IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS

C&H HOG FARMS, INC. **PLAINTIFF**

VS. **CASE NO. 51CV-18-68**

ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY **DEFENDANT**

RESPONSE TO MOTION FOR CHANGE OF VENUE

Comes now the plaintiff, C & H Hog Farms, Inc., and for its response to the motion for change of venue filed herein by the Arkansas Department of Environmental Quality, states:

1. C & H responds only to ADEQ's motion for change of venue in this filing in order to address the Court's comments during the telephone hearing on November 7, 2018 so that the resolution of the venue issue might be expedited. C & H will respond separately to the alternative motion to dismiss within the time allowed by the Arkansas Rules of Civil Procedure.

2. C & H filed its complaint on October 16, 2018 and alleged that ADEQ had violated its obligations under Regulation 8.208(E) of the Arkansas Pollution Control & Ecology Commission by not complying with the Arkansas Freedom of Information Act as required by that regulation and the provisions of the FOIA. *See* Complaint, ¶¶ 6-12. C & H's FOIA request is part and parcel of the public comment process that is a prerequisite to a draft permitting decision as set forth in Regulation 8.208(E). The draft permitting decision is already at issue in two separate appeals pending before the

Newton County Circuit Court as 51CV-18-48 and 51CV-18-58. On October 17, 2018, the Honorable John Putman entered an order that concluded as follows:

> Minute Order No. 18-20 issued by the Commission, including the remand and instructions stated therein, should be, and hereby is, stayed. To avoid substantial prejudice, the stay allowing C&H to continue to operate its facility is continued until further order of this court.

See Interim Order and Stay Pending Appeal attached hereto as Exhibit A.

3. The complaint in the present case is related to the issues on appeal in 51CV-18-48 and 51CV-18-58, and it was filed as a related case. Paragraph 20 of the Complaint in the present case notes the interrelationship between the comment period at issue in 51CV-18-58 and the FOIA issue in the present case. The relief requested in this case is not limited to an order to provide the public records to which C & H is entitled; rather, C & H also seeks the related relief of ordering ADEQ to extend the comment period for a reasonable time after ADEQ provides C & H with the requested public records. The Court may order relief beyond the express relief provided by the Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-107. In *Rehab Hosp. Services Corp. v. Delta-Hills Health Systems Agency, Inc.*, 285 Ark. 397, 401, 687 S.W.2d 840, 842-843 (1985), the Arkansas Supreme Court stated as follows, before deciding that additional relief was not appropriate in that case:

> Some states hold that when the "public meeting" statute sets out specific remedies, the courts are limited to those remedies set out. For a listing of those jurisdictions see *Annotation–Statutes–Proceedings Open to Public*, 38 A.L.R.3d 1070, § 7. We decline to take such a limited approach but instead, in order to effectuate the laudable public purposes of the act, hold that some actions taken in violation of the requirements of the act may be voidable. It will be necessary for us to develop this law on invalidation on a case-by-case basis.

The present case is such a case in which ADEQ's failure to comply with C & H's FOIA request is so connected to the underlying permitting decision that additional relief is warranted. Thus, the connection between the FOIA violation and the issues on appeal in 51CV-18-48 and 51CV-18-58 distinguish the present case from a case in which only the provisions of Ark. Code Ann. § 16-60-201(e)(2) are involved, particularly since a stay has already been entered in the related case of 51CV-18-58. The connection between the present case and the appeals in 51CV-18-48 and 51CV-18-58 further distinguish this matter.

4. Turning to ADEQ's arguments in its motion for change of venue, C & H notes that it stated in its complaint that venue was proper pursuant to Ark. Code Ann. § 16-60-101, not Ark. Code Ann. § 16-60-104. Nowhere in C & H's complaint is § 16-60-104 cited. C & H reads ADEQ's motion as arguing that venue of the present action is governed only by § 16-60-104, but that is not the case, given the provisions of Ark. Code Ann. § 25-19-107(a).

5. C & H stated in ¶ 3 of its complaint that the Court has subject matter jurisdiction pursuant to Ark. Code Ann. § 25-19-107(a). That section states:

> (a) Any citizen denied the rights granted to him or her by this chapter may appeal immediately from the denial to the Pulaski County Circuit Court *or to the circuit court of the residence of the aggrieved party*, ...

(Emphasis added). Thus, the statute cited by C & H for jurisdiction actually establishes venue as well, and venue is proper in Newton County based on § 25-19-107(a), which makes § 16-60-201(e)(2) in applicable by its own terms since venue is not premised upon § 16-60-104(3). Therefore, the premise of ADEQ's motion is incorrect.

6. Further, C & H does not believe that the Arkansas Supreme Court has construed Ark. Code Ann. § 16-60-201(e)(2) in a published majority opinion. C & H

notes, however, that in two opinions – one a dissent and the other a concurrence – the Honorable Shawn Womack has construed the statute the same way as ADEQ in its motion for change of venue. *See Gillespie v. Planned Parenthood of Ark. & Eastern Okla., Inc.*, 2018 Ark. 228 (Exhibit B hereto) and *State v. McKesson Medical-Surgical, Inc.*, 2018 Ark. 154 (Exhibit C hereto). Since there is no published majority opinion in either case to C & H's knowledge, it appears that a motion for change of venue was denied in at least one of the cases for reasons that distinguish Ark. Code Ann. § 16-60-201(e)(2). In *Gillespie*, although the circuit court's order denying the motion for change of venue (Exhibit D hereto) did not state the ground on which the motion was denied, the response to the motion for change of venue (Exhibit E hereto) noted, among other arguments, that venue was not established by Ark. Code Ann. § 16-60-104 but rather by another statute. Therefore, the respondent argued that Ark. Code Ann. § 16-60-201(e)(2) was inapplicable. The same is true in the present case, since venue is established pursuant to Ark. Code Ann. § 25-19-107(a).

WHEREFORE, C & H Hog Farms, Inc. prays that ADEQ's motion for change of venue be denied and for all other proper relief to which C & H may be entitled.

Respectfully submitted,

/s/ William A. Waddell, Jr.
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Attorneys for C&H Hog Farms, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following attorney by electronic mail on this 9th day of November, 2018:

Daniel Pilkington
ADEQ Attorney Specialist
5301 Northshore Drive
North Little Rock, AR 72118-5317

/s/ William A. Waddell, Jr.
William A. Waddell, Jr.

IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS

C&H HOG FARMS, INC. PLAINTIFF

VS. CASE NO. 51CV-18-68

ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY DEFENDANT

EXHIBIT A

TO

RESPONSE TO MOTION FOR CHANGE OF VENUE

IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS
CIVIL DIVISION

C & H HOG FARMS, INC. — APPELLANT

VS. CASE NO. 51CV-18-58

ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION — APPELLEE

BUFFALO RIVER WATERSHED ALLIANCE, INC., ARKANSAS CANOE CLUB, GORDON WATKINS AND MARTI OLESEN — INTERVENORS

INTERIM ORDER AND STAY PENDING APPEAL

This case came on for hearing on October 17, 2018. After reading the pleadings in the case, hearing the arguments of counsel, and considering the testimony presented the court finds and holds:

The Intervenors should be, and hereby are, allowed to intervene in this lawsuit as permissive intervenors.

On January 10, 2018 the Arkansas Department of Environmental Quality (ADEQ) issued its decision denying the application of C&H Hog Farms, Inc. (C&H) pursuant to Regulation No. 5 for a liquid animal waste management system permit concentrated animal feeding operation in Mt. Judea, Arkansas ("Permitting Decision"). On January 11, 2018 C&H filed a Motion for Stay of Permitting Decision with the Arkansas Pollution Control and Ecology Commission ("Commission"), which was granted on January 17, 2018. On January 18, 2018 C&H appealed the Permitting Decision to the Commission. On August 24, 2018 the Commission remanded the Permitting Decision to ADEQ and closed the docket of the appeal. On September 6, 2018 C&H filed a Notice of Appeal of the Commission's decision, which included a request to further stay the Director's Permitting Decision and to stay the Commission's decision.

Exhibit A

The court finds that pursuant to Ark. Code Ann. § 8-4-223, this court obtained jurisdiction over C&H's application for a Regulation No. 5 permit for a liquid animal waste management system permit in Mt. Judea, Arkansas, the subject matter of this appeal, on September 6, 2018, when C&H filed its notice of appeal (the "Permit Matter"). Minute Order No. 18-20 issued by the Commission, including the remand and instructions stated therein, should be, and hereby is, stayed. To avoid substantial prejudice, the stay allowing C&H to continue to operate its facility is continued until further order of this court.

IT IS SO ORDERED.

John Putnam
Circuit Judge
Date: October 17, 2018

IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS

C&H HOG FARMS, INC. PLAINTIFF

VS. CASE NO. 51CV-18-68

ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY DEFENDANT

EXHIBIT B

TO

RESPONSE TO MOTION FOR CHANGE OF VENUE

2018 Ark. 228

NOTICE: THIS DECISION WILL NOT APPEAR IN THE SOUTHWESTERN REPORTER. SEE REVISED SUPREME COURT RULE 5-2 FOR THE PRECEDENTIAL VALUE OF OPINIONS.

Supreme Court of Arkansas.

Cindy GILLESPIE, Director, Arkansas Department of Human Services, In Her Official Capacity, Petitioner

v.

PLANNED PARENTHOOD OF ARKANSAS & EASTERN OKLAHOMA, INC. d/b/ a Planned Parenthood Great Plains; and Washington County Circuit Court, from Washington County Circuit Court, Respondents

No. CV–18–395

|

Opinion Delivered: June 21, 2018

PETITION FOR WRIT OF MANDAMUS, PROHIBITION, CERTIORARI, OR A SUPERVISORY WRIT, OR OTHER APPROPRIATE RELIEF [WASHINGTON COUNTY CIRCUIT COURT, NO. 72CV–18–591]

Opinion

*1 Writ denied.

DISSENTING OPINION.

SHAWN A. WOMACK, Associate Justice

**1 *1 Because I believe that an extraordinary writ is the only way to vindicate the petitioner's right to a change of venue granted by the General Assembly in Act 967 of 2017, I must dissent from this court's denial of that relief.

Act 967 of 2017 amended Arkansas's venue laws to create a mandatory right for state actor defendants to change the venue of a proceeding to "any county in the state of Arkansas" if "no plaintiff is a resident of Arkansas." *See* Ark. Code Ann. § 16–60–201(e). *See also State of Arkansas et al. v. McKesson Medical–Surgical, Inc.*, 2018 Ark. 154 (Womack, J., concurring). The defendant below, as the director of the Arkansas Department of Human *2 Services, is indisputably a state actor. The plaintiff below, as an Oklahoma corporation with headquarters in Kansas, is not a resident of Arkansas under this court's interpretation of corporate residency. *See, e.g., Citicorp Industrial Credit, Inc. v. Wal–Mart Stores, Inc.*, 305 Ark. 530, 534–35, 809 S.W.2d 815, 817 (1991) (summarizing our interpretation that a corporation is a "resident of the state under the laws of which it was created" and that "foreign corporations do not become Arkansas residents by registering to do business here.").

The state defendant, having satisfied the only requirements of section 16–60–201(e), invoked the provision to transfer venue in this action from Washington County to Faulkner County. The Washington County Circuit Court denied the motion without explanation, refusing to provide the legislatively mandated remedy to which the petitioner was entitled.

The respondents correctly note that a writ of mandamus is not appropriate to control the circuit court's exercise of discretion. *See, e.g., Tyson v. Roberts*, 287 Ark. 409, 410, 700 S.W.2d 50, 51 (1985). Further, motions for change of venue often involve the sort of discretionary balancing and consideration that would render mandamus relief wholly inappropriate. *See, e.g., Taylor v. State*, 334 Ark. 339, 344, 974 S.W.2d 454, 458 (1998). That general treatment of venue does not apply here, however, where the petitioner satisfied the requirements of a statute with mandatory effect. Instead, the petitioner has asked the circuit court to fulfill the sort of purely ministerial—rather than discretionary—duty *3 for which mandamus relief is appropriate. *See, e.g., Russell v. Pope*, 2015 Ark. 199, at 1, 461 S.W.3d 681, 682.

The circuit court was required to grant the petitioner's motion to change venue. This court's denial of mandamus relief to correct that failure leaves the petitioner without an effective method of vindicating her right under section 16–60–201(e).

I respectfully dissent.

Wood, J. joins.

Exhibit B

All Citations

Not Reported in S.W. Rptr., 2018 Ark. 228, 2018 WL 3061694

End of Document

IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS

C&H HOG FARMS, INC. PLAINTIFF

VS. CASE NO. 51CV-18-68

ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY DEFENDANT

EXHIBIT C

TO

RESPONSE TO MOTION FOR CHANGE OF VENUE

2018 Ark. 154

NOTICE: THIS DECISION WILL NOT APPEAR IN THE SOUTHWESTERN REPORTER. SEE REVISED SUPREME COURT RULE 5-2 FOR THE PRECEDENTIAL VALUE OF OPINIONS.

Supreme Court of Arkansas.

STATE of Arkansas, ARKANSAS DEPARTMENT OF CORRECTION, Asa Hutchinson, in His Official Capacity as Governor of the State of Arkansas; Wendy Kelley, in Her Official Capacity as Director of the Arkansas Department of Correction, Appellants

v.

MCKESSON MEDICAL-SURGICAL, INC., Appellee

No. CV-17-317

|

Opinion Delivered: April 26, 2018

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. 60CV-17-1960], HONORABLE ALICE S. GRAY, JUDGE

CONCURRING OPINION.

SHAWN A. WOMACK, Associate Justice

*1 **1 I join in the court's vote to grant the parties' joint motion to dismiss this case as moot due to the expiration of the State's supply of vecuronium bromide. I write separately to highlight two points. First, to note what I believe to be unacceptable conduct by the circuit court in the handling of this case. Specifically, the blatant disregard for the law shown by this judge in refusing to consider and rule upon the threshold issue of venue. Second, to draw attention to the new mandatory provisions in the law regarding venue in certain actions, as passed by the General Assembly in 2017.

*2 On April 18, 2017, the State filed a motion to change venue pursuant to Act 967 of 2017, which amended Arkansas Code Annotated § 16-60-201(e) to read:

> (1) A defendant in a civil action under § 16-60-104(3) may obtain an order for a change of venue by motion requesting a transfer to one (1) of the following counties:
>
> (A) Pulaski County;
>
> (B) Any county in which one (1) of the plaintiffs, or in the case of a certified class action, any member of the class, resides, conducts business, or maintains a principal place of business; or
>
> (C) If no plaintiff is a resident of Arkansas, any county in the state of Arkansas.
>
> (2) The venue of the civil action shall be changed upon a showing that the proposed transferee county is a proper venue as set forth in this subsection.

Act 967 had an emergency clause, and it went into effect on April 5, 2017.

Despite the amended venue statute being in effect and dictating that venue "*shall* be changed" upon satisfaction of its conditions, the circuit court declined to rule on the State's venue-change motion. It instead reached and granted McKesson's request for injunctive relief, leading directly to an interlocutory appeal and later to the appeal we have just dismissed today. After the issue had been briefed, the circuit court finally deigned to hear arguments about venue at a hearing on July 12, 2017. That hearing combined arguments on the venue issue with the State's motion to dismiss on sovereign immunity grounds. When the circuit court denied the motion to dismiss, however, it again declined to address the venue issue. The court claimed that it was "going to take this transfer under advisement and make the decision as soon as possible." No decision has been forthcoming.

*3 Good-faith legal arguments can be had about McKesson's residency for the purposes of the statute, and therefore whether the State satisfied the requirements for securing the statute's mandatory venue transfer. As it happens, those arguments *were* had, both when the State initially moved to change venue at the outset of litigation and when a hearing was finally held several months later. Even if the circuit court had issued its ruling at the July hearing, reaching the foundational issue of venue only after ruling on the merits of the case and generating two separate appeals to this court would have been putting the horse well after the cart. The circuit court's dilatory handling of the State's motion to change venue, whether willful or not, has altered the entire texture of this litigation.

Exhibit C

All Citations

Not Reported in S.W. Rptr., 2018 Ark. 154, 2018 WL 3400708

End of Document

IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS

C&H HOG FARMS, INC. PLAINTIFF

VS. CASE NO. 51CV-18-68

ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY DEFENDANT

EXHIBIT D

TO

RESPONSE TO MOTION FOR CHANGE OF VENUE

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
FIRST DIVISION

PLANNED PARENTHOOD OF ARKANSAS & EASTERN OKLAHOMA, INC. d/b/a PLANNED PARENTHOOD GREAT PLAINS, PLAINTIFFS

VS. NO. 72CV-18-591-1

CINDY GILLESPIE, Director, Arkansas Department of Human Services, in her Official Capacity, DEFENDANT

ORDER DENYING DEFENDANT'S MOTION FOR CHANGE OF VENUE

On the 13th day of April, 2018, came on for consideration the *Defendant's Motion for Change of Venue* and having reviewed the motion and brief in support, the plaintiff's response, and the defendant's reply, the court finds that the motion should be and hereby is denied.

IT IS SO ORDERED.

DOUG MARTIN
Circuit Judge - First Division

Copy to:

Dylan L. Jacobs, via email: Dylan.Jacobs@ArkansasAG.gov

Michael D. Sutton, via email: msutton@cwlaw.com

Kerri E. Kobbeman, via email: kkobbeman@cwlaw.com

Exhibit D

IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS

C&H HOG FARMS, INC. PLAINTIFF

VS. CASE NO. 51CV-18-68

ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY DEFENDANT

EXHIBIT E

TO

RESPONSE TO MOTION FOR CHANGE OF VENUE

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

PLANNED PARENTHOOD OF ARKANSAS & EASTERN OKLAHOMA, INC. d/b/a PLANNED PARENTHOOD GREAT PLAINS, **PLAINTIFF**

v. **CASE NO. 72CV-18-591-1**

CINDY GILLESPIE, Director, Arkansas Department of Human Services, in her Official Capacity. **DEFENDANT**

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE

Comes now the Plaintiff, Planned Parenthood of Arkansas & Eastern Oklahoma, Inc., d/b/a Planned Parenthood Great Plains (hereafter "Plaintiff") and submits this response in opposition to the Motion for Change of Venue (hereafter the "Motion") filed by Defendant Cindy Gillespie, Director of the Arkansas Department of Human Services, and her employees, agents, delegates, and successors in office (hereafter collectively referred to as "ADHS"), in their official capacity, and states:

ARGUMENT & AUTHORITIES

ADHS's Motion for Change of Venue should be denied for three primary reasons. *First*, the specific venue provisions of the Medicaid Fairness Act and Administrative Procedure Act are clear that venue is proper in Washington County. *Second*, ADHS's interpretation fails as Arkansas's principles of statutory interpretation likewise establish that venue is proper in Washington County and that ADHS's request for change of venue is improper. *Third*, ADHS's interpretation is inconsistent with Arkansas's public policy.

Exhibit E

I. The Medicaid Fairness Act and the Administrative Procedure Act Establish That Venue is Proper in Washington County.

The Arkansas Supreme Court has stated that the first step of statutory interpretation is to "construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language, and if the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory interpretation." *Thompson v. State*, 2014 Ark. 413, at 5, 464 S.W.3d 111, 114 (2014); *see also Worsham v. Bassett*, 2016 Ark. 146, at 3-4, 489 S.W.3d 162, 164 (2016). Further, "[t]he basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature." *Graham v. Forrest City Hous. Auth.*, 304 Ark. 632, 634, 803 S.W.2d 923, 924 (1991); *Holt v. City of Maumelle*, 302 Ark. 51, 53, 786 S.W.2d 581, 583 (1990). In construing one statute, this Court will "place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole." *Stivers v. State*, 354 Ark. 140, 144, 118 S.W.3d 558, 561 (2003); *Singleton v. State*, 2009 Ark. 594, at 3, 357 S.W.3d 891, 893.

Plaintiff brought this action pursuant to *Ark. Code Ann.* § 20-77-1718 (the Medicaid Fairness Act), *Ark. Code Ann.* § 25-15-212 (the Administrative Procedure Act), *Ark. Code Ann.* § 25-15-214 (the Administrative Procedure Act), and *Ark. Code Ann.* § 16-111-101, *et seq.* (the Declaratory Judgment Act) seeking injunctive and declaratory relief. The Medicaid Fairness Act states that "[a] Medicaid provider that is aggrieved by an adverse decision of the Department of Human Services with respect to termination of the provider's certification or Medicaid provider agreement . . . may appeal the decision to Pulaski County Circuit Court or in a circuit court in a county in which the provider resides or **does business**." *Ark. Code Ann.* § 20-77-1718(a) (emphasis added). Likewise, the Administrative Procedure Act states that "any person . . . who considers himself or herself injured in his or her person, business, or property by final agency action shall be

entitled to judicial review of the action" in "(A) The circuit court of any county in which the petitioner resides or **does business**; or (B) Pulaski County Circuit Court." *Ark. Code Ann.* § 25-15-212 (emphasis added). Finally, *Ark. Code Ann.* § 25-15-214 of the Administrative Procedure Act provides that "if an agency shall unlawfully, unreasonably, or capriciously fail, refuse, or delay to act, any person who considers himself or herself injured . . . may bring suit in the circuit court of any county in which he or she resides or **does business**, or in Pulaski County Circuit Court, for an order commanding the agency to act." (emphasis added). By filing this action in Washington County, Plaintiff complied with Medicaid Fairness Act and Administrative Procedure Act, as Plaintiff conducts business in both Washington County and Pulaski County, where its health care centers are located. It is not disputed that Plaintiff's causes of action were appropriately brought in Washington County. *See Motion for Change of Venue*, ¶ 2.

Ordinarily, a party may only seek a change of venue from an otherwise proper venue,[1] where there is some concern about that party's ability to obtain a fair and impartial trial. "In actions to be tried by jury, a party may seek a change of venue on the basis that an adversary's undue influence or other prejudice against the party will cause the trial to be other than fair and impartial." David Newbern et al., *Civil Practice & Procedure* § 9:13 (5th ed. Supp. 2017). This determination traditionally falls within the discretion of the trial court. *Id.* There is no such concern in this case and ADHS has not suggested that there is.

Despite Washington County being a proper venue for Plaintiff's specific claims, ADHS improperly seeks to transfer venue to Faulkner County pursuant to *Ark. Code Ann.* § 16-60-201 (hereafter "Section 201"). ADHS offers no valid justification for this transfer. ADHS's request is particularly surprising as Plaintiff does not operate a health care center in Faulkner County,

[1] ADHS has conceded that venue is proper in Washington County. *See Motion for Change of Venue*, ¶ 2.

Plaintiff does not render services in Faulkner County, there is no apparent connection between Faulkner County and the parties or the events involved in this case, there is no indication whatsoever (nor does ADHS even assert) that venue in Washington County would subject ADHS to undue hardship or expense or would otherwise fail to afford ADHS a fair opportunity to be heard, nor is there any evidence whatsoever that Faulkner County would be more convenient or expedient in resolving this case.

As a result, Plaintiff respectfully requests that this Court deny ADHS's Motion for Change of Venue.

II. Arkansas's Principles of Statutory Interpretation Instruct That ADHS's Interpretation is Improper and Its Motion Must Be Denied.

Arkansas courts employ principles of statutory interpretation where there is ambiguity. A statute is only "ambiguous" when it is "open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning." *Central & Southern*, 339 Ark. 76, 80, 3 S.W.3d 294, 297; *see also ACW, Inc. v. Weiss*, 329 Ark. 302, 312, 947 S.W.2d 770, 775 (1997). Although Plaintiff contends that no ambiguity exists between the Medicaid Fairness Act, Administrative Procedure Act, and Section 201's application through *Ark. Code Ann.* § 16-60-104, if there were any ambiguity, the principles of statutory construction and legislative intent would establish that Plaintiff's construction is correct.

A. The General Default Provisions of Ark. Code Ann. § 16-60-104 Must Yield to the More Specific Provisions in the Medicaid Fairness Act and Administrative Procedure Act.

The Arkansas Supreme Court has consistently recognized that "a general statute must yield when there is a specific statute involving the particular matter." *Vill. Mkt. Inc. v. State Farm Gen. Ins. Co.*, 334 Ark. 227, 229, 975 S.W.2d 86, 86 (1998); *see also R.N. v. J.M.*, 347 Ark. 203, 212, 61 S.W.3d 149, 154 (2001). Here, the Medicaid Fairness Act specifically addresses where a

Medicaid provider (such as Plaintiff) may seek to appeal termination of a provider agreement (the very issue in this case), providing that the correct venues include Pulaski County and other counties in which the provider conducts its business. This provision specifically and directly addresses the very situation that is at issue in this case. Likewise, the Administrative Procedure Act addresses instances in which a party may seek judicial review of an agency's action, just as Plaintiff is attempting to do in this case by challenging ADHS's actions in terminating Plaintiff's provider agreements, in failing to submit Plaintiff's Notice of Appeal to a case hearing officer, and for unilaterally terminating Plaintiff's Notice of Appeal. Just like the Medicaid Fairness Act, the Administrative Procedure Act specifies that the correct venues for judicial review include Pulaski County and other counties in which the provider conducts its business.

In contrast, ADHS seeks to transfer venue by relying on the general venue provisions arising under *Ark. Code Ann.* § 16-20-201 and *Ark. Code Ann.* § 16-60-104. Specifically, Section 201(e)(1) provides that:

> A defendant in a civil action under § 16-60-104(3) may obtain an order for a change of venue by motion requesting a transfer to one (1) of the following counties:
>
> (A) Pulaski County;
> (B) Any county in which one (1) of the plaintiffs, or in the case of a certified class action, any member of the class, resides, conducts business, or maintains a principal place of business; or
> (C) If no plaintiff is a resident of Arkansas, any county in the state of Arkansas.

(emphasis added). *Ark. Code Ann.* § 16-60-104 provides that certain civil actions shall be brought in Pulaski County. Subpart (3) states that "[a] civil action against the state or a civil action against a state board, state commissioner, or state officer because of his or her or the state board's official acts" "shall be brought in Pulaski County." Subpart (3)(B) provides for a caveat, stating that "if a civil action could otherwise be brought in another county or counties under the venue laws of this

state, including without limitation this subchapter, then the civil action may be brought either in Pulaski County or the other county or counties."

ADHS's argument that the general venue statute controls runs directly counter to the long-recognized rules of statutory interpretation. The Arkansas Supreme Court has stated that "[i]t is well settled that where there is, in the same statute, a particular and also a general enactment, the latter including what is embraced in the former, the particular enactment is operative and the general enactment must be taken to affect only that which, within its general language, is not within the provisions of the particular enactment." *Wiseman v. Ark. Utils. Co.*, 191 Ark. 854, 88 S.W.2d 81, 82 (1935). Additionally, the "well-settled rule of construction is that, 'where general terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions will be given effect as **clearer** and **more definite expressions of the legislative will.**" *Hodges v. Dawdy*, 104 Ark. 583, 598, 149 S.W. 656, 662 (1912) (emphasis added); *see also Scott v. Greer*, 229 Ark. 1043, 1048, 320 S.W.2d 262, 266 (1959).

It is clear that the venue provisions of the Medicaid Fairness Act and Administrative Procedure Act embody more "specific" and "particular" provisions addressing proper venue in certain actions arising under these provisions. Plaintiff's action is brought under the Medicaid Fairness Act and the Administrative Procedure Act and the specific venue provisions contained therein apply.

B. The Venue Provisions of the Medicaid Fairness Act and Administrative Procedure Act Would be Deprived of Any Meaning if Section 201 Applied to All Actions Against a State Officer.

The Arkansas Supreme Court has stated that the "legislature will not be presumed to have done a vain and useless thing. Quite the opposite is true . . . [W]e must presume that the General

Assembly did not intend to purposelessly pass an act." *Phillips Petroleum v. Heath*, 254 Ark. 847, 852-53, 497 S.W.2d 30, 33 (1973); *see also Stapleton v. M.D. Limbaugh Constr., Co.*, 333 Ark. 381, 389, 969 S.W.2d 648, 652 (1998). "The statute must be construed so that no word is left void or superfluous and in such a way that meaning and effect is given to every word therein, if possible." *Stephens v. Arkansas School for the Blind*, 341 Ark. 939, 945, 20 S.W.3d 397, 401 (2000); *see also Reeves v. State*, 339 Ark. 304, 310, 5 S.W.3d 41, 44 (1999) (courts must "not construe acts of the General Assembly to be meaningless"); *Central & Southern*, 339 Ark. at 80, 3 S.W.3d at 297; *Ford v. Keith*, 338 Ark. 487, 494, 996 S.W.2d 20, 25 (1999).

Here, the interpretation proffered by ADHS would render the venue provision of the Medicaid Fairness Act and Administrative Procedure Act utterly meaningless and superfluous, in direct contradiction of Arkansas's principles of statutory interpretation. ADHS seems to argue that in any and all actions involving a claim against a state official in his/her official capacity that Section 201 trumps and the state can select the forum that they want. Given the nature of the Medicaid Fairness Act and the Administrative Procedure Act, it is hard to imagine any case in which a state official would not be the defendant. Indeed, it is not clear who else could terminate a Medicaid provider agreement, refuse to submit an administrative appeal to a case hearing officer, or otherwise unilaterally terminate an administrative appeal relating to a Medicaid provider agreement. ADHS's interpretation would, in effect, always allow state officers to set aside the claimant's choice of venue regardless of the Medicaid Fairness Act or Administrative Procedure Act.

As a result, ADHS's interpretation would render the venue provisions of the Medicaid Fairness Act and Administrative Procedure Act utterly meaningless and superfluous in contradiction with Arkansas law. Such an interpretation must fail.

C. Plaintiff is a Resident of the State of Arkansas for Purposes of Venue.

ADHS contends that Plaintiff is not a resident of Arkansas and suggests that by virtue of this, ADHS is permitted to select the venue under Section 201. Specifically, Section 201(e)(1)(C) provides that "[a] defendant in a civil action under § 16-60-104(3) may obtain an order for a change of venue by motion requesting a transfer to one (1) of the following counties [including] [i]f no plaintiff is a **resident** of Arkansas, any county in the state of Arkansas." (emphasis added). ADHS does not define what it means to be a "resident" of Arkansas and simply concludes that "[n]o plaintiff in this case is a 'resident of Arkansas'" citing only Section 201, which likewise does not define what it means to be a "resident" of Arkansas. *See Motion for Change of Venue*, ¶ 4. Fortunately, the Arkansas General Assembly has defined what constitutes "residency" for purposes of venue in Arkansas.

Arkansas's default venue statutes provide that:

> A civil action other than a civil action mentioned in §§ 16-60-102-16-60-109, 16-106-101, and specific venue provisions codified in another title of the Arkansas Code shall be brought in any of the following counties:
>
> (1) The county in which a substantial part of the event or omission giving rise to the cause of action occurred;
>
> (2)
>
> (A) The county in which an individual defendant resided at the time of the event or omission giving rise to the cause of action.
>
> (B) If the defendant is an entity other than an individual, the civil action shall be brought in the county where the entity had its principal office in this state at the time of the event or omission giving rise to the cause of action; or
>
> (3)
>
> (A) The county in which the plaintiff **resided** at the time of the event or omission giving rise to the cause of action.
>
> (B) **If the plaintiff is an entity other than an individual, the civil action shall be brought in the county where the plaintiff had its principal office in this state at the time of the event or omission giving rise to the cause of action.**

Ark. Code Ann. § 16-60-101(a) (emphasis added). Importantly, the statute makes no distinction between domestic and foreign corporations nor does there appear to be any reason to surmise such

a distinction. Further, the provision focuses on the principal office "in this state" which establishes that for purposes of Arkansas's venue laws, an entity's "residence" is its "principal office in this state." Plaintiff operates health care centers in Pulaski County and Washington County, and thus Plaintiff's "principal office" and "residence" for venue purposes in Arkansas is either Pulaski County or Washington County. Regardless of which center constitutes Plaintiff's principal office, Plaintiff's residence is certainly not in Faulkner County. Scholarly commentary on this subject also supports Plaintiff's position, stating that:

> A plaintiff other than a natural person may bring suit in the county where it "had its principal office in this state at the time of the event or omission giving rise to the cause of action." In effect, the principal office is the plaintiff's residence for venue purposes . . . **It appears that an out-of-state organization with a branch office in Arkansas can bring suit in the county where that office is located.**

David Newbern et al., *Civil Practice & Procedure* § 9:13 (5th ed. Supp. 2017) (quoting *Ark. Code Ann.* § 16-60-101(a)(3)) (emphasis added).

ADHS appears to confuse residency for purposes of *venue* with residency for purposes of *jurisdiction*. This is an important distinction as one of the features of registering as a foreign corporation with a state's Secretary of State is that the corporation may sue or be sued. There must be a proper venue in the state wherein a corporation may sue or be sued. ADHS cites *Douglass v. Levi Strauss & Co.*, but that case only addressed whether a foreign corporation having its "principal place of business" elsewhere was a "resident" for purposes of the Arkansas Property and Casualty Insurance Guaranty Act. 315 Ark. 380, 868 S.W.2d 70 (1993). In that case, the claimant sought to recover from the Arkansas Property and Casualty Insurance Guaranty Fund, which served to "provide funds in addition to assets of insolvent insurers for the protection of 'covered claims' against such insurers which would otherwise go unpaid." *Id.* at 381, 816 S.W.2d at 71. Recovery under the fund was only available to a "resident of this state." *Id.* The court thereafter conducted

a discussion on the various cases in other jurisdictions addressing "residency" for matters related to direct insurers and general funds, concluding that "[h]aving looked to the case law from other jurisdictions, we can say that in no case in which we know the issue was raised has a corporation been held a resident of a state in which it was neither incorporated nor maintained its principal place of business." Significantly, the opinion even confines its holding to the insurance context, stating "[w]e have been cited to no authority indicating that a corporation which is incorporated in state A and which has its principal place of business in state B is to be considered a resident of state C **in the context of an insurance guaranty fund.**" *Id.* at 385, 816 S.W.2d at 73 (emphasis added).

ADHS also cites *Hertz Corp. v. Friend* in support of its argument that Plaintiff does not qualify as a "resident" of Arkansas, but this case likewise has nothing to do with residency in the venue context. 559 U.S. 77 (2010). Rather, this case discusses diversity jurisdiction for federal courts and interprets 28 U.S.C. § 1332, the federal diversity statute. In light of the above, Plaintiff respectfully requests that this Court deny ADHS's Motion for Change of Venue as Plaintiff is a resident of Arkansas and thus Section 201 has no application.

D. ADHS's Interpretation Would Render Section 201 Unconstitutional.

The Arkansas Supreme Court has stated that "[i]f it is possible to construe an act so that it will pass the test of constitutionality, the courts not only may, but should and will, do so." *Love v. Hill*, 297 Ark. 96, 99, 759 S.W.2d 550, 551 (1988). ADHS's interpretation would render Section 201 unconstitutional. The Arkansas Supreme Court has held that "foreign corporations must be treated the same as domestic corporations regarding the venue of law suits." *Philco-Ford Corp. v. Holland*, 261 Ark. 404, 405, 548 S.W.2d 828, 829 (1977). Even the United States Supreme Court has also held that statutes allowing suit against a foreign corporation in a venue which would not

be permissible against a domestic corporation as unconstitutional and contrary to the United States Constitution's equal protections clause. *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927).

The entirety of ADHS's argument that it is entitled to a change of venue hinges on its incorrect contention that "[n]o plaintiff in this case is a 'resident of Arkansas.'" *See Motion for Change of Venue*, ¶ 4. In other words, ADHS argues that solely by virtue of Plaintiff's status as non-resident, ADHS should be permitted to pick the venue. ADHS certainly cannot assert that it has a right to select the venue where it is adverse to a resident, as Section 201(e)(1)(c) would only allow ADHS to select "any county in the state of Arkansas" as the venue if "no plaintiff is a resident of Arkansas." Indeed, Section 201 would not allow ADHS to seek a change of venue to Faulkner County against a domestic corporation as Section 201(e)(1) limits such capacity to change to: "(A) Pulaski County; (B) Any county in which one (1) of the plaintiffs, or in the case of a certified class action, any member of the class, resides, conducts business, or maintains a principal place of business; or (C) If no plaintiff is a resident of Arkansas, any county in the state of Arkansas."

In *Power Manufacturing Co. v. Saunders*, the United States Supreme Court considered whether certain Arkansas statutes violated the federal equal protection clause where:

> The Arkansas statutes require actions of this character, if against a domestic corporation, to be brought in a county where it has a place of business or in which its chief officer resides, and, if against a natural person, in a county where he resides or may be found; but they broadly permit such actions, if against a foreign corporation, to be brought in any county in the state.

274 U.S. at 491-92. The defendants in that action challenged the validity of the statutory scheme "in so far as they permit a foreign corporation to be sued in a county where it does no business and has no office, officer, or agent, on the ground that they are unreasonably discriminatory and arbitrary, and therefore in conflict with the equal protection clause of the Fourteenth Amendment

to the Constitution of the United States." *Id.* at 492. The Court ultimately held that "a foreign corporation is differently treated" and that said "special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary." *Id.* at 493-94.

Similarly, in *Philco-Ford Corporation v. Holland*, the Arkansas Supreme Court considered the constitutionality of a statute allowing a plaintiff to bring a contract action against a foreign corporation in the county where the plaintiff resided, while not allowing a plaintiff to similarly sue a domestic corporation in the county where the plaintiff resided. 261 Ark. 404, 405, 548 S.W.2d 828, 829 (1977). In that case, the only distinction was the entity's status as a domestic or foreign corporation. The Arkansas Supreme Court held that said scheme was "unconstitutional in that it discriminates against foreign corporations in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution." *Id.* at 406, 548 S.W.2d at 829. The Arkansas Supreme Court has also stated:

> Inasmuch as some of our past decisions would sustain the proposition that venue in a transitory action against a foreign corporation authorized to do business in Arkansas could be laid in any county in the state, we point out that the effect of these decisions was nullified by the United States Supreme Court in Power Manufacturing Company v. Saunders, 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165 (1927), as recognized in Crutchfield v. McLain, 230 Ark. 147, 321 S.W.2d 217. The Supreme Court of the United States held that our law, which permitted venue to be placed in any county, unconstitutionally discriminated against foreign corporations and in favor of domestic corporations and individuals. Consequently, venue cannot constitutionally be laid against such a foreign corporation in any county where the venue would not be proper in a suit against a domestic corporation or a resident individual.

B-W Acceptance Corp. v. Colvin, 252 Ark. 306, 312 n.4, 478 S.W.2d 755, 758 n.4 (1972).

ADHS is attempting to discriminate against ADHS solely on the basis that it is not a "resident" of Arkansas. As detailed above, this discrimination is arbitrary and patently inappropriate.

E. Plaintiff's Action Does Not Arise Under Ark. Code Ann. § 16-60-104, and Thus Section 201 Does Not Govern.

As stated above, ADHS seeks to transfer venue pursuant to *Ark. Code Ann.* § 16-20-201. Section 201 is codified within Title 16, Subtitle 5 which is entitled "Civil Procedure Generally." Specifically, Section (e)(1) provides that:

> A defendant in a civil action **under § 16-60-104(3)** may obtain an order for a change of venue by motion requesting a transfer to one (1) of the following counties:
>
> (A) Pulaski County;
> (B) Any county in which one (1) of the plaintiffs, or in the case of a certified class action, any member of the class, resides, conducts business, or maintains a principal place of business; or
> (C) If no plaintiff is a resident of Arkansas, any county in the state of Arkansas.

(emphasis added). *Ark. Code Ann.* § 16-60-104 provides that certain civil actions shall be brought in Pulaski County. Specifically, Subpart (3) states that "[a] civil action against the state or a civil action against a state board, state commissioner, or state officer because of his or her or the state board's official acts" "shall be brought in Pulaski County." Subpart (3)(B) provides for a caveat, stating:

> **However, if a civil action could otherwise be brought in another county or counties under the venue laws of this state, including without limitation this subchapter, then the civil action may be brought either in Pulaski County or the other county or counties.**

(emphasis added). In other words, a party bringing an action falling under *Ark. Code Ann.* § 16-60-104 must bring said action in Pulaski County, **unless** the action falls under *another* statute, in which case the *other* statute will govern.

In light of Plaintiff's pursuit of judicial review under the Medicaid Fairness Act (*Ark. Code Ann.* § 20-77-1718) and the Administrative Procedure Act (*Ark. Code Ann.* §§ 25-15-212 and 214), Plaintiff's action was brought under *specific* venue statutes and not under the default provisions of

Ark. Code Ann. § 16-60-104. As a result, Plaintiff's action does not fall **under** *Ark. Code Ann.* § 16-60-104 and the exception outlined under Section 201 has no application in this case.

F. Even If Section 201 Applied, Venue Would Still Be Proper in Washington County.

Section 201(e) provides that venue would be "proper" in "[a]ny county in which one (1) of the plaintiffs, or in the case of a certified class action, any member of the class, resides, **conducts business**, or maintains a principal place of business." *Ark. Code Ann.* § 16-60-201(e)(1)(B). There is no question that Plaintiff conducts business in both Washington County and Pulaski County, as that is where Plaintiff's health care centers are located. There is also no question that Plaintiff does *not* conduct business in Faulkner County. It is strange that ADHS would simply ignore Subpart (e)(1)(B) and skip to the immediately following provision (Subpart (e)(1)(C)) in its attempt to select a forum that is in no way form or fashion related to the facts or parties in this case.

Drawing from all of the above, the Medicaid Fairness Act, Administrative Procedure Act, and even Section 201 (if applicable) all establish that Washington County is the proper venue for this action.

G. ADHS Offers No Legal Support For Its Contention That Change of Venue is Mandatory.

ADHS also asserts that it enjoys an unfettered and mandatory right to change venue upon request. ADHS cites not authority for this contention other than Section 201(e). Subpart (e) states:

> (1) A defendant in a civil action under § 16-60-104(3) **may** obtain an order for a change of venue by motion requesting a transfer to one (1) of the following counties:
> (A) Pulaski County;
> (B) Any county in which one (1) of the plaintiffs, or in the case of a certified class action, any member of the class, resides, conducts business, or maintains a principal place of business; or
> (C) If no plaintiff is a resident of Arkansas, any county in the state of Arkansas.
> (2) The venue of the civil action **shall** be changed upon a showing that the proposed transferee county is a proper venue as set forth in this subsection.

(emphasis added). Drawing from this provision, there is language that suggests that the change of venue remains within the discretion of the Court, but also language that suggests change of venue is non-discretionary.

As noted above, the Arkansas Supreme Court has instructed that in construing one statute, this Court will "place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole." *Stivers v. State*, 354 Ark. 140, 144, 118 S.W.3d 558, 561 (2003); *Singleton v. State*, 2009 Ark. 594, at 3, 357 S.W.3d 891, 893. A cursory review of the surrounding text makes it clear that changes in venue fall within the discretion of the court. Ordinarily, a change of venue is intended to serve as a safeguard where a defendant believes that they will not receive a fair jury in a particular county. Indeed, Subpart (a) of Section 201 provides that "[a]ny party to a civil action to be **tried by a jury** may obtain an order for a change of venue therein by motion upon a petition **stating that he or she verily believes that he or she cannot obtain a fair and impartial trial in the action in the county in which the action is pending, on account of the undue influence of his or her adversary, or of the undue prejudice against the petitioner or his or her cause of action or defense in the county**." (emphasis added). Section 201 also imposes a number of requirements to ensure the veracity of the need for a change of venue, including verified pleadings and accompanying affidavits. *See Ark. Code Ann.* § 16-60-201(a)(2)-(3), (c).

Taking all of this together, it is clear that ADHS offers no basis for the change of venue and no legal support for its premise that the change is mandatory. As a result, Plaintiff respectfully requests that this Court deny ADHS's Motion for Change of Venue.

III. ADHS's Interpretation of *Ark. Code Ann.* § 16-60-201 and *Ark. Code Ann.* § 16-60-104 Would Allow for Blatant Forum Shopping.

ADHS's interpretation would, in effect, arm state officers with unfettered discretion to forum shop by allowing them to pick any county they want regardless of its ties to the case. Forum shopping is not favored by the law. *See, e.g.*, *Worth v. Benton County Circuit Court*, 351 Ark. 149, 160, 89 S.W.3d 891, 898 (2002). As noted above, it is hard to imagine any case in which a state official would not be the defendant in an action seeking judicial review under the Medicaid Fairness Act or the Administrative Procedure Act. As a result, the exception outlined in Section 201 would threaten to eliminate any and all venue provisions arising outside of *Ark. Code Ann.* § 16-60-104, disrupting the well-recognized principle that the plaintiff is the master of his/her complaint and would equip ADHS with the ability to forum shop at will.

For the reasons outlined above, Plaintiff, Planned Parenthood of Arkansas & Eastern Oklahoma, Inc., d/b/a Planned Parenthood Great Plains respectfully requests that this Court deny ADHS's Motion for Change of Venue and grant all other relief to which it may be entitled.

Respectfully submitted,

PLANNED PARENTHOOD OF
ARKANSAS & EASTERN OKLAHOMA, INC.,
d/b/a PLANNED PARENTHOOD
GREAT PLAINS

By: _____

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CERTIFICATE OF SERVICE

I, Michael D. Sutton, attorney of record for the Plaintiff herein, state that a true and correct copy of the above and foregoing was sent via electronic mail and U.S. mail, with proper postage thereon fully prepaid, to:

Mr. Dylan L. Jacobs
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on this 21st day of March, 2018.

Michael D. Sutton