (a) the Arkansas Ethics Commission has certain authorities, (b) that the Arkansas Ethics Commission has the authority to take appropriate action when certain violations occur, (c) that a certain section

of the administrative code is *ultra vires* and violates Arkansas law, and (d) that the same certain section of the administrative code violates the equal protection provision of the Arkansas Constitution. Separate Defendants Warwick Sabin and the Sabin for Mayor Exploratory Committee file a motion to dismiss this cause of action, which is filed contemporaneously with this brief in support of the motions to dismiss.

II. DISCUSSION

Separate Defendants Warwick Sabin and the Sabin for Mayor Exploratory Committee (hereafter “Sabin Defendants”) file two separate and distinct motions to dismiss this cause of action. The standard of review regarding a motion to dismiss is well established. In reviewing a circuit court's decision on a motion to dismiss, the appellate court will treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Worden v. Kirchner*, 2013 Ark. 509, 431 S.W.3d 243 (2013); *Deer/Mt. Judea Sch. Dist. v. Kimbrell*, 2013 Ark. 393, 430 S.W.3d 29, (2013). In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Id*; *Baptist Health v. Murphy*, 2010 Ark. 358, 373 S.W.3d 269 (2010). The standard of review for the granting of a motion to dismiss under Rule 12(b)(6) is whether the circuit judge abused his or her discretion. *Worden*, at 247; *St. Vincent Infirmary Med. Ctr. v. Shelton*, 2013 Ark. 38, 425 S.W.3d 761 (2013).

Rule 8(a)(1) of the Arkansas Rules of Civil Procedure requires that a complaint state facts, not mere conclusions, in order to entitle the pleader to relief. *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, 372 S.W.3d 324. Only facts alleged in the complaint are

treated as true, not the plaintiff's theories, speculation, or statutory interpretation. *Dockery v. Morgan*, 2011 Ark. 94, 380 S.W.3d 377. Rules 8(a)(1) and 12(b)(6) must be read together in testing the sufficiency of a complaint. *Id.*

The nature of the Plaintiff's suit is that of a petition seeking a declaratory judgment. The Arkansas Supreme Court has held that a clearly erroneous standard of review applies to an appeal of a declaratory judgment in a bench trial. *Poff v. Peedin*, 2010 Ark. 136, 366 S.W.3d 347 (2010). This standard in *Poff* overruled the previous standard found in *Hoffman v. Gregory*, 361 Ark. 73, 204 S.W.3d 541 (2005), which was whether *any substantial evidence* to support the finding upon which the judgment is based is found, it would be affirmed (emphasis added).

**A. Motion to Dismiss No. 1:
Failure to state facts upon which relief can be granted**

The Plaintiff's Complaint fails to state facts upon which relief can be granted pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure; therefore, it must be dismissed.

Warwick Sabin and Sabin for Mayor Exploratory Committee are, and at all times relevant to this cause of action, have been in compliance with Arkansas law. All conduct complained of against the Sabin Defendants complains of the practices of the Sabin for Mayor Exploratory Committee, not Warwick Sabin personally. Regardless, these Defendants are not only in compliance with Arkansas law as it pertains to exploratory political campaigns and campaign committee, these Defendants are also in compliance with the ordinance referenced in Paragraph 36 of the Plaintiff's Complaint. Arkansas law

expressly and specifically allows exploratory committees. See Ark. Code Ann. §7-6-216. Therefore, a reading of the four corners of the Complaint clearly shows that the Plaintiff has not stated facts upon which relief can be granted.

Further, the relief sought in the Complaint is only as against the Ethics Commission and does not seek any relief from these Defendants. For instance, Count I of the single-count complaint only addresses the declaratory relief the city seeks against the Commission. Complaint at 15. Likewise, the four enumerated remedies in the Complaint only address the Commission. Complaint at 18-19. Where facts specific to claims against each of the several parties in a multi-party lawsuit are absent, the suit fails under Arkansas fact pleading requirements. *See, e.g., Arkansas Dep't of Env'tl. Quality v. Brighton Corp.*, 352 Ark. 396, 408–09, 102 S.W.3d 458, 466 (2003)(Holding that the mere recitation that the 15 different defendants were “generators” or “transporters” who brought hazardous substances or hazardous waste to the USI site “for disposal,” without any further facts to support a conclusion that the defendants came within the meanings of these terms, simply fails to comport with our fact-pleading requirements.) Here, where the city seeks no relief whatsoever against Sabin or the Sabin exploratory committee, the standard for fact pleading has not been met.

The Plaintiff’s Complaint seeks not only for the Pulaski County Circuit Court to interpret the state of the law as a neutral arbiter in a declaratory judgment action, but the Plaintiff is asking the court to apply the law and enforce it as against two individuals and two individual exploratory committees. Yet the Plaintiff has not properly filed an

enforcement action against these individuals or put them on notice of such an enforcement action; therefore, the Complaint must be dismissed.

A plain reading of the Complaint shows that the Plaintiff's requested remedies ask the court to compel the Arkansas Ethics Commission to interpret and enforce the City's ordinance. This fails at the outset because the Arkansas Ethics Commission is under no mandatory duty (and may actually lack authority) to enforce a city ordinance. The Plaintiff's Complaint is a Writ of Mandamus in disguise, but the enforcement work of the Arkansas Ethics Commission is inherently discretionary, not ministerial. Even assuming the Arkansas Ethics Commission has this authority, the commission already exercised its discretion and declined to enforce the ordinance, and the court should defer to the agency's expertise about laws it enforces (and doesn't) and refrain from interfering with the discretionary work of an enforcement agency. It is clear that the Complaint does not state facts upon which relief can be granted in an Arkansas circuit court.

**B. Motion to Dismiss No. 2:
Rule 12(b)(1): Lack of subject matter jurisdiction**

Also, this Court does not have subject matter jurisdiction over this action, and Plaintiff's Complaint must therefore be dismissed pursuant to Rule 12(b)(1) of the Arkansas Rules of Civil Procedure.

Subject-matter jurisdiction is the power of the court to hear and determine the subject matter in controversy between the parties. *Allen v. Cir. Ct. of Pulaski Cty.*, 2009 Ark. 167, 303 S.W.3d 70. It is well settled that subject-matter jurisdiction is a court's authority to hear and decide a particular type of case. *Edwards v. Edwards*, 2009 Ark. 580, 357 S.W.3d 445. A court obtains subject-matter jurisdiction under the Arkansas Constitution or by means of constitutionally authorized statutes

or court rules. *Id.* An Arkansas court lacks subject-matter jurisdiction if it cannot hear a matter “under any circumstances” and is “wholly incompetent to grant the relief sought.” *Id.* at 4, 357 S.W.3d at 448 (quoting *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 352–53, 836 S.W.2d 853, 858 (1992)). We determine whether a court has subject-matter jurisdiction based on the pleadings. *Union Pac. R.R. Co. v. State ex rel. Faulkner Cty.*, 316 Ark. 609, 873 S.W.2d 805 (1994). Circuit courts have original jurisdiction of “all justiciable matters not otherwise assigned pursuant to” the constitution. Ark. Const. amend. 80 § 6(A); *Edwards v. Nelson*, 372 Ark. 300, 275 S.W.3d 158 (2008).

Perroni v. Sachar, 2017 Ark. 59, 4–5, 513 S.W.3d 239, 242 (2017)

There is no jurisdiction over the subject matter because Plaintiff is without standing to bring an action over regulations that have not been applied to Plaintiff, and Plaintiff has not pled any harm that it has suffered to give it standing.

LR Code Secs. 2-386 *et seq.* by their terms do not apply to exploratory committees. Applying these ordinances to exploratory committees outstrips the authority granted to local jurisdictions under Ark. Code. Ann. §7-6-224, because the state statute expressly defines “exploratory committees” and does not grant cities any authority to regulate them. Further, the ordinances themselves do not outlaw exploratory committees and only explicitly apply to candidates. The City’s attempt to utilize the aforementioned state statute in an attempt to enforce the City’s ordinances is an implicit admission that the ordinance at issue does not apply to exploratory committees. There is no standing, and therefore, this Court lacks subject matter jurisdiction.

Additionally, the Plaintiff City of Little Rock is a city of the First Class and is a political subdivision of the State of Arkansas. The municipality has no inherent powers

and may only act within the powers granted to it by the state through the constitution or when the General Assembly delegates that power by statute. *City of Little Rock v. Raines*, 411 S.W.2d 486, 491 (1967). The City cannot compel the State to act. State law trumps local law to the extent of a conflict, and not the reverse. The duly enacted statutes from the General Assembly are the best evidence of the public policy of this state. *Moore v. Moore*, 2016 Ark. 105, 8, 486 S.W.3d 766, 772 (2016). Furthermore:

The legislature has the power and responsibility to proclaim the law through statutory enactments, and the judiciary has the power and responsibility to interpret legislative enactments. *See, e.g., Dep't of Human Servs. and Child Welfare Agency Review Bd. v. Howard*, 367 Ark. 55, 238 S.W.3d 1 (2006). Moreover, public policy is for the General Assembly to establish, not the courts. *E.g., Carmody v. Raymond James Fin. Servs., Inc.*, 373 Ark. 79, 281 S.W.3d 721 (2008).

McCutchen v. City of Fort Smith, 2012 Ark. 452, 15, 425 S.W.3d 671, 681 (2012).

A municipal corporation may aid the state through enacting ordinances only when the General Assembly delegates that power to it. *City of Lowell v M & N Mobile Home Park*, 916 S.W.2d 95, 97 (1996). A City is not permitted to use its delegated state authority to subvert the legitimate purposes of state law.

Again, state law only allows cities to establish reasonable limitations on “candidates” for local office. Cities are not allowed to limit exploratory committees by the very terms of Ark. Code. Ann. §7-6-224. To find for the Plaintiff this Court must invalidate the state law defining an exploratory committee. This Court must assume the state law allowing exploratory committees is constitutional and rationally related to a legitimate government interest, which in this instance is allowing incumbent and non-incumbent

individuals alike the ability to explore the upsides and downside of running for an office they don't hold without committing to being a candidate. This is a legitimate purpose for government to encourage democratic participation, and the state law is crafted to that end.


The City has not and cannot state a cognizable interest that is impaired by allowing for exploratory committees, nor can it articulate how the valid state law impairs the City or any individual's rights. For an individual (and no less the City itself which is the only Plaintiff in this action) to even state a claim under the baseless theory put forth by the Plaintiff, this Court would have to substitute itself for the will of the General Assembly and make the nonsensical factual finding that an incumbent has a right to learn more about a position that the incumbent already holds. For all such reasons, this court lacks subject matter jurisdiction and the Plaintiff's complaint must be dismissed.

III. CONCLUSION


Based on the foregoing, it is clear that the court in this case lacks subject matter jurisdiction, as the Plaintiff lacks the legal standing and basis to bring this suit. Further, the Complaint fails to state facts upon which relief can be granted, as the Sabin Defendants are, and have been, in compliance with Arkansas law, and in compliance with the ordinances referenced in the Plaintiff's Complaint at all times. Therefore, the Plaintiff's Complaint must be dismissed.

Respectfully Submitted,

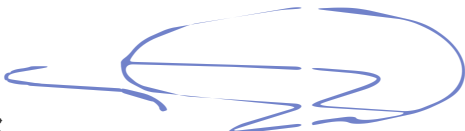
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CERTIFICATE OF SERVICE

I, Steve Harrelson, do hereby certify that I have sent via:

- Hand Delivery
- Facsimile
- Electronic Mail
- U.S. Mail, Postage Prepaid
- U.S. Mail, Certified, Return Receipt Requested
- State Court CM/ECF System
- Federal Court CM/ECF System

This 19th Day of February, 2018 a true and complete copy of the foregoing to the following individuals:

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