
IN THE COURT OF APPEALS OF ARKANSAS

ST. FRANCIS RIVER REGIONAL WATER DISTRICT **APPELLANT**

v. **No. CV-19-595**

CITY OF MARMADUKE, AR **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, ARKANSAS CIVIL DIVISION

THE HONORABLE MELISSA RICHARDSON, CIRCUIT JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

On June 21, 2017, Plaintiff, St. Francis River Regional Water District ("SFRRWD"), filed its Complaint against Defendant, City of Marmaduke, Arkansas (the "City"), alleging that the City without authority had entered into SFRRWD's designated service area and the City was providing water service to American Railcar Industries, Inc.'s buildings which were located in SFRRWD's service area. **(RP14-16)**. Further, SFRRWD alleged that it was indebted to the Arkansas Natural Resources Commission (the "Commission") and had pledged its revenue in its service area to repay the financial assistance provided by the Commission. Finally, SFRRWD alleged that the City had not received approval of the Commission to provide water service in SFRRWD's service area. **(RP16-17)**. SFRRWD requested injunctive relief ordering the City to cease and desist in providing water service to ARI in SFRRWD's service area as well as damages in an amount to be determined. **(RP17)**.

The City timely filed its Answer to the Complaint on August 7, 2017 (after being granted an extension). **(RP40-47)**. On January 5, 2018, SFRRWD filed its Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment. **(RP48-73)**. Following an extension of time to respond **(RP92)**, the

City timely responded to SFRRWD's Motion for Summary Judgment **(RP94-164)** on February 23, 2018 and also, filed its First Amended Answer. **(RP165-172)**. Thereafter, SFRRWD timely replied to the City's Response. **(RP252-279)**.

On June 7, 2018, the trial court held a hearing on SFRRWD's Motion for Summary Judgment and at that time denied SFRRWD's Motion without prejudice and set a discovery deadline after which SFRRWD could resubmit or renew its Motion for Summary Judgment. **(RT1, 5, 36-43)**. On March 8, 2019, the City filed a Motion for Summary Judgment with an accompanying Brief. **(RP474-679)**. SFRRWD timely filed its Response to the City's Motion for Summary Judgment along with a Brief in Support of its Response. **(RP687-766)**. The City timely filed its Reply to SFRRWD's Response on April 8, 2019. **(RP783-789)**. On April 8, 2019, the trial court held a hearing on both SFRRWD's renewed Motion for Summary Judgment and the City's Motion for Summary Judgment. **(RT44-50)**.

On April 17, 2019, the trial court entered its letter opinion in this case in which it granted the City's Motion for Summary Judgment which effectively denied SFRRWD's Motion for Summary Judgment as the court determined and ruled that the City could continue to provide water service to ARI in SFRRWD's service area and that SFRRWD had no right to provide water service to ARI in

SFRRWD's service area. With its ruling, the trial court removed the case from its trial docket as no issues remained for trial. **(RP800-801)**. Thereafter, judgment was entered on April 30, 2019 by fax filing **(RP 803-805)** which was followed by a paper filing on May 3, 2019 **(RP806-807)**. The judgment incorporated the letter opinion dated April 17, 2019 and dismissed this case with prejudice **(RP803-805)**. SFRRWD timely filed a Notice of Appeal and Designation of Record on May 9, 2019 **(RP808-809)** and an Amended Notice of Appeal and Designation of Record on May 28, 2019 **(RP810-811**).

The issues raised in this appeal are as follows:

a. whether the trial court erred in granting summary judgment in favor of Defendant based upon its erroneous interpretation of Ark. Code Ann. §§ 15-22-223 and 15-22-503; and

b. whether the trial court erred in denying summary judgment in favor of Plaintiff based upon its erroneous interpretation of Ark. Code Ann. §§ 15-22-223 and 15-22-503.

The issues are ripe for review by this Court as the judgment is final and this case involves competing Motions for Summary Judgment in which one was granted which denied the other competing motion. **(RP800-805)**. Further, the Court dismissed the case with prejudice as described above. **(RP803)**. Thus, the

review of both motions should be conducted by this Court for the reasons as set forth in *Smith v. Farm Bureau Mut. Ins. Co. of Arkansas*, 88 Ark. App. 22, 31–32, 194 S.W.3d 212, 219 (2004) in which the Court stated as follows:

> [Generally], an order denying a motion for summary judgment is only an interlocutory order and is not appealable. *City of North Little Rock v. Garner*, 256 Ark. 1025, 511 S.W.2d 656 (1974). Review of certain interlocutory orders is allowed in conjunction with the appeal of a final judgment. *Id*. Thus, an order denying summary judgment may be reviewable in conjunction with an appeal of an order granting summary judgment. *See id.*
>
> In *Wilson v. McDaniel*, 247 Ark. 1036, 449 S.W.2d 944 (1970), the supreme court stated, "certain interlocutory orders are reviewable in conjunction with a final judgment; an order granting summary judgment is a final order, and therefore is appealable."

As a result, this Court has jurisdiction of this appeal in regard to the trial court's findings as to each of the Motions for Summary Judgment as the case has been fully and finally decided.

Further, this case involves significant issues concerning the construction and interpretation of two (2) statutes (Ark. Code Ann. §§ 15-22-223 and 15-22-503). The issues in question regarding these statutory provisions are as follows:

1. whether a water district has exclusive rights to provide water in its designated territory;

2. who qualifies as or is a “current provider”;

3. the meaning of the word “area” under Ark. Code Ann. § 15-22-223 when revenue is pledged to repay financial assistance to the Arkansas Natural Resources Commission; and

4. the authority of Arkansas Natural Resources Commission in determining who can supply water in a designated area.

For these reasons and pursuant to Arkansas Supreme Court Rule 1-2, the Arkansas Supreme Court should hear and decide this case.

By /s/ Jim Lyons
Attorneys for Appellant St. Francis River Regional Water District

V.

STATEMENT OF THE CASE AND THE FACTS

This case involves the right of St. Francis River Regional Water District ("SFRRWD"), an Arkansas regional water distribution district subject to the Regional Water Distribution District Act, to serve all customers who are located in SFRRWD's designated service area. SFRRWD was formed on July 27, 1987 and, at that time, certain lands were assigned to SFRRWD as its exclusive geographical service area, which included all of Section 18 lying south and east of the St. Louis Southwestern Railroad Line in Township 18 North, Range 7 East. All of the assigned lands were outside the city limits of the City of Marmaduke, Arkansas (the "City") and were not in the City's water service territory. **(RP14-15, 29, 511-517, 639, 717, 743)**. Further, SFRRWD has received financial assistance from the Arkansas Natural Resources Commission (the "Commission") and has pledged its revenue from water provided in its service area to repay the Commission for this financial assistance. **(RP66-67)**.

American Railcar Industries, Inc. ("ARI") is a manufacturing plant located in Marmaduke, Greene County, Arkansas. **(RP15, 30, 166)**. The land which comprises the eastern portion of the Marmaduke campus of ARI is located in SFRRWD's water service area and the western portion of the Marmaduke campus

of ARI is located in the City's water service territory. **(RP15, 30-31, 617-618, 717, 747, 749)**. At the time the City initially provided water service to ARI in 1999, the ARI campus was located solely in the City's service territory as well as in the City's corporate limits. **(RP16, 31, 167)**. Several years later, ARI completed the construction of an additional separate building at Marmaduke with this separate building being entirely located in SFRRWD's service area. Then in 2015, ARI completed construction of another building which is also located entirely in SFRRWD's service territory. **(RP16, 554, 747, 749)**. These two (2) buildings which are connected to each other are completely located in SFRRWD's service area. (**RP24, 747, 749).** After the construction of each these buildings by ARI, the City began to provide water service to these buildings in SFRRWD's service area without seeking permission of the Commission as required by law. **(RP718, 746-747, 749)**. SFRRWD, through its President, Ronald Pigue, Sr., made demand on the City to discontinue water service to the ARI buildings located in SFRRWD's service area so that SFRRWD could provide water service to ARI's buildings. **(RP575, 581)**. However, the City refused to do so. **(RP67)**. Thereafter, on June 21, 2017, SFRRWD filed its complaint against the City in order to allow SFRRWD to provide water service to ARI in its service area. **(RP14-24)**. In July of 2018, over a year **after** SFRRWD filed its lawsuit against

the City to prevent them from serving ARI in SFRRWD's serving area, the City annexed the lands which only contained the eastern portion of the Marmaduke campus of ARI into the City. [Emphasis supplied]. **(RP600-605)**. The City of Marmaduke still has not taken any action to seek approval from the Commission to provide water service to these ARI buildings located in SFRRWD's service area. **(RP718, 746-747)**. SFRRWD and the City filed Motions for Summary Judgment and on April 8, 2019, both Motions were heard. **(RT44-100)**. Following the hearing, the Circuit Court entered a letter opinion and judgment granting the City's Motion for Summary Judgment (thus denying SFRRWD's Motion for Summary Judgment) as each sought the right to serve the two (2) ARI buildings located in SFRRWD's service area. The trial court determined and ruled that the City could continue to provide water service to ARI in SFRRWD's service area and that SFRRWD had no right to provide water service to ARI in SFRRWD's service area. This was the issue before the Court. **(RP800-807)**. With its ruling, the trial court removed the case from its trial docket as no issues remained for trial. **(RP800-801)**. The judgment incorporated the letter opinion dated April 17, 2019 and dismissed this case with prejudice **(RP803-805)**. Thereafter, SFRRWD timely appealed the judgment. **(RP808-811)**.

VI.

ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BASED UPON ITS ERRONEOUS INTERPRETATION OF ARK. CODE ANN. § 15-22-223 and 15-22-503.

1. Standard Of Review For Summary Judgment

Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Danner v. MBNA America Bank, N.A.*, 369 Ark. 435, 255 S.W.3d 863 (2007). The standard is whether the evidence is sufficient to raise a fact issue, not whether the evidence is sufficient to compel a conclusion. A fact issue exists, even if the facts are not in dispute, if the facts may result in differing conclusions as to whether the moving party is entitled to judgment as a matter of law. In such an instance, summary judgment is inappropriate. *Id.* The evidence is viewed in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. The review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id*. The purpose of summary judgment is not to try

the issues, but to determine whether there are any issues to be tried. *Lamar Advantage Holding Co., Inc. v. Arkansas State Highway Comm'n*, 369 Ark. 295, 253 S.W.3d 914 (2007).

2. Under Arkansas Law, The City of Marmaduke Was And Is Not Entitled To Provide Water Service In SFRRWD's Service Area.

Ark. Code Ann. §15-22-223(a) and Section 605.1 of Title 6, Arkansas Natural Resources Commission Water Plan Compliance Review Procedures gives SFRRWD the right to provide water service to all persons or entities who are located in its designated service area. Both the statute and the regulation provide as follows:

> [i]t is unlawful for a person to provide water or wastewater services to an area where such services are being provided by the current provider that has pledged or utilizes revenue derived from services within the area to repay financial assistance provided by the Arkansas Natural Resources Commission, unless approval for such activity has been given by the commission and the new provider has received approval under the Arkansas Water Plan established in § 15-22-503, if applicable.

Additionally, Section 601.3 of Title 6, Arkansas Natural Resources Commission Water Plan Compliance Review Procedures defines "[s]ervice area" as "either an area that is provided water or wastewater service by a system or an area not receiving water or wastewater service that is included within a system's approved

Master Plan or water development project as an area where the system will provide service in the near future." *Id.*

As the Court is well aware, the basic rule of statutory construction is to give effect to the intent of the legislature. Further, where the language of a statute is plain and unambiguous, the legislative intent is determined from the ordinary meaning of the language used. In considering the meaning of a statute, it is construed just as it reads, giving the words their ordinary and usually accepted meaning in common language. The statute is construed so that no word is left void, superfluous or insignificant, and the meaning and effect is given to every word in the statute, if possible. *City of Little Rock v. Rhee*, 375 Ark. 491, 495, 292 S.W.3d 292, 294 (2009)[*citing, Great Lakes Chem. Corp. v. Bruner*, 368 Ark. 74, 82, 243 S.W.3d 285, 291 (2006)].

Based on the above statutory language and regulations, giving effect to each of the words therein, the proper interpretation of the statute and regulations is that it is unlawful for anyone to provide water service to an area that is allocated to another system by the approved Master Plan of the Commission, despite the fact that the customer is receiving water service from another system without any Commission approval. This is because the area included within a system's approved Master Plan allows the approved system (in this case SFRRWD) to

provide service in the near future since the approved system (in this case SFRRWD) has pledged or utilizes revenue derived from the water service within the area to repay financial assistance provided by the Commission. To determine otherwise would allow every water service provider to disregard their boundaries and to race to be the first provider to a building regardless of whose area in which it is located. This is illogical as it renders service areas or territories meaningless and fails to protect the Commission's loans. One of purposes of the statutory and regulatory scheme is to assure that loans can be repaid from funds earned by providing water service in its territory or service area.

St. Francis River Regional Water District ("SFRRWD") was formed on July 27, 1987 and, at that time, certain lands were assigned to SFRRWD as its service area, which included all of Section 18 lying south and east of the St. Louis Southwestern Railroad Line in Township 18 North, Range 7 East with all of this territory being located outside the city limits of the City of Marmaduke, Arkansas (the "City"). Thus, this territory was, obviously, not in the City's water service territory. **(RP14-16, 21, 24, 29, 511-517, 639, 717, 743)**. Following its proper formation and necessary approval, SFRRWD developed a water system throughout its service area which service area included what would later be the eastern portion of ARI's Marmaduke campus. Thereafter, SFRRWD began

providing water service to customers who were located in its service area. **(RP717)**. As a result, SFRRWD is the current provider of water service throughout SFRRWD's designated service area. Additionally, SFRRWD has pledged its revenue from the sale of water in its service area to repay the Commission for funds owed. **(RP66-67)**.

In fact, the City never obtained approval to provide water service in SFRRWD's service area from the Commission and has not received approval under the Arkansas Water Plan established in § 15-22-503. **(RP718, 746-747, 749)**. This was expressly admitted by Mayor Steve Dixon of the City of Marmaduke. **(RP744-749)**. Thus, based on the statute, the Commission regulations and the fact that SFRRWD has pledged or is utilizing the income derived from its service area which includes the eastern portion of ARI's Marmaduke campus, SFRRWD is the current provider of water service in this area and it is unlawful for any person or entity other than SFRRWD (including the City of Marmaduke) to provide water service in this service area.

3. The Trial Court Erroneously Interpreted Ark. Code Ann. §§ 15-22-223 and 15-22-503.

The trial court misinterpreted Ark. Code Ann. § 15-22-223 when it found that the "current provider" under the statute is the "provider currently providing

services." **(RP801)**. This interpretation is inconsistent with Ark. Code Ann. § 15-22-223 because the statute clearly states "[i]t is unlawful for a person to provide water or wastewater services to **an area** where such services are being provided by the current provider". (Emphasis added.) The area at issue is located in SFRRWD's service area and SFRRWD is providing water service in that area. **(RP717, 747)**. The trial court's interpretation would mean that every single building is a separate service area. This will create a race to serve every single building because if you get there first you become the current provider to "an area". This is not the intent of the allocation of service areas or territories.

The fact that the City "jumped" into SFRRWD's service area and started supplying water to ARI without approval (as admitted) does not make the City the current provider of water to ARI as set forth in § 15-22-223 as the current provider must be the one legally authorized to provide such service in the area, i.e. service being provided illegally does not make the City the "current provider". If the current provider under the statute and regulations can be anyone who is the first one to connect water to a customer and provide water to that customer, as determined by the trial court in this case, then the designated service area of a regional water district becomes meaningless and § 15-22-223 is meaningless in providing protection to water districts, such as SFRRWD, who are providing water

in areas that otherwise would have inadequate water service. This interpretation also emasculates the protection of loans by the commission contrary to the intent of the statutory scheme and the regulations. Thus, current provider cannot be defined or applied to include those who serve a customer without any authority and, thus, illegally. The term, "current provider" should not be interpreted in the manner in which the trial court ruled without doing away with purpose of the statutes and the regulations. Therefore, this Court should reverse the trial court's decision.

In fact, the trial court's ruling is characteristic of allowing "claim jumping" during the California gold rush. Without any right to be on someone else's claim, the jumper just moves in and takes over. For the Court to read the statute to mean whoever is the first person or entity to provide water service to the customer (regardless of whose territory in which the customer is located) is the current provider guts the purpose of ACA § 15-22-223 as this permits intrusion into another's service area and erodes the water district's stream of income. This, effectively, allows municipal water systems to "cherry pick" new customers who may be located in a neighboring water district's service area and rush to be the first one to provide them water service whether or not they are in the limits of the municipality and whether the municipality has made any application to the

Commission to provide the service.

Additionally, Ark. Code Ann. § 15-22-223 addresses two (2) different providers – a "current provider" and "new provider" – of the water service in the service area. SFRRWD cannot be the new provider under the statute because SFRRWD was already authorized to provide water service in its service area which included the area where the eastern part of ARI's campus is located and, in fact, was providing water in the area. **(RP264-265, 511-517, 717, 719, 747)**. SFRRWD was not providing water service to ARI due to the "claim jumping" by the City. The "new provider" under the statute can only be someone who has never received approval from the Commission to provide water service in the area. Therefore, the Court erred in granting summary judgment in favor of the City based on its finding that the City was the current provider of water service in the area because the only legally designated provider of water service in the area was SFRRWD. Further, the only method by which the City can become a "legal provider" in the area would be to obtain approval of the Commission which they have never even sought. As a result, the City has no status as a current provider or as a new provider.

Additionally, the Court erred in holding that Ark. Code Ann. § 15-22-223 required SFRRWD to be indebted to the Commission during all applicable time

frames in order for SFRRWD to receive protection under the statute against the City. This is also incorrect. The statute does not provide a time frame for when a provider must be indebted to the Commission. Instead, Ark. Code Ann. § 15-22-223 only provides that the provider has pledged or utilizes revenue derived from services within the area to repay financial assistance provided by the Commission. In fact in the hearing on Plaintiff's Motion for Summary Judgment on June 7, 2018, the Court noted that it read no time limitation with respect to Ark. Code Ann. § 15-22-223 in regard to the Commission granting approval. **(RT40)**. By the same token, the statute is silent as to any time frame in regard to pledging or utilizing revenue from the service to repay financial assistance to the Commission. Therefore, the Court erred in granting summary judgment in favor of the City based on its reading of Ark. Code Ann. § 15-22-223.

Further, the Court erred in determining that the City did not have to obtain approval from the Commission to provide water service to ARI because such service did not constitute a water development project. This finding is incorrect. First, the City has to comply with the Arkansas Water Plan (Ark. Code Ann. § 15-22-503) which states as follows:

> No political subdivision or agency of the state shall spend any state funds on or engage in any water development project, excluding any water development project in which game protection funds or federal

> or state outdoor recreation assistance grant funds are to be spent**, provided that such a project will not diminish the benefits of any existing water development project**, until a preliminary survey and report therefor which sets forth the purpose of the water development project, the benefits to be expected, the general nature of the works of improvement, the geographic area to be served by the water development project, the necessity, feasibility, and the estimated cost thereof is filed with the commission and is approved by the commission to be in compliance with the plan. Ark. Code Ann. § 15-22-503(e)(1). (Emphasis added).

The City never took any of these steps necessary to obtain that approval and the City's Mayor, Steve Dixon, admits that the City has not worked with or obtained any approval of the Commission for its water or wastewater services or obtained any preliminary reports or other approval in regard to providing water service to the ARI facilities at issue. **(RP745-749)**. Additionally, a water development project is defined by Section 601.4 of Title 6, Arkansas Natural Resources Commission Water Plan Compliance Review Procedures as follows:

> A. All political subdivisions must obtain water plan compliance approval prior to construction of a water development project.
>
> B. The term **"project" as used in this title shall include the following**:
>
> > 1. Development of a new water supply source or water or wastewater treatment plant;
> > 2. Development of a new or different location for water withdrawal or wastewater discharge;
> > 3. Any increase to water or wastewater treatment plant capacity;

4. System expansion that would result in:
    a. Use of water exceeding eighty percent (80%) of the drinking water system's capacity to produce drinking water;
    b. Increasing wastewater flow by greater than eighty percent (80%) of existing treatment capacity; or
    c. An increase of more than twenty percent (20%) of the current average water usage or treatment capacity;
5. A project involving flood control or drainage;
6. Transfer of a service area currently receiving service from one utility to another;
7. Transfer of a service area not yet receiving service from a utility but included within another political subdivision's approved service area or within another entity's application for water plan compliance approval;
8. Acquisition of properties, facilities, or customers belonging to another system; or
9. Proposal of a master plan for water plan compliance certification. *Id*. (Emphasis added).

According to Crystal Phelps, general counsel for the Commission, SFRRWD was properly formed and was allocated its service territory by Court Order. Further, she testified in her deposition that the proper steps for the City to take to serve ARI in SFRRWD's territory was to apply to the Commission before invading SFRRWD's territory, which the City chose not to do. **(RP717-720)**. Instead, the City simply chose to "claim jump". In fact, the City's action violates the Water Plan. In this regard, Ms. Phelps, in her deposition, stated the following:

Mr. Lyons: Okay. And so, in your legal opinion, was the district [SFRRWD] properly formed?

Ms. Phelps: Yes.

Mr. Lyons: And based on your letter of Exhibit 2 -- marked as Exhibit 2, not only was the district properly formed, but the East Plant of ARI was located in St. Francis River Regional Water District's territory; is that correct?

Ms. Phelps: Yes.

Mr. Lyons: Okay. Has there been any action taken since 1987 to change those district boundaries, that you've seen?

Ms. Phelps: No.

Mr. Lyons: Okay. Are you familiar with any attempt by either Marmaduke or anyone else to change the boundaries of St. Francis River Regional Water District?

Ms. Phelps: No.

Mr. Lyons: So, as far as you're concerned as we sit here today, the boundaries that were originally granted to St. Francis River Regional Water District, those still remain the boundaries in which they are supposed to be able to serve or provide water; is that correct?

Mr. Mann: Object to the form.

Ms. Phelps: The boundaries of the district are the boundaries of the district. **(RP717)**.

. . .

Mr. Lyons: Marmaduke has not submitted any paperwork or any requests to serve the ARI East Plant located in St. Francis River Regional Water District's territory --

Ms. Phelps: Not --

Mr. Lyons: -- true?

Ms. Phelps: Yes.

Mr. Lyons: Under your rules is that the proper thing to do for -- proper thing for Marmaduke to do if they want to serve something outside their territory?

Mr. Mann: Object to the form of the question.

Ms. Phelps: Yes.

Mr. Lyons: If they want to invade someone else's territory, is it proper for Marmaduke to come to the ANRC before they begin serving that invaded territory?

Ms. Phelps: Yes.

(RP718).

. . .

Mr. Lyons: Okay. What does the effect of allocation of a territory have in regard to decisions made by the ANRC?

Ms. Phelps: Are you asking what is the effect of an entity being given Water Plan Compliance approval over a certain service area --

Mr. Lyons: Yes.

Ms. Phelps: -- to ANRC?

Mr. Lyons: Yes.

Ms. Phelps: If that's occurred, then -- well, the effect is that you're in compliance with the Water Plan.

Mr. Lyons: Okay.

Ms. Phelps: The state's water plan.

Mr. Lyons: Okay. And somebody who invades that territory is not in compliance with the Water Plan; are they?

Mr. Mann: Object to the form.

Ms. Phelps: Somebody who invades a service area that's been approved by ANRC for Water Plan Compliance approval, if it's invaded, then that person is not in compliance with the Water Plan.

(RP719-720).

By supplying water to the two (2) buildings of ARI which are in

SFRRWD's service area, the City is engaging in a water development project which requires compliance by the City with Arkansas' Water Plan and compliance with Arkansas law. Thus, the City must have sought a transfer of the service area based on Section 601.4(B)(7) of Title 6, Arkansas Natural Resources Commission Water Plan Compliance Review Procedures. Instead, the City chose just to provide the water without any approval from the Commission. Ms. Phelps' testimony shows that the City was required to appear before the Commission and take proper action to comply with the Water Plan prior to providing water service in SFRRWD's territory. **(RP718)**. Further, the testimony of Mayor Dixon confirms that it took no action whatsoever before the Commission or any other governmental body, agency or entity before providing water service to ARI in SFRRWD's territory. **(RP745-749)**. Thus, the Court's finding that the City's actions did not constitute a water development project was erroneous and was not a valid basis for granting summary judgment in favor of the City. Therefore, the Court erred in granting summary judgment in favor of the City.

B. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF BASED UPON ITS ERRONEOUS INTERPRETATION OF ARK. CODE ANN. §§ 15-22-223 and 15-22-503.

1. Standard Of Review For Summary Judgment

Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Danner v. MBNA America Bank, N.A.*, 369 Ark. 435, 255 S.W.3d 863 (2007). The standard is whether the evidence is sufficient to raise a fact issue, not whether the evidence is sufficient to compel a conclusion. A fact issue exists, even if the facts are not in dispute, if the facts may result in differing conclusions as to whether the moving party is entitled to judgment as a matter of law. In such an instance, summary judgment is inappropriate. *Id.* The evidence is viewed in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. The review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id*. The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried. *Lamar Advantage Holding Co., Inc. v. Arkansas State Highway Comm'n*, 369 Ark. 295,

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Additionally, as set forth in *Smith v. Farm Bureau Mut. Ins. Co. of Arkansas, Inc.*, 88 Ark. App. 22, 31–32, 194 S.W.3d 212, 219 (2004):

> An order denying a motion for summary judgment is only an interlocutory order and is not appealable. *City of North Little Rock v. Garner*, 256 Ark. 1025, 511 S.W.2d 656 (1974). Review of certain interlocutory orders is allowed in conjunction with the appeal of a final judgment. *Id*. Thus, an order denying summary judgment may be reviewable in conjunction with an appeal of an order granting summary judgment. *See id.*
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> In *Wilson v. McDaniel*, 247 Ark. 1036, 449 S.W.2d 944 (1970), the supreme court stated, "certain interlocutory orders are reviewable in conjunction with a final judgment; an order granting summary judgment is a final order, and therefore is appealable."

Thus, the denial of SFRRWD's summary judgment is reviewable as it is in conjunction with an appeal of an order granting summary judgment in this case.

2. SFRRWD Is Entitled To Serve ARI In SFRRWD'S Service Area.

In this case, there is no dispute that SFRRWD is an Arkansas regional water distribution district with a designated service area which was approved by the Commission and includes the buildings in question on ARI's Marmaduke campus. **(RP511-517, 717, 719, 747, 749)**. Additionally, SFRRWD has made demand on the City to stop supplying water to that portion of ARI's Marmaduke campus

which is in SFRRWD's service territory. However, the City has refused to do so. **(RP67, 581)**. Further, SFRRWD has received financial assistance from the Commission and has pledged its revenue from services rendered to repay said financial assistance. **(RP66-67)**. The City has admitted through its chief executive officer, Mayor Steve Dixon, that it has not sought or received approval from the Commission to provide water service to that portion of ARI's facility located in SFRRWD's service territory. **(RP745-749)**. Further, the Commission, through its counsel, testified that the City has not sought or obtained approval to provide water to ARI in SFRRWD's service area. **(RP717-718)**.

As stated above in Section A.2., the City is in violation of Ark. Code Ann. § 15-22-223(a) for providing water service to that portion of ARI's facility located in SFRRWD's service area as SFRRWD is the current provider of water service in its service area. Further, SFRRWD has pledged or utilizes the revenue derived from the water service in that area to repay financial assistance provided by the Commission and the City has not received approval from the Commission to provide water to ARI in SFRRWD's service area. Finally, the City has not received approval under the Arkansas Water Plan. Instead, the City has just ignored the law and crossed over into SFRRWD's service area and defiantly provided water service to ARI. The fact that the City annexed the lands on which

the buildings at issue in this matter are located well after this lawsuit was filed does not suddenly and automatically give the City the right to provide water service to ARI as the buildings are still in SFRRWD's service area and the City has not obtained any approval by the Commission under the Water Plan to provide water service to ARI. *See e.g., City of Fort Smith v. River Valley Regional Water Dist.*, 344 Ark. 57, 37 S.W.3d 631 (2001)(municipalities may be contained in the boundaries of regional water districts).

The City's actions in this matter are similar to the actions of the City of Bentonville in the case of *Arkansas Soil and Water Conservation Com'n v. City of Bentonville*, 351 Ark. 289, 92 S.W.3d 47 (2002). In that case, the City of Bentonville claimed that it had exclusive territorial jurisdiction of all land lying within five (5) miles of its corporate limits and this jurisdiction trumped the Arkansas Soil and Water Conservation Commission's (n/k/a Arkansas Natural Resources Commission, i.e. the "Commission") authority under Ark. Code Ann.§ 15-22-503 such that the city was granted the exclusive right to provide utilities to residents in its five-mile extraterritorial planning area. *Id.* at 299, 53. The Arkansas Supreme Court did not agree. In so holding, the Supreme Court stated the following:

> Bentonville overstates the power granted to them by

> section 14-56-413. First, section 15-22-503(e) clearly grants ASWCC power over other political subdivisions, such as municipalities, to approve any water development project for compliance with the state water plan. Ark. Code Ann. § 15-22-503(e). Our case law provides that a Regional Water District, whose water projects also require ASWCC approval, can include municipalities. *City of Fort Smith v. River Valley Regional Water Dist., supra*. Moreover, cities cannot spend state funds on or engage in any water development project until the project is approved by ASWCC. Ark. Code Ann. § 15-22-503(e); *City of Benton v. ASWCC, supra*. A municipality clearly does not have absolute power to control water projects within its own boundaries, much less within its five-mile extraterritorial planning area.
>
> Statutes relating to the same subject are said to be in pari materia and should be read in a harmonious manner, if possible. *R.N. v. J.M.*, 347 Ark. 203, 61 S.W.3d 149 (2001); *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). Here, we have no difficulty in reading the two statutes at issue in harmony. While a municipality may prepare plans for lands lying within five miles of the city limits, Ark. Code Ann. § 14-56-413, all water development projects must still comply with the Arkansas Water Plan. Ark. Code Ann. § 15-22-503. *Arkansas Soil and Water Conservation Com'n*, 351 at 299-300, 92 S.W.3d at 53-54.

As stated in Section A.3. above, the supplying of water by the City to ARI in SFRRWD's service area was a project which requires compliance by the City with Arkansas' Water Plan because one of the definitions of a project pursuant to Section 601.4 of Title 6, Arkansas Natural Resources Commission Water Plan

Compliance Review Procedures is the "[t]ransfer of a service area not yet receiving service from a utility but included within another political subdivision's approved service area or within another entity's application for water plan compliance approval." *Id.* For the City to be in compliance with the Arkansas Water Plan and serve ARI in SFRRWD's service area, the City ***before*** providing water service to the ARI buildings in question must have received approval of the transfer of a service area not yet receiving service from a utility that is included in another political subdivision's approved service area or another entity's application for water plan compliance. This never occurred and SFRRWD has been denied its right to provide service to ARI's facilities located in SFRRWD's service area. Thus, the trial court erred in denying SFRRWD's Motion for Summary Judgment when it granted the City's Motion for Summary Judgment.

C. CONCLUSION

For all of the above reasons, the trial court erred in granting the City's Motion for Summary Judgment by misinterpreting Ark. Code Ann. §§ 15-22-223 and 15-22-503 when it found that pursuant to § 15-22-223, the City was the "current provider" and the legality of providing water was meaningless; that SFRRWD had to be indebted to the Commission at all applicable time frames; that the City did not have to obtain permission from the Commission and that the City

did not have to comply with § 15-22-503 (the Arkansas Water Plan).

Further, the trial court erred in denying SFRRWD's Motion for Summary Judgment due to its granting the City's Motion for Summary Judgment by misinterpreting Ark. Code Ann. §§ 15-22-223 and 15-22-503 as the proper interpretation of said statutes mandates summary judgment in favor of SFRRWD. Finally, the trial court's ruling is directly contrary to *Arkansas Soil and Water Conservation Com'n v. City of Bentonville*, cited above and should be reversed and summary judgment granted in favor of SFRRWD and, thereafter, the case should be remanded for a determination of damages since SFRRWD would have prevailed on its claim.

Respectfully submitted,

Jim Lyons (Bar #77083)
LYONS & CONE, P.L.C.

By /s/ Jim Lyons
Attorneys for St. Francis River Regional Water District

VII.

REQUEST FOR RELIEF

Appellant respectfully requests this Court to reverse the judgment of the trial court granting the City's Motion for Summary Judgment and enter an order granting SFRRWD's Motion for Summary Judgment and, thereafter, the case should be remanded for a determination of damages since SFRRWD would have prevailed on its claim.

In the alternative, the Appellant respectfully requests this Court to reverse the judgment of the trial court granting the City's Motion for Summary Judgment and remand this case to the trial court for a trial on the merits.

VIII.

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that a true and correct copy of the foregoing will be served on the following counsels of record via eFlex on this 11th day of September, 2019, pursuant to Administrative Order No. 21, § 7(a). Additionally, a true and correct copy of the foregoing has been served upon the following via U.S. Mail, First Class Postage prepaid, on the 11th day of September, 2019: William C. Mann, III
Amanda LaFever
Gabrielle Gibson
Arkansas Municipal League
P.O. Box 38
North Little Rock, AR 72115

The undersigned attorney does hereby further certify that a true and correct copy of the foregoing has been served upon the following via U.S. Mail, First Class Postage prepaid, on the 11th day of September, 2019:

Honorable Melissa Richardson
P.O. Box 420
Jonesboro, AR 72403-0420

/s/ Jim Lyons

Jim Lyons (Bar #77083)
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IX.

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER NO. 19 AND WITH WORD-COUNT LIMITATIONS

I, the undersigned attorney, hereby certifies that the attached Appellant's Brief complies with Administrative Order No. 19 in that all "confidential information" has been be excluded from the "case record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

Further, the undersigned states that the foregoing Brief conforms to the word-count limitation identified in Rule 4-2(d) and said Brief contains 6,469 words.

Identification of paper documents not in PDF format:

The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None

/s/ Jim Lyons
Jim Lyons (Bar #77083)
LYONS & CONE, P.L.C.
September 11, 2019