IN THE ARKANSAS COURT OF APPEALS

JUNE BRADSHAW — APPELLANT

VS. — NO. CV-16-189

FORT SMITH SCHOOL DISTRICT and
FORT SMITH PUBLIC SCHOOL
BOARD OF EDUCATION — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF
SEBASTIAN COUNTY, ARKANSAS

HONORABLE JAMES O. COX, CIRCUIT JUDGE

ABSTRACT, OPENING BRIEF, AND ADDENDUM OF APPELLANTS JUNE BRADSHAW AND JOEY McCUTCHEN

Volume 1 of 2: Abstract and Opening Brief

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ARGUMENT

POINT ONE. THE CIRCUIT COURT ERRED IN FINDING THAT THERE WAS NO VIOLATION OF THE FREEDOM OF INFORMATION ACT WHEN A COMMITTEE MEETING CONSISTING OF A MAJORITY OF THE FORT SMITH SCHOOL BOARD OF DIRECTORS WAS HELD IN A MANNER INCONSISTENT WITH *ARKANSAS GAZETTE CO. V. PICKENS*, 258 ARK. 69, 522 S.W.2D 350 (1975)

STANDARD OF REVIEW: This point involves an issue of statutory interpretation, which is reviewed on a *de novo* basis. *Crafton, Tull, Sparks & Associates, Inc. v. Ruskin Heights, LLC*, 2015 Ark. 1, 453 S.W.3d 667, citing *Roberson v. Phillips County Election Comm'n*, 2014 Ark. 480, 449 S.W.3d 694.

ARGUMENT: Background Information and Introduction

This appeal and the issues raised in the Circuit Court involved meetings of the Fort Smith School Public Schools (herein "FSPS") Board of Directors on June 23, 2015. (Ab. 48; Circuit Court's announcing that only the June 23, 2015 events were in issue; Add. 93; Conclusion of Law ¶ 7) What appears to be a clear violation of the Arkansas Freedom of Information Act (herein "FOIA"), Ark. Code Ann. § 25-19-101, *et seq*, and particularly the open meeting provisions of Ark. Code Ann. § 25-19-106, turned into a protracted event involving evidence from a previously non-suit case brought by another litigant, evidence of Facebook postings of Appellant's counsel (Add. 199-229), and even an unsupported finding that the case was frivolous

(addressed in Point Two, *infra*). For the reasons stated below, and with all due respect, the Circuit Court's findings are inconsistent with well-established precedent and with Professor Watkins' teachings.

For more than 50 years preceding June 2015, Fort Smith's Southside High School used a Rebel as its mascot and had the fight song "Dixie." (Ab. 33 [Testimony of Wayne Haver]; Add 292 [Media communication] On June 22, 2015, an appropriately noticed regular school board meeting of the Fort Smith School Board was held. (Ab. 63)

However, on June 22 and 23, 2015, Appellees gave two notices that the FSPS Board of Directors would hold a meeting to evaluate the performance of the Superintendent (Benny Gooden) on June 23, 2015 (Add. 288, 289; Add. 89—, Finding of Fact ¶ 4(a); Ab. 20--Benny Gooden testimony). The first notice of the June 15, 2015 meeting stated:

> "The Fort Smith Board of Education will meet on Tuesday, June 23, 2015 at 5:30 p.m. in the Service Center, Building B. The purpose of the meeting is the annual evaluation of the superintendent." (Add. 288)

The second notice stated:

> "Members of the FSPS Board of Education will meet today for the annual evaluation of Superintendent Benny Gooden. A fax regarding ***this closed meeting*** was sent yesterday." [emphasis added] (Add. 289)

As emphasized above, the second notice made it very clear that the FSPS School Board meeting was "closed." (Add. 289). Appellees argued below, and the Circuit Court found, that calling an open meeting a "closed" meeting was merely "inartful." (Add. 93, Conclusion of Law ¶ 8). In fact, the Circuit Court held:

> "The next day, another meeting notice although *inartfully* drafted to include something about a closed meeting, was sent out saying that there will be a meeting of the School Board to evaluate the Superintendent." [emphasis added] (Add. 93)

The term "closed" means "not public." See http://www.dictionary.com/browse/closed. It is akin to saying to an oral argument before the Arkansas Supreme Court is "closed" when, in fact, the argument is open and making a finding that the misstatement is only "inartful."

In any event, both notices stated that there would be a single meeting of the "Board of Education" with the sole purpose being "the annual evaluation of" the Superintendent. The first notice stated the meeting would start at 5:30 p.m. (Add. 288) No other notices of FSPS Board of Director meetings or meetings consisting of a majority of the Board of Directors were given for any meeting to be held on

June 23, 2015. No notice was given of any meeting of "Committee of the Whole"—or of the FSPS School Board members for June 23, 2015. (Ab. 40-41, 68)

The events that transpired at and after 5:30 p.m. on June 23, 2015 were vastly different than the meeting described in the two notices given by FSPS, especially when it is considered that the last notice said that the meeting was "closed." (Add. 289). Instead, no meeting began at 5:30 p.m. but this would not be an issue if the FSPS School Board had held a single meeting that was consistent with the two notices of a single meeting that were provided. (Add. 288, 289).

Instead, what transpired was that the FSPS Board of Directors convened a meeting called a "Committee of the Whole"—meaning a Committee at which the entire School Board could participate. (Ab. 40-41, 68) Appellees' Minutes from the meetings first recite that a "Committee of the Whole" meeting was held and adjourned. (Add. 293-294; Ab. 19-20) Although two school board directors (including Dr. David Hunton) were absent, a majority of the Board was present. (Ab. 30-31).

A media release was subsequently published on June 23, 2015, almost immediately after the Committee meeting, by FSPS Communications Director Zena Featherston Marshall, acknowledging that the meeting constituted final action,

stating that a final decision had been made concerning a change in Southside High School mascot and fight song:

> "(Email dated June 23, 2015 at 7:42 PM)
>
> Giving great consideration to the continuing impact of perceived symbols of racism on the community, state and nation, ***the Fort Smith Public School Board convened as a Committee of the Whole tonight and passed a motion to stop using 'Dixie' as the Southside High School fight song in the 2015-2016 school year and to change the Southside mascot from the Rebel in the 2016-2017 school year***. * * * The Rebel and 'Dixie' have been used as the Southside High School mascot and fight song since the school opened more than 50 years ago. The board understands the challenges of changing what has come to be the tradition of the Southside High School community, and will work with the student body and staff over the next year to name a new mascot and fight song for the school." [emphasis added] (Add. 292)

Rationale as to Why FOIA was Violated

Appellants believed that only a single Special School Board meeting was held because, as noted below, the FSPS School Board Policies do not provide for a Committee of the Whole (School Board) [Policy BDE (Add. 132)] and because FSPS School Board Policy BEB provides:

> "No business shall be transacted at any special meeting of the Board which does not come within the purpose(s) set forth in the call for the meeting, ***unless all members of the Board*** are present and by majority vote agree to the consideration of the additional items." [emphasis added] (R. 619; Add. 287).

Because two Directors (*i.e*., Dr. David Hunton and Russell Owen) were absent (Add. 293-294), Policy BEB precluded considering changing the Southside High School mascot and fight song. Although the Circuit Court found otherwise, Ark. Code Ann. § 6-13-620 mandates that a School Board must obey its own policies:

> "The board of directors of each school system in the state is charged with the following powers and required to perform the following duties in order to provide no less than a general, suitable, and efficient system of free public schools:
>
> . . .
>
> (4) Enact, enforce, and obey school district policies[.]"

In any event, the Circuit Court agreed with Appellees that two separate meetings were held (*i.e*., a "Committee of the Whole" and a Special School Board Meeting). (Add. 89; Finding ¶ 4(b)):

> "Because one of the members of the School Board was running late, the members who were there at 5:30 p.m. on June 23 convened as a Committee of the Whole while awaiting his arrival. ***The June 23, 2015 meeting of the Committee of the Whole was not a special meeting of the Fort Smith Public Schools Board of Directors within the meaning of the Board's policies and procedures of the AFOIA***" [emphasis added]

Even though Appellees contend that the "Committee of the Whole" vote was not final action of the Board of Directors (see, *e.g*., Ab. 12), this contention is inconsistent with the media release sent on behalf of Appellees saying that the action

was final. (Add. 292). It is likewise inconsistent with the formation of a Committee established to recommend or establish a new fight song held almost immediately after the June 23, 2015 meeting (Add. 296) and before the purported final meeting where the final vote was taken. (Add. 297). It is, however, inconsequential as to whether the action of the Committee of the Whole was final or not in determining whether the open meeting provisions of FOIA were violated.

Even though Appellants disagree with this finding, Appellants accept that this is a factual finding that is binding in this appeal on both parties, unless this Court directs otherwise. But what is absolutely clear is that two meetings were held on June 23, 2015, one being a "Committee of the Whole" that convened at 5:45 p.m. and adjourned at 6:35 p.m. according to Appellees' minutes:

> "Ms. Susan McFerran made a motion, seconded by Ms. Yvonne Keaton-Martin, to convene as a Committee of the Whole at 5:45 p.m. on Tuesday, June 23. * * * The Committee of the Whole adjourned at 6:35 p.m." (Add. 293)

The same minutes further indicate that the Special School Board meeting convened at 6:35 p.m. and adjourned at 8:25 p.m.:

> "A called school board meeting for the purpose of evaluating the superintendent was convened at 6:35 p.m. * * * The meeting adjourned at 8:25 p.m." (Add. 293-294)

Ark. Code Ann. § 25-19-102, part of FOIA, declares the legislative intent of open and public government, stating:

> **"Legislative intent.**
>
> It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them or their representatives to learn and to report fully the activities of their public officials."

Ark. Code Ann. § 25-19-106 (a) provides:

> "**Open public meetings.**
>
> Except as otherwise specifically provided by law, all meetings, formal or informal, special or regular, of the governing bodies of all municipalities, counties, townships, and school districts and all boards, bureaus, commissions, or organizations of the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds, shall be public meetings."

A two hour notice to the media is statutorily required for special meetings of the type of "Committee of the Whole" meeting held on June 23, 2015. Ark. Code Ann. § 25-19-106(b)(2). The Circuit Court correctly reasoned in its October 1, 2015 order announced from the bench, in accordance with the teachings of Professor Watkins, that, presumably, the media are recognized as representatives of the public and are expected to inform the public of emergency or special meetings. (Ab. 50-51; citing Professor Watkins as the authority for the statement; see also Add. 95-96,

Conclusion of Law ¶ 12, citing J. Watkins and R. Peltz, The Arkansas Freedom of Information Act 339 (5th Ed. 2009)).

Where the Circuit Court erred, however, was in reasoning that there is a vast difference, for purposes of FOIA's open meeting requirements, between a meeting of a "committee" comprised of a majority of the entire Board of Directors and a meeting of Board of Directors itself. Professor Watkins makes clear that no difference exists, and this rationale shows that the Circuit Court's holding is incorrect:

> "In *Arkansas Gazette Co. v. Pickens* [258 Ark. 69, 522 S.W.2d 350 (1975), the Supreme Court held that FOIA applies to meetings of committees composed of the members of a governing body." J. Watkins and R. Peltz, The Arkansas Freedom of Information Act, Section 2.04[b]1], p. 77 (5th Ed. 2009).

In *Pickens*, *supra*, the Supreme Court made clear that FOIA was to be liberally interpreted. *Id*., 258 Ark. at 72, citing *Laman v. McCord*, 245 Ark. 401, 432 S.W.3d 753 (1968). The Court went further to quote, then existing Ark. Stat. Ann. § 12-2803 [now codified as Ark. Code Ann. § 25-19-103(4)], making it manifestly clear that "Committees" comprised of members of School District's Board of Education—even if less than a majority of members are present—are subject to the open meeting requirements (which also include notice requirements in Ark. Code Ann. § 25-19-106) of FOIA:

"'***Public meetings' are the meetings of*** any bureau, commission or agency of the state, or any political subdivision of the state, including municipalities and counties, ***Boards of Education***, and all other boards, bureaus, commissions or organizations in the State of Arkansas, except Grand Juries, supported wholly or in part by public funds, or expending public funds.'"

It is the contention of appellees, which view was also taken by the trial court, that the language in the statutes just quoted refers only to the governing body as a whole, *i.e.*, public meetings are only required when the full board meets, and committee or subgroup meetings are not covered in the Freedom of Information Act. ***Granted, the act does not specifically set out the word 'committees' when it defines public meetings, and the question thus becomes whether the legislative intent was to encompass the subgroups of a board.*** Before proceeding further, perhaps it would be well to state that we attach no significance to one of the arguments advanced by appellants. It is pointed out in their brief that six members (including the chairman) of a ten-man board constitute the Student Affairs Committee; that this number likewise constitutes a majority of the board itself, and it is suggested that this circumstance permits the board to transact board business as a committee and thus (according to the view of the board) exclude the public from its meetings. ***It is also shown by the evidence that two other board members, not members of the committee, came into the meeting room off and on at the November meeting, and one board member, not a committee member, endeavored to speak, or ask a question at the December meeting which was not permitted. These facts deserve no further comment, for the conclusion which we have reached in this case, hereinafter set out, is not in any manner predicated upon the number of board members constituting the Student Affairs Committee, and our decision would be the same if that committee were composed of a lesser number***." [emphasis added]

Id., 258 Ark. at 72-73.

Pickens remains valid today. *Harris v. City of Fort Smith*, 359 Ark. 355, 364, 197 S.W.3d 461, 467 (2004) made clear that *Pickens* remains valid today. ["When a committee of a board meets for the transaction of business — this is a public meeting, and subject to the provisions of the Freedom of Information Act."] Even if *Pickens* required a majority of FSPS Board of Directors to be present to implicate the open meeting requirements of FOIA, it is clear that five of the seven FSPS Board members were present when the Committee of the Whole convened. (Add. 293-294) Thus, under the rationale of *Pickens*, FOIA's notice requirements for an open meeting were implicated with regard to the Committee of the Whole (separate and apart from the Board meeting). Thus, notice of a "closed" Board meeting (Add. 289) could not possibly be notice of an open "Committee as a Whole" meeting. Furthermore, the lack of any prior notice of the "Committee of the Whole" meeting is inconsistent with the notice requirements in Ark. Code Ann. § 25-19-106(b)(2). See *Pickens*, *supra*. The Circuit Court erred in holding otherwise. (Add.90; Finding of Fact ¶ 4(f); Add. 89-90; Finding of Fact ¶ 4(c)]

Appellees also took inconsistent positions in the Circuit Court, taking one position on whether one meeting or two meetings were held. Appellees contended that only one meeting was held for purposes of FOIA's notice requirements (and that a notice of a Special Meeting for 5:30 p.m. on June 23, 2015 was sufficient notice

of a "Committee of the Whole" meeting). (Add. 89-90; Findings of Fact ¶ 4(a), ¶ 4(c), ¶ 4(e), and ¶ 4(f)). Yet, Appellees otherwise contended that two meetings were held (one being a "Committee of the Whole" and one being a Special Board Meeting) for purposes of—and finality of the actions of—the Board of Directors. (See, e.g., Ab. 12). It must also be remembered that Appellee's own minutes reflect that two separate meetings were convened:

> "Ms. Susan McFerran made a motion, seconded by Ms. Yvonne Keaton-Martin to ***convene*** as a Committee of the Whole . . .. * * * The Committee of the Whole adjourned at 6:35 p.m. A called school board meeting for the purpose of evaluating the superintendent was ***convened*** at 6:35 p.m. (emphasis added) (Add. 293)

With all due respect, the Circuit Court erroneously, but completely, adopted the Appellees' argument that notice of a Special Board of Directors Meeting, which stated the purpose of the meeting being the evaluation of the Superintendent and stating that the meeting was closed—satisfied FOIA's notice requirements for a Committee of the Whole Meeting. (Add. 89-90, Finding of Fact ¶ 4(c) and ¶ 4(f)]. With no disrespect intended, the Circuit Court seemed to misunderstand that the "Committee of the Whole" meeting was separate and distinct from the Special Meeting of the FSPS Board of Directors meeting that was properly noticed. The Circuit Court also seemed to assume that the Committee of the Whole was free from the notice requirements of FOIA, with the Circuit Court stating:

> "While no agenda was provided in the [notice of a single meeting held on June 23, 2015] stating there would be an open meeting of the Committee of the Whole beginning at 5:45 p.m. on June 23, 2015, notice was provided that there would be a special meeting of the Fort Smith Public School Board of Directors beginning at 5:30 p.m. on June 23, 2015. The Freedom of Information Act does not require that the notice include an agenda, or any similar statement of purpose. Moreover, the media was actually present at that time." (Circuit Court's Order at R. 300-301; Add. 89-90, ¶ 4c).

The Circuit Court apparently believed that a single meeting, rather than two separate meetings, was held for FOIA's notice purposes. (Add. 89-90; Finding of Fact ¶ 4(c)). While two separate meetings were held and the first (the Committee of the Whole) was adjourned and the second (a Special School Board Meeting) commenced (Add. 293-294), even if only one meeting was held, a clear violation of the open meeting requirements of FOIA occurred for two very clear reasons. First, FOIA requires open government (as indicated above). Secondly, the two notices given were for a closed meeting (as stated in one notice, Add. 289) with the very specific purpose of evaluation of the superintendent being the stated purpose in both notices. (Add. 288. 289)

And if only a single meeting occurred and an agenda was not required by statute, an agenda is required by the FSPS Board of Directors Policy BEB:

> "No business shall be transacted at any special meeting of the Board which does not come within the purpose(s) set forth in the call for the meeting, ***unless all members of the Board*** are present and by majority

> vote agree to the consideration of the additional items." [emphasis added] (Add. 287).

As noted above, the Board's own minutes reflect that not all members were present so this policy precludes consideration of any issue other than the annual evaluation of the superintendent. (Add. 293-294).

What is confusing is that Appellees contended, and the Circuit Court also held, that the FSPS Board of Directors was not bound to follow its own policies:

> "The Fort Smith School District's policies and procedures do not have the force of law and are subject to revision at any time by the Fort Smith Public Schools Board of Directors under the authority granted to them to govern the school system. On their face they have no application to a meeting of the Committee of the Whole." (Add. 90, Finding of Fact ¶ 4(g)."

We agree that no violation of this particular policy occurred if two separate meetings—one a Board meeting and one a Committee meeting—occurred. But, if a single Board of Directors meeting occurred, Policy BEB was clearly violated, while if two meetings were held the lack of notice of the Committee of the Whole violates the requirements of FOIA.

Albeit absurd, the Appellees take the position in the Circuit Court that, even though they are an elected governmental entity, they are not required to follow their own rules (including Policy BEB). Appellant June Bradshaw moved in the Circuit Court for a finding of fact and conclusion of law, pursuant to Ark. R. Civ. P. 52, that

Appellees are "required to enforce school district policies" pursuant to Ark. Code Ann. § 6-13-620. (Add. 105, ¶ 9). While June Bradshaw had an absolute right to a finding on the issue—one way or the other—no finding was made and her motion was deemed denied thirty (30) days after it was filed when the Circuit Court declined to make any finding whatsoever. Ark. R. Civ. P. 52(b)(1). See also *Fields v. Fields*, 88 Ark. App. 277, 198 S.W.3d 123, 126 (2004) ["Rule 52(a) of the Arkansas Rules of Civil Procedure affords a litigant a right to *request* specific findings of the trial court"].

Appellees were also successful in having the Circuit Court adopt a finding of fact that Appellant June Bradshaw did not have standing to challenge whether Appellees followed their own procedures. (Finding of Fact ¶ 4(h), Add. 90). This finding is not based on any precedent or evidence and is not even a finding of fact, but rather a conclusion of law with no legal support. The question of standing if a matter of law that is reviewed *de novo*. *Arkansas Beverage Retailers Ass'n, Inc. v. Moore*, 369 Ark. 498, 256 S.W.3d 488, 492 (2007), citing *Farm Bureau Ins. Co. of Arkansas, Inc. v. Running M Farms, Inc.*, 366 Ark. 480, 237 S.W.3d 32 (2006). Appellant June Bradshaw is a citizen who pays taxes to the Fort Smith School District. (Ab. 42-43) Appellees' own policy, Policy BEB, requires:

> "Each member of the Board and the general public shall be entitled of the time, place, and purpose of the special meeting in accordance with the established procedure." (Add. 287)

How any Court could hold that Bradshaw had no standing to raise the issue is completely unsupported by law. After all, standing exists for people residing in the school district to file suit "whenever the directors of a school district fail or refuse to do an act which is plainly their duty to do so." *Springdale Board of Education v. Bowman*, 294 Ark. 66, 40 S.W.3d 909, 911 (1987) citing *Springdale School District v. Jameson*, 274 Ark. 78, 621 S.W.2d 860 (1981).

In *Walker v. Arkansas State Board of Education*, 2010 Ark. 277, 365 S.W.3d 899, the Supreme Court citing *Moore*, *supra*, held that "so long as an individual considers his or her legal rights violated or considers himself or herself harmed or damaged, has been adversely affected or aggrieved by the agency action, has a personal stake in the outcome of the controversy, and can demonstrate a concrete, specific, real, and immediate injury by the agency's final action, that individual is entitled to judicial review of that agency action." *Moore*, *supra*, 369 Ark. at 505-506, 256 S.W.3d at 494.

Here, Appellant June Bradshaw is a citizen that pays taxes supporting the Fort Smith Public Schools. The matter involved expenditure of tax funds. School Board

Policy BEB requires notice to "the general public" of Special Meetings of the Board of Directors. (Add. 287) Because Appellant pays taxes that support the Fort Smith Public Schools, she clearly had standing and the issue of a lack of standing by Bradshaw to enforce the Appellee's own policies was never raised until Appellee's submitted proposed findings of fact and conclusions of law to the Circuit Court.

But, again, in all fairness, the Circuit Court did find that there were two separate meetings:

> "Because one of the members of the School Board was running late, the members who were there at 5:30 p.m. on June 23 convened as a Committee of the Whole while awaiting his arrival. The June 23, 2015 meeting of the Committee of the Whole was not a special meeting of the Fort Smith Public School Board of Directors within the meaning of the Board's policies and procedures of the AFOIA." [Add. 89; Finding of Fact ¶ 4(b)]

The Circuit Court simply erred in finding that two separate and distinct meetings could be satisfied by a notice of a single meeting which stated that the meeting would be closed. (Add. 288, 289) However, under FSPS Board Policy BEB, if only a single meeting was held, considering the issues of the Southside High School Rebel and Mascot were precluded by Policy BEB. And the Circuit Court's finding that the School Board's policies do not have the effect of law, (Add. 90, Finding of Fact ¶ 4(g), the Circuit Court's finding is precluded by, and inconsistent with, Ark. Code Ann. § 6-13-620.

Arg. 17

The "Committee of the Whole" meeting was neither recorded or transcribed, but it is undisputed that the FSPS School Board—at a minimum—decided to put changing the Rebel mascot and the fight song Dixie on the agenda for the July 27, 2015 Special School Board meeting. After the purported "Committee" meeting was alleged to have adjourned, the FSPS Special School Board meeting – consisting of the same school Board (with Dr. David Hunton now in attendance) convened to consider the performance of Superintendent Benny Gooden and the minutes of the Special Meeting of the Board of Directors make unequivocally clear that this Special Board Meet was entirely separate from the meeting of the Committee of the Whole. (Add. 293-294).

For all these reasons, the Circuit Court's finding that there was no violation of FOIA is inconsistent with FOIA and must be reversed and the Circuit Court should be directed to enter a declaratory judgment declaring that a Committee of the Whole Meeting without a two hour notice is unlawful and issuing an injunction such further meetings without notice as required by Ark. Code Ann. § 25-19-106(b)(2).

POINT TWO. THE UNDERLYING COMPLAINT WAS NOT FRIVILOUS.

STANDARD OF REVIEW: Ark. Code Ann. § 25-19-107 (d)(2) allows for imposition of attorney's fees against a Plaintiff in a suit brought under the Freedom

of Information Act only if the suit was initiated primarily for frivolous or dilatory purposes. The Circuit Court found that the original complaint and all amended complaints were frivolous. (Add. 91, Finding of Fact ¶ 4(i)) Because the matter involves an issue of statutory interpretation under Ark. Code Ann. § 25-19-107(d)(2), it is subject to *de novo* review. *Swindle v. Southern Farm Bureau Casualty Ins. Co*., 2015 Ark. 241, at 3, citing *Berryhill v. Synatzske*, 2014 Ark. 164, at 4, 432 S.W.3d 637, 640.

ARGUMENT: **Standing and Jurisdiction**

Before proceeding, it might be argued that because the Appellees did not seek attorney's fees against June Bradshaw that she was not prejudiced by the finding that the suit was frivolous. However, she is clearly prejudiced because her reputation is tarnished by the finding that she filed a frivolous lawsuit.

In addition, Attorney Joey McCutchen, who filed this lawsuit, filed a separate Notice of Appeal regarding this issue. (Add. 281) Ark. R. Appellate Procedure 3(c) – Civil provides:

> "Joint or consolidated appeals. If two or more persons are entitled to appeal and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in the appeal after filing separate, timely notices of appeal and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Supreme Court upon its own motion or upon motion of a party."

Under this rule, this appeal is proper with the separate Notices of Appeal filed by both June Bradshaw (Add. 284-286) and the Notice of Appeal filed by Attorney Joey McCutchen (Add. 281-283). The filing of a separate Notice of Appeal by Attorney McCutchen was filed to avoid jurisdictional problems in addressing a finding that McCutchen filed a frivolous lawsuit, such as those raised in *Arkansas Dept. of Human Services. v. Shipman*, 25 Ark. App. 247, 756 S.W.2d 930, 933-934 (1988). Both Appellant Bradshaw and Appellant McCutchen filed separate Notices of Appeal to eliminate any question about the jurisdiction of this Court to hear and decide the finding that the matter was frivolous.

As to standing, as noted above, so long as an individual considers his or her legal rights violated or considers himself or herself harmed or damaged, has been adversely affected or aggrieved by the agency action, has a personal stake in the outcome of the controversy, and can demonstrate a concrete, specific, real, and immediate injury by the agency's final action, that individual is entitled to judicial review of that agency action. *Arkansas Beverage Retailers Ass'n, Inc. v. Moore*, 369 Ark. 498, 505-506, 256 S.W.3d 488, 494 (2007).

Attorney McCutchen's reputation was injured by the finding because a judicial order now exists showing that McCutchen filed a frivolous lawsuit. Moreover, McCutchen has standing because the finding of filing a frivolous lawsuit

could potentially be used in proceedings before the Arkansas Supreme Court Committee on Professional Conduct. For example, such finding could be used in support of a claim that McCutchen violated Rule 3.1 of the Arkansas Rules of Professional Conduct, which provides:

> "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."

The Lawsuit was Not Frivolous

Appellants note that a reversal on Point One, above, would mandate that the Court find that the underlying cause of action was not frivolous. The term "frivolous" is not well defined as the term is used in Ark. Code Ann. § 25-19-107(d)(2). However, the Merriam-Webster online diction defines frivolous as "having no sound basis (as in law or fact)" (Add. 140) Furthermore, under the terms of Rule 3.1, *supra*, a complaint cannot be frivolous if it includes a basis in law and fact or a good faith argument for an extension, modification, or reversal of existing law.

There was a valid basis for the underlying suit because, for the reasons set forth in detail in Point One, above, the FSPS Board of Directors either: (i) held a

single meeting that after giving notice of a closed meeting that involved only the annual evaluation of the superintendent in violation of FSPS School Board Policy BEB and further in violation of FOIA because the notice said the meeting was "closed" (Add. 289); or (ii) held a Committee of the Whole meeting consisting of a majority of the FSPS School Board of Directors without notice, which is clearly precluded by existing law stated in *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975). While this should really end any question about whether the underlying suit was frivolous, Appellants go further to show that the case was not frivolous and a finding that the case was frivolous has a chilling effect on persons who wish to seek redress for violations of FOIA.

Appellees submitted a proposed Order to the Court containing numerous unsupported Findings of Fact and Conclusions of Law to the Circuit Court that were never announced by the Court in the October 1, 2015 hearing. (Ab. 46-59). Appellant June Bradshaw requested a mere six calendar days (or four business days) to respond to the proposed Order and Findings of Fact and Conclusions of Law—seeking to be allowed until October 26, 2015. (Add. 130) Appellant asked "to be promptly notified if this is not acceptable to the Court." (Add. 130)

Yet, with no further notice to the Appellant, on October 23, 2015, the Circuit Court adopted each and every one of the Appellees' Proposed Findings of Fact and

Conclusions of Law and entered the final Order at such time, including the finding that the suit was frivolous. (Add. 85). The filing of the Order and Findings and Fact and Conclusions of Law forced the filing of a post-trial motion that sought relief that included a motion for findings of fact and conclusions of law under Ark. R. Civ. P. 52. Yet, the Circuit Court took no action to address any post-trial motion or make any findings or conclusions of law or otherwise rule on any issue raised by Appellants, causing the motions to be deemed denied (as noted in the Statement of the Case) pursuant to applicable court rules.

After the Circuit Court made the finding that the suit was frivolous, Appellants requested a hearing on the issue of whether the lawsuit was frivolous, but the Circuit Court declined to even address the request—neither granting nor denying the request. (Add. 252) The Circuit Court was also specifically asked in a Motion for Findings of Fact and Conclusions of Law filed under Rule 52 of the Arkansas Rules of Civil Procedure, and timely filed on October 26, 2015 (Add. 102), "to state all facts upon which the Circuit Court relies in finding that the complaint and amended complaint are frivolous and to state all authorities upon which the Court relies." (Add. 105-106, ¶ 9). Although Appellants had an absolute right to such findings under Ark. R. Civ. P. 52, see *Fields v. Fields*, 88 Ark. App. 277, 198 S.W.3d at 126, *supra*, the Circuit Court again declined to even address the Motion, making no

findings of fact or conclusions of law and the part of the motion including the Motion for Findings of Fact and Conclusions of Law was deemed denied thirty (30) days after it was filed. Ark. R. Civ. P. 52(b)(1).

The Circuit Court also apparently and erroneously relied upon a previously non-suited case in finding that the present case was frivolous, relying on *Sorrells v. Fort Smith School District and Fort Smith Public Schools Board of Education*, Sebastian Circuit No. CV-1507, calling *Sorrells* "the original AFOIA complaint." (Add. 86, Finding of Fact ¶ 1). On its face, this finding relied upon exhibits to a Motion for Summary Judgment that were never introduced at the trial or hearing in this matter. It is hard to tell from the Circuit Court's Order exactly what reliance was placed on the *Sorrells* case because of the Circuit Court's failure to make the requested findings of fact and conclusions of law that it was obligated to make (See Circuit Court Order at Add. 86 ¶ 1, Add. 87 ¶ 2-3, Add. 86 ¶ 1, Add. 88, ¶ 3(c) and ¶ 3(d)). Despite the fact that *Sorrells* was dismissed without prejudice and the non-suit means that the case has no *res judicata* effect, see Ark. Code Ann. § 16-56-126 and Ark. R. Civ. Pro. 41(a), the Circuit Court erroneously relied upon the case in formulating its opinion in finding that the present case was frivolous.

Curtis Sorrells was not a party in the present suit and to hold that somehow his actions in bringing a prior claim were germane to the present issues is

unsupported by any authority. After all, res judicata requires a decision on the merits. *Hunt v. Perry*, 355 Ark. 303, 138 S.W.3d 656, 659 (2003), citing *Crooked Creek, III, Inc. v. City of Greenwood*, 352 Ark. 465, 101 S.W.3d 829 (2003). Because there was a non-suit in *Sorrells* and no trial, there could not be a trial on the merits. Collateral estoppel requires a final judgment on the merits and the same parties or their privies. *Beebe v. Fountain Lake School District*, 365 Ark. 536, 545, 231 S.W.3d 628, 635 (2006). Neither of these elements, a decision on the merits or the same parties or their privies, was present. Thus, *Sorrells* was completely irrelevant and its citation as authority for the finding that *Sorrells* was authoritative or persuasive, as the Circuit Court appears to have found, was erroneous.

To summarize the numerous reasons that the present case was not frivolous, Appellants point out the following:

- Notice was given that a single meeting would be held on June 23, 2015 to consider the performance of the Superintendent of the Fort Smith Public Schools Superintendent and the meeting would begin at 5:30 p.m. (Add. 288) One of the notices stated that the meeting would be closed. (Add. 289). The media was clearly informed the meeting was not open.

- FSPS School Board Policy BEB requires that FSPS state the purpose of special meetings (Add. 287) and the stated purpose was only evaluation of the Superintendent. (Add. 288, 289). Ark. Code Ann. § 6-13-620 requires a School Board to enforce and obey its own policies. No notice was given of any meeting at which any consideration would be given to changing the Southside High School mascot or fight song.

- On June 23, 2015, a Committee of the Whole—consisting of a majority of the FSPS was convened and adjourned. A separate Special School Board meeting to evaluate the Superintendent was held. (Add. 293-294) No notice of the Committee of the Whole meeting was given.

- The media is the representative of the public for purposes of notice of school board meetings and committee meetings. J. Watkins and R. Peltz, The Arkansas Freedom of Information Act 339 (5th Ed. 2009).

- Instead of holding a single "closed" meeting on June 23, 2015, Appellees held a committee meeting of a majority of the School Board and a Special School Board meeting in violation of FOIA because notice of only a single "closed" meeting was given to the media or to any other person or entity. In fact, the illegal meeting was only held because a School Board member was running late. (Add. 89, Finding of Fact ¶ 4b).

- Defendants' own policies (Policy BDE) do not even authorize a "Committee of the Whole." (Add. 132). A Committee of the Whole is inconsistent with FSPS School Board Policy BDE, which as noted above, Appellees are required to obey.

- A school board meeting to change the Southside High School fight song and mascot is a public meeting, which must be open and at least some notice must be given pursuant to Ark. Code Ann. § 25-19-106 and/or Ark. Code Ann. § 6-13-619.

- *Harris* made it manifestly clear that Boards subject to the Freedom of Information Act could not use "an intermediary between the Board members" to obtain a decision of the Board and that, by doing so, the Board was circumventing the Freedom of Information Act. *Id*., 197 S.W.3d at 468.

- While members of KFSM, Channel 5, from Fort Smith were present at the June 23, 2015, there was no evidence of any other media source or member being present. (Ab. 74-75)

- There was no evidence that any media source made any broadcast about the June 23, 2015 meeting (found to be a Committee meeting) before the meeting occurred.

- June Bradshaw is a taxpaying citizen of Fort Smith, and her taxes support the Fort Smith Public Schools. (Ab. 42-43)

- Both the media and general public were misled about the purpose of the meeting held at approximately 5:30 p.m. on June 23, 2015.

- This matter is a matter of significant public interest. As reflected by the Facebook pages attached to the Defendants' Response to Plaintiff's Motion, the Court can see that the matter is of significant public interest. (Add. 199-229)

- A violation of the Freedom of Information Act and the School Board's own policies and of Ark. Code Ann. § 6-13-619 occurred in the meeting that was actually held on June 23, 2015 at approximately 5:30 p.m. without any notice (insofar as the statutory violations are concerned) and/or with a misleading notice (insofar as the statutory violations and violations of the Board's own policies and procedures are concerned.

- Appellees have shown that they believe that they can continue to operate, holding meetings of a Committee as a Whole, without notice to the public or hold them at the same time as notice is given of a closed meeting. Appellant June Bradshaw is and was entitled to declaratory and injunctive relief precluding the events of June 23, 2015 from recurring. Appellees should be given clear direction that they may not give notice of a closed meeting when the meeting is required by law to be open. Appellees should further be given clear direction that if they must obey and enforce their own policies and that if they are going to state the purpose of a meeting for which notice is required that they

must state the correct purpose and not mislead the public with an inaccurate statement of the purpose.

- The Court's finding that the Freedom of Information Act claim was frivolous, when there are a plethora of facts supporting a finding in favor of a violation of the Freedom of Information Act, has a chilling effect upon future litigants who desire to enforce their statutory rights that protect open and transparent government. Finding that the Plaintiff's Complaint brought under the Freedom of Information Act requires completely excluding all evidence set forth above.

In sum, the underlying suit was clearly not frivolous.

CONCLUSION

For the foregoing reasons, the decision of the Circuit Court of Sebastian County should be reversed and remanded with instructions to enter judgment in favor of the Appellants on the underlying complaint and to find that the underlying suit was not frivolous. Alternatively, the decision of the Circuit Court of Sebastian County should be reversed insofar as its finding that the underlying suit was frivolous. And in the final alternative, the Circuit Court should be instructed to hold a hearing on the issue of whether the Plaintiff's Complaint was frivolous without giving consideration to the *Sorrells*' case.

Respectfully submitted,

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