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SIXTEEN YEARS OF LITIGATION UNDER THE ARKANSAS CIVIL RIGHTS ACT: WHERE WE HAVE BEEN AND WHERE WE ARE GOING

*Michael Mosley, Robert Beard, and Paul Charton**

I. INTRODUCTION

The Arkansas Civil Rights Act of 1993 (hereinafter the ACRA or the Act) is the state mechanism that provides an individual a means to redress the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution.[1] In 1991, civil rights legislation intended to partially follow the federal Civil Rights Act of 1871 was introduced in the state's legislature and was approved by the Senate.[2] The provisions of the ACRA largely mirror federal and civil rights statutes that preceded it, with certain deviations discussed in this article. Some of the federal corollaries to the ACRA include, 42 U.S.C. section 1983 (commonly known as section 1983), Title VII of the Civil Rights Act of 1964 (commonly known as Title VII), and the Americans with Disabilities Act. In effect, the ACRA allows litigants and attorneys an alternative forum to pursue claims in state courts that would otherwise be only available through the federal court system, thereby altering the procedure that will be followed and the composition of the jury pool.

This article focuses on the subsequent interpretation of the ACRA by state and federal courts, as well as how those interpretations sometimes mirror and other times deviate from federal court interpretations of similar federal acts. Part II surveys the express provisions of the ACRA. Part III discusses the manner in which state and federal courts have interpreted the ACRA with regard to issues of employment law. The remaining sections of this article compare state and federal court interpretations of the Arkansas and United States constitutions. Part IV discusses claims of immunity by defendants facing liability under the ACRA. Part V evaluates due process claims. Part VI analyzes search and seizure jurisprudence under the ACRA.

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1. ARK. CODE ANN. § 16-123-105(a) (LEXIS Repl. 2006).

2. *See generally* Theresa M. Beiner, *An Overview of the Arkansas Civil Rights Act*, 50 ARK. L. REV. 165 (1997) (providing a thorough analysis of the ACRA).

Finally, the article concludes with a call for clear guidance from the Arkansas courts as well as a recommendation that they should interpret the ACRA and the Arkansas Constitution in a manner consistent with the federal courts' interpretation of the United States Constitution by and through the various corresponding federal rights of action provided by Congress.

II. PROVISIONS OF THE ACRA

At the outset, the ACRA states, "Nothing in [the Act] shall be construed to waive the sovereign immunity of the State of Arkansas."[3] The next section of the ACRA, section 105(a), merits direct quotation:

> Civil rights offenses.
>
> (a) Every person who, under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action in circuit court for legal and equitable relief or other proper redress.[4]

Section 105(b) provides for the payment of court costs and reasonable attorney's fees to the injured party, under the discretion of, and in the amount determined by the court.[5] Section 105(c) lends guidance to courts interpreting the provisions of the ACRA: "[W]hen construing this section, a court may look for guidance to state and federal decisions interpreting . . . 42 U.S.C. § 1983 . . . which decisions and act shall have persuasive authority only."[6]

Section 106 of the ACRA addresses hate offenses.[7] Where actions are motivated by racial, religious, or ethnic animosity, the Act prohibits intimidation or harassment; violence directed at persons; or vandalism directed at a persons real or personal property.[8]

Section 107 specifies that "[t]he right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability is recognized and declared to be a civil right."[9] It also provides for a private right of action against violators of the ACRA[10] and further explains the applicable

3. ARK. CODE ANN. § 16-123-104.
4. *Id.* § 16-123-105(a).
5. *Id.* § 16-123-105(b).
6. *Id.* § 16-123-105(c).
7. *Id.* § 16-123-106.
8. *Id.*
9. ARK. CODE ANN. § 16-123-107(a).
10. *Id.* § 16-123-107(b).

statutes of limitations and outlines what punitive damages are recoverable under the ACRA.[11] The final section of the ACRA prohibits retaliation against those who opposed any act or practice made unlawful by the ACRA.[12]

III. EMPLOYMENT LAW

As with most civil rights legislation, the Act has profound implications on discrimination in the workplace. Because ACRA claims are litigated in both state and federal courts, the article will now discuss the differing approaches taken by each to decide such actions.

A. State Court Interpretations of the ACRA

There are relatively few reported cases from the Arkansas Supreme Court and Court of Appeals that substantively interpret the employment discrimination provisions of the ACRA and their distinctions with federal civil rights statutes. This section will outline some of the more important cases to show how the state courts have approached interpreting the ACRA relative to its interplay with federal jurisprudence.

1. *Sexual Harassment*

In 2003, the Arkansas Supreme Court held that the ACRA provides a remedy for sexual harassment by an employer.[13] In *Island v. Buena Vista Resort*, an employee alleged that her supervisor had sexually propositioned her, that she had rebuffed those advances, and that he had repeatedly made lewd comments to her.[14] She claimed that following her refusal of his sexual advance she was fired in retaliation—a violation of the ACRA.[15]

At the trial court level, the employer had filed a motion for summary judgment, arguing inter alia, that the ACRA did not allow a claim for sexual harassment;[16] the trial court agreed and dismissed the case.[17] On appeal, the Arkansas Supreme Court reversed the lower court's decision.[18]

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11. *Id.* § 16-123-107(c).
12. *Id.* § 16-123-108.
13. Island v. Buena Vista Resort, 352 Ark. 548, 103 S.W.3d 671 (2003).
14. *Id.* at 552, 103 S.W.3d at 673.
15. *Id.* at 553, 103 S.W.3d at 673.
16. *Id.* at 553, 103 S.W.3d at 673.
17. *Id.* at 553–54, 103 S.W.3d at 673–74.
18. *Id.* at 556, 103 S.W.3d at 675.

Although the ACRA does not explicitly prohibit sexual harassment in the workplace,[19] the court discussed language in the Act that appeared to forbid sexual harassment in the workplace:

> (a) The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or the presence of any sensory, mentor, or physical disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> (1) The right to obtain and hold employment without discrimination.[20]

Acknowledging that the statute requires it to look to federal court decisions in its implementation of the ACRA, the court looked first to the comparable language in Title VII.[21] The applicable language states:

> It shall be unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[22]

The court noted that federal courts have interpreted this language as providing an employee protection against both "sexual harassment due to a hostile work environment or . . . sexual harassment based on *quid pro quo*."[23]

> [A] plaintiff asserting a hostile work environment claim must show (1) membership in a protected group or class, (2) unwelcome sexual harassment (3) based upon gender (4) resulting in an effect on a term, condition, or privilege of employment, and (5) that the employer knew or should have known about the harassment and failed to take proper remedial action. In addition, the plaintiff must show that the sexual harassment created an environment that was both objectively and subjectively abusive.[24]
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> . . .

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19. *Island*, 352 Ark. at 556, 103 S.W.3d at 675.
20. *Id.* at 556, 103 S.W.3d at 675 (quoting ARK. CODE ANN. § 16-123-107 (LEXIS Repl. 2006)).
21. *Id.* at 556, 103 S.W.3d at 675 (quoting ARK. CODE ANN. § 16-123-105(c)).
22. *Id.* at 557, 103 S.W.3d at 676 (quoting 42 U.S.C. § 2000e-2(a)(1) (2000)).
23. *Id.* at 558, 103 S.W.3d at 676 (citing Henderson v. Simmons Foods Inc., 217 F.3d 612 (8th Cir. 2000)).
24. *Id.* at 558, 103 S.W.3d at 676 (citing Staton v. Maries County, 868 F.2d 996, 998 (8th Cir. 1989); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

> For a plaintiff to make a *prima facie* case of *quid pro quo* harassment, [she] must show that (1) she was a member of a protected class; (2) she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) the harassment was based on sex; and (4) her submission to the unwelcome advances was an express or implied condition or receiving job benefits or her refusal to submit resulted in tangible job detriment.[25]

The *Island* court concluded that because the federal interpretation of analogous civil rights laws permits a claim of sexual harassment, the same analysis should apply in cases pursued under the ACRA.[26] In short, the Arkansas court agreed with the federal court that the ACRA does protect against sexual harassment. Its review of the record showed that the plaintiff's allegations and proof were sufficient to defeat summary judgment and, therefore, it remanded the case for resolution of factual issues related to the plaintiff's ACRA claims.[27]

2. *Disability Discrimination*

In another employment discrimination case, the Arkansas Supreme Court had to determine whether the ACRA protects an employee who is discriminated against because he is *regarded as* disabled, as opposed to discrimination against an individual who is *actually* disabled under the applicable definition of disability.[28] In *Faulkner v. Arkansas Children's Hospital*, the court was asked to determine if federal case law interpreting the Americans with Disabilities Act would influence the extension of protection to those who are *regarded as* disabled notwithstanding the lack of express language providing such coverage in the ACRA.[29] The employee in *Faulkner* adamantly insisted that she was not disabled, but claimed that her employer discriminated against her because it regarded her as disabled.[30]

Importantly, the court recognized that the United States Court of Appeals for the Eighth Circuit had already ruled on this specific issue—deciding that an Arkansas court "would interpret the ACRA's definition of 'disability' in identical fashion to its federal corollary."[31] The Eighth Circuit

25. *Island*, 352 Ark. at 558, 103 S.W.3d at 676–77 (citing Smith v. Foote's Dixie Dandy, Inc., 941 F. Supp. 807 (E.D. Ark. 1995)).
26. *Id.* at 567, 103 S.W.3d at 682.
27. *Id.* at 567, 103 S.W.3d at 682.
28. 347 Ark. 941, 954, 69 S.W.3d 393, 401 (2002) (discussing ARK. CODE ANN. § 16-23-105(c) LEXIS Repl. (2006)).
29. *Id.* at 954, 69 S.W.3d at 401.
30. *Id.* at 955, 69 S.W.3d at 402.
31. *Id.* at 954, 69 S.W.3d at 401 (citing Land v. Baptist Med. Ctr., 164 F.3d 423 (8th Cir. 1999)).

concluded that such identical interpretation would lead the Arkansas courts to extend protection to employees whose employers regarded them as disabled.[32]

But the Arkansas Supreme Court noted instead, that "the plain language of these two legislative enactments differs significantly."[33] The court further acknowledged, as other similar cases typically have, "that the Arkansas Civil Rights Act specifically provides that our state courts may look to state and federal decisions which interpret the federal civil rights laws as persuasive authority for interpretive guidance."[34] However, the Arkansas statute "does not similarly point to decisions reached interpreting the Americans with Disabilities Act."[35] The *Faulkner* court declined to follow the Eighth Circuit's prior decision, reasoning that it was too radical of a departure from the plain language of the ACRA and that it would be akin to judicial legislating.[36]

B. Federal Interpretations of the ACRA

While relatively few cases in the Arkansas state courts discuss the interaction between state and federal courts' respective interpretations of the various employment-related civil rights statutes, there are many more within the federal court system. This section does not attempt to cover each of these various attempts by the federal courts to anticipate how Arkansas courts would eventually rule in ACRA employment cases. Rather, it outlines the federal courts' general method of analysis of employment discrimination cases.

There are numerous cases in the federal court system that attempt to interpret and apply the ACRA.[37] Yet nearly all of these cases simply add the ACRA claims as pendent to the already well-established Title VII and section 1983 discrimination claims. Most often, the federal claims are decided with consistent analysis of the two jurisdictions' treatments, or with only an analysis of the federal claims and a dismissal without prejudice of all state pendent claims. What is of particular interest is a possible conflict in the treatment of such cases within Arkansas jurisprudence.

In a typical case, the federal courts simply note the statutory language in the ACRA providing that a "court may look for guidance to state and

32. *Id.* at 954, 69 S.W.3d at 401.
33. *Id.* at 954, 69 S.W.3d at 401.
34. *Faulkner*, 347 Ark. at 954, 69 S.W.3d at 401.
35. *Id.* at 954, 69 S.W.3d at 401.
36. *Id.* at 955, 69 S.W.3d at 402.
37. These cases are in federal court due to the presence of a federal question, but they also included supplemental claims brought under the ACRA.

federal decisions interpreting . . . [section] 1983."[38] The federal courts have a well-established process to evaluate employment discrimination cases, using the familiar *McDonnell Douglas* burden shifting analysis, whereby a low threshold is set to establish a prima facie case of discrimination before a higher standard is used to determine if an employer's proffered excuse for the treatment of the employee is pretextual.[39]

Once a plaintiff successfully establishes a prima facie case, the burden shifts to the employer to articulate 'a legitimate, non-discriminatory reason for its adverse employment action.' If the employer meets its burden, 'the presumption of discrimination disappears, requiring the plaintiff to prove that the proffered justification is merely a pretext for discrimination.' The plaintiff has the burden of persuasion at all times.[40]

Although the jurisprudence is not fully developed, presumably the Arkansas courts will follow the federal courts' deeper interpretation of a plaintiff's burden to prove discriminatory motive.

In 1993, the Supreme Court of the United States announced that in order to prevail on an employment discrimination claim, it is not enough that a plaintiff disprove the employer's proffered reason for adverse action taken against the employee.[41] Instead, because the burden of persuasion remains with the plaintiff, an additional showing of discriminatory intent is required.[42]

There is an ongoing discussion among the Arkansas federal district courts about precisely who the ACRA subjects to liability for retaliation in an employment context. Unlike the ACRA's employment discrimination section, the ACRA's retaliation provision is not expressly clear regarding whether an employee's supervisor can be individually liable for retaliation claims. In one section of the ACRA, it indicates that any individual who is injured by employment discrimination *by an employer* in violation of the ACRA shall have a private right of action against the employer.[43] However, another section of the ACRA states, "[n]o *person* shall discriminate against any individual" in retaliation for exercising his or her ACRA rights.[44] In federal jurisprudence, it is clear that retaliation claims under federal em-

38. ARK. CODE ANN. § 16-123-105(c) (LEXIS Repl. 2006); *see also* Littleton v. Pilot Travel Ctrs, LLC, 568 F.3d 641, 643 (8th Cir. 2009) (citing Clegg v. Ark. Dep't of Corr., 496 F.3d 922, 926 (8th Cir. 2007)).

39. *E.g.*, Turner v. Honeywell Fed. Mfg. & Techs., LLC, 336 F.3d 716, 720 (8th Cir. 2003) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801–04 (1973)).

40. Davis v. KARK-TV, Inc., 421 F.3d 699, 704 (8th Cir. 2005) (citations omitted).

41. St. Mary's Honor Ctr v. Hicks, 509 U.S. 502, 519 (1993).

42. *Id.* ("It is not enough, in other words, to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.").

43. ARK. CODE ANN. § 16-123-107(c)(1)(A).

44. *Id.* § 16-123-108 (emphasis added).

ployment statutes do not impose liability against supervisors individually.[45] Interestingly, the Arkansas federal district courts have recently been attempting to resolve this very question.[46]

In 2002, Judge Eisele of the Eastern District of Arkansas, decided that a supervisor may be individually liable to an employee for retaliation under the ACRA, contrary to Title VII.[47] Judge Eisele specifically noted in his ruling that this was a preliminary decision on the issue and that the court would "not hesitate to revisit the issue upon additional briefing from the parties."[48] This decision, therefore, creates a significant distinction between the ACRA and the body of law interpreting Title VII.[49] Among the other judges of the United States district courts of Arkansas who have confronted this issue, some have followed the decision that supervisors are liable for retaliation claims under the ACRA, whereas some others have not.[50]

In 2008, the Arkansas Supreme Court accepted certification of this particular question because it may have been determinative in a pending case.[51] In his certifying order, Judge Moody of the Eastern District of Arkansas noted:

> The issue of whether an individual supervisor can be held personally liable for alleged acts of retaliation under [the ACRA] is likely to arise repeatedly in federal diversity cases, as well as in Arkansas circuit court cases. There is no precedent from the Arkansas Supreme Court on this

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45. *See, e.g.*, Bales v. Wal-Mart Stores, Inc., 143 F.3d 1103 (8th Cir. 1998) (supervisor could be held liable only as an employee of Wal-Mart, not as an individual); Bonomolo-Hagen v. Clay Central-Everly Cmty. Sch. Dist., 121 F.3d 446, 447 (8th Cir. 1997) ("Our Court quite recently has squarely held that supervisors may not be held individually liable under Title VII.") (citation omitted); Smith v. St. Bernard's Reg'l Med. Ctr., 19 F.3d 1254, 1255 (8th Cir. 1994); *see also* Young-Parker v. AT&T Mobility LLC, No. 4:09CV00202 JMM (E.D. Ark. Apr. 29, 2009) ("Plaintiff's Title VII, ADA, and ADEA claims . . . fail as supervisors are not individually liable under Title VII, ADA, or the ADEA.").

46. Unless and until the state courts settle this issue, the authors believe that Arkansas circuit courts should follow the federal jurisprudence on this issue as directed by the statute. *See* ARK. CODE ANN. § 16-123-105(c).

47. Vineyard v. EWI, Inc., No. 02-609 (E.D. Ark. Dec. 16, 2002) (order granting in part and denying in part a motion to dismiss).

48. *Id.*

49. *See, e.g.*, Whitney v. Unibar Maintenance Service, Inc., No. 04-561 (E.D. Ark. June 23, 2004) (order denying motion to remand).

50. *Id.*. *See also* Gizlow v. Lenders Title Co., No. 05-5091 (W.D. Ark. Sept. 29, 2005) (order granting in part and denying in part a motion for protective order and stay of discovery); Wilson v. Zieglar, No. 03-306 (E.D. Ark. May 28, 2004) (order denying motion to dismiss). *Cf.* Whitney v. Unibar Maintenance Services, Inc., No. 04-561 (E.D. Ark. June 23, 2004).

51. Battles v. Townsend, 374 Ark. 59, 285 S.W.3d 629 (2008).

issue. There is also no consensus among the Judges of the United States District Courts on this issue.[52]

Judge Moody was correct in his prediction that this issue was sure to be revisited in future claims of retaliation under the ACRA. His prescience was evidenced approximately a year later by a motion to certify this very question before Judge Wilson in the Eastern District of Arkansas.[53] In *Murphy v. Bunge Corp. of North America*, Judge Wilson has been asked to have the Arkansas Supreme Court determine whether "an individual may be sued under the ACRA for retaliation . . . ."[54]

It would be useful to future litigants if the Arkansas Supreme Court resolves this matter. Otherwise, plaintiffs will remain unclear as to their rights, the proper jurisdiction in which such ACRA retaliation claims may be pursued, and even which defendants to sue. If the Arkansas Supreme Court does accept and resolve this pending question, it will undoubtedly clarify a legal matter that has divided the federal bench. Considering Arkansas courts are statutorily directed to use federal jurisprudence as persuasive authority in interpreting the ACRA,[55] this matter is all the more confusing.

IV. IMMUNITY

Arkansas courts have addressed the concept of immunity for governmental officials in many contexts. This section will discuss immunity from liability and suit for governmental officials from claims under the ACRA. In order to understand immunity in the context of a civil rights act claim, however, it is necessary to understand the state's statutory scheme for immunity for governmental officials from state torts.

A. The State of Arkansas and its Employees

In *Simons v. Marshall*, the Arkansas Supreme Court addressed claims of unreasonable seizure and violation of due process under both the United States Constitution via section 1983 and the Arkansas Constitution via the ACRA.[56] The essential facts alleged by the appellee Marshall were that,

52. Battles v. Townsend, No. 08-117 (E.D. Ark. May 20, 2008). The question of whether a supervisor can be held personally liable for retaliation under the ACRA was never reached by the Arkansas Supreme Court because the case below was settled and the certified question was rescinded.

53. Brief in Support of Motion to Remand, Response to Motion to Dismiss, or to Certify the Issue to the Arkansas Supreme Court, Murphy v. Bunge Corp. of N. Amer., No. 5:90CV0271 (E.D. Ark. Aug. 27, 2009).

54. *Id.*

55. *See* ARK. CODE ANN. § 16-123-105(c) (LEXIS Repl. 2006).

56. 369 Ark. 447, 255 S.W.3d 838 (2007).

during a traffic stop, Simons, a state trooper, groped Marshall's breasts and legs.[57] Marshall alleged that these acts violated her rights under the Fourth and Fourteenth Amendments of the Federal Constitution and the ACRA.[58] The provisions of the Arkansas Constitution presumably at issue were article II, section 15, the Arkansas Constitution's analogue to the Fourth Amendment; and article II, section 8, which most closely resembles the due process protections of the Fourteenth Amendment.[59] That claim was dismissed without prejudice and Marshall later refiled the case against Simons alleging violation of her right against unreasonable seizure, specifically claiming that Simons acted maliciously and with the intent to harass and demean her.[60]

Simons filed a motion to dismiss, claiming immunity from suit pursuant to article V, section 20 of the Arkansas Constitution which states: "The State of Arkansas shall never be made a defendant in any of her courts."[61] Simons also moved to dismiss the claim against him in his individual capacity based on section 19-10-305(a) of the Arkansas Code.[62] The trial court denied the motion and Simons took an interlocutory appeal to the Arkansas Supreme Court.[63] The Arkansas Supreme Court accepted the appeal as proper given that it was from a denial of a motion to dismiss based on the assertion of immunity by a governmental official.[64]

57. *Id.* at 448–49, 255 S.W.3d at 840.

58. *Id.* at 449, 255 S.W.3d at 840.

59. *See id.* at 449, 255 S.W.3d at 840. The opinion does not list these provisions as those that the Plaintiff claimed were violated; however, the ACRA is a conduit by which one may sue to redress violations of the Arkansas Constitution or other laws of the state. Consequently, it is necessarily true that the Arkansas Constitution's provisions for unreasonable seizure and due process were at issue as the ACRA does not create a substantive right itself under section 16-123-105(a) of the Arkansas Code.

60. *Id.* at 449, 255 S.W.3d at 840.

61. ARK. CONST. art. V, § 20. Simons's claim of immunity under this provision of the Arkansas Constitution was a claim of sovereign immunity in his "official capacity." "Official capacity" claims regard only the governmental entity for which the official works, not the individual official. Consequently, sovereign immunity is immunity available to the State of Arkansas, not individual employees of the state. Simons also claimed immunity in his "individual capacity" under section 19-10-305(a) of the Arkansas Code, which is immunity available to individual employees of the State of Arkansas. *Simons*, 369 Ark. at 449, 255 S.W.3d at 840.

62. *Simons*, 369 Ark. at 449, 255 S.W.3d at 840.

63. *Id.* at 449–50, 255 S.W.3d at 840.

64. *Id.* at 450, 255 S.W.3d at 841. The rationale of permitting an interlocutory appeal from the denial of a claim of immunity is that (1) governmental officials should not be required to engage in protracted litigation where they did not violate clearly established law of which a reasonable official would have known, and (2) because immunity is effectively lost if a case is erroneously permitted to go to trial. However, this rationale does not preclude a claim of immunity at successive stages of litigation in federal court, up to and following trial,

The court first noted that Simons's claim of immunity in his official capacity was a claim of sovereign immunity based on article V, section 20 of the Arkansas Constitution.[65] The court held, consistent with federal jurisprudence, that a claim against a governmental official in his or her "official capacity" is only a claim against the governmental entity that employs the individual.[66] In this case, the governmental entity was the State of Arkansas, and the claim against Simons in his official capacity was not a claim against Simons as an individual.

The court noted that, through the ACRA, the State explicitly retained sovereign immunity for claims against it.[67] Consequently, under article V, section 20 of the Arkansas Constitution, the Arkansas Supreme Court held that Simons was entitled to sovereign immunity from his suit in his official capacity.[68]

The court next addressed Simons's claim of immunity from suit in his individual capacity pursuant to section 19-10-305(a) of the Arkansas Code.[69] That section states: "Officers and employees of the State of Arkansas are immune from liability and from suit, except to the extent that they may be covered by liability insurance, for damages for acts or omissions, other than malicious acts or omissions, occurring within the scope of their employment."[70] The court recognized that a state official in his personal capacity is permitted to assert a "qualified immunity" similar to that which is available to federal officials.[71] The court found that qualified immunity for state officials emanates from section 19-10-305 of the Arkansas Code, which also provides immunity from other causes of action, including state-law torts where the official does not have liability insurance, the actions alleged are nonmalicious, and the actions alleged were taken within the course and scope of the governmental official's employment.[72]

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and there is no reason a different rule should apply to claims of immunity from actions under the ACRA. *See* Littrell v. Franklin, 388 F.3d 578, 586 (8th Cir. 2004).

65. *Simons*, 369 Ark. at 450–51, 255 S.W.3d at 841.

66. *Id.* at 451, 255 S.W.3d at 841. *See also* Kentucky v. Graham, 473 U.S. 159, 165 (1985).

67. *Simons*, 369 Ark. at 451, 255 S.W.3d at 841 ("'Nothing in this subchapter shall be construed to waive the sovereign immunity of the State of Arkansas.'") (quoting ARK. CODE ANN. § 16-123-104 (LEXIS Repl. 2006)).

68. *Id.* at 451, 255 S.W.3d at 842.

69. *Id.* at 452, 255 S.W.3d at 842. The court employs the term "personal capacity" but the term is used interchangeably with "individual capacity."

70. ARK. CODE ANN. § 19-10-305(a) (LEXIS Repl. 2007). By its terms, the statute provides immunity to state officials, but not county or municipal governmental officials; however, section 21-9-301 of the Arkansas Code provides a similar immunity for county and municipal officials. *See infra* Part IV.B.

71. *Simons*, 369 Ark. at 452, 255 S.W.3d at 842.

72. *Id.* at 452, 255 S.W.3d at 842.

First, the court discussed qualified immunity. An official is immune from liability and suit if his or her "actions did not violate clearly established principles of law of which a reasonable person would have knowledge."[73] The federal courts have a large body of jurisprudence concerning qualified immunity.[74]

"[Q]ualified immunity provides immunity from suit rather than a mere defense to liability, and . . . is effectively lost if a case is erroneously permitted to go to trial."[75] The defense is designed to "protect officials from the disruptions of going to trial as well as from liability for money damages . . . [i]t is important for public officials to be shielded from the burden of trial on insubstantial claims."[76] Accordingly, a court generally should rule upon the defense "at the earliest possible time."[77]

In deciding the immunity question, the court should "ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable interpretation of the events can be constructed . . . ."[78] "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[79] The test for qualified immunity is an objective one.[80]

A court reviewing a claim of qualified immunity should ask two essential questions: (1) whether the plaintiff has "asserted a violation of a constitutional or statutory right; and (2) if so, whether that right was clearly established at the time of the violation."[81] If the answer to either question is no,

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73. *Id.* at 452, 255 S.W.3d at 842.

74. *See id.* at 452, 255 S.W.3d at 842 ("This court has recognized that the immunity provided by section 19-10-305 is similar to that provided by the Supreme Court for federal civil-rights claims.") (citing Fegans v. Norris, 351 Ark. 200, 207, 89 S.W.3d 919, 924 (2002)).

75. Brown v. Nix, 33 F.3d 951, 953 (8th Cir. 1994) (citations and internal quotations omitted).

76. Wright v. S. Ark. Reg'l Health Ctr., Inc., 800 F.2d 199, 202 (8th Cir. 1986) (citing Mitchell v. Forsyth, 472 U.S. 511 (1985)).

77. *Id.* at 203.

78. Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam). Officials should not have to always err on the side of caution out of fear of being sued. *Id.* at 229.

79. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter*, 502 U.S. at 229 (quoting Malley v. Briggs, 475 U.S. 335, 343 (1986)).

80. *See* Gorra v. Hanson, 880 F.2d 95, 97 (8th Cir. 1989).

81. Burnham v. Ianni, 119 F.3d 668, 673 (8th Cir. 1997) (en banc). That court also framed the issue this way: "'[W]e must consider what specific constitutional rights the defendants allegedly violated, whether the rights were clearly established in law at the time of the alleged violation, and whether a reasonable person in the official's position would have

the governmental official is entitled to qualified immunity. When faced with an assertion of qualified immunity in the context of a motion for summary judgment pursuant to either Arkansas Rule of Civil Procedure 56 or Federal Rule of Civil Procedure 56, the court should address a third question if necessary: "[W]hether, given the facts most favorable to the plaintiffs, there are no genuine issues of material fact as to whether a reasonable official would have known that the alleged action violated that right."[82]

It can be argued that the Arkansas courts have adopted these general principles about the doctrine of qualified immunity.[83] Furthermore, in practice it is evident that the court's decision in *Simons* entails that state employees enjoy an increased measure of immunity under section 19-10-305 of the Arkansas Code. Under the statute, state officials are entitled to "immunity from civil liability for non-malicious acts occurring within the course [and scope] of their employment."[84] Malice is defined as:

> [A]n intent and disposition to do a wrongful act greatly injurious to another . . . the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent . . . [a] conscious violation of the law . . . which operates to the prejudice of another person. A condition of the mind showing a heart . . . fatally bent on mischief.[85]

In addition to the claims of constitutional violations, the appellee in *Simons* also asserted the state-law intentional torts of assault and battery.[86] Nevertheless, pursuant to section 19-10-305 of the Arkansas Code, the Arkansas Supreme Court found that Simons was entitled to immunity in his "individual capacity" from all of Marshall's claims.[87] In practice, as evidenced by the *Simons* opinion, the statute provides broader protection to state officials because, even if it is shown that a state official violated a clearly established right, a plaintiff must still plead and prove facts demonstrating malice.

Indeed, the Arkansas Supreme Court ruled in *Simons* that Marshall's allegations that Simons had groped her breasts and legs were conclusory and failed to allege facts demonstrating "either malice or a conscious violation

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known that his conduct would violate such rights.'" *Id.* at 674 n.8 (quoting Waddell v. Forney, 108 F.3d 889, 891 (8th Cir. 1997)).

82. *Id.* at 673–74.

83. *See* Simons v. Marshall, 369 Ark. 447, 452, 255 S.W.3d 838, 842 (2007).

84. *Id.* at 452, 255 S.W.3d at 842 (citing Grine v. Board of Trustees, 338 Ark. 791, 797, 2 S.W.3d 54, 58 (1999)).

85. *Id.* at 452–53 (quoting Satterfield v. Rebsamen Ford, Inc., 253 Ark. 181, 185, 485 S.W.2d 192, 195 (1972); BLACK'S LAW DICTIONARY, 956–57 (6th ed. 1990)).

86. *Id.* at 452, 255 S.W.3d at 842.

87. *See id.* at 454–55, 255 S.W.3d at 843–44.

of existing law."[88] The court granted both qualified immunity—as can be seen from its finding that the appellee failed to plead facts sufficient to demonstrate a "conscious violation of existing law"—and statutory immunity, as the court found the appellee failed to plead facts demonstrating malice.[89] Notably, Simons' immunity extended to Marshall's state law claims of assault and battery, both intentional torts.[90]

B. Municipal and County Officials

In *Smith v. Brt*, the Arkansas Supreme Court discussed qualified immunity asserted by Brt, the mayor of the city of Elkins, Arkansas, as an affirmative defense to Appellant Smith's claims that Brt fired him in retaliation for speech protected under article II, section 6 of the Arkansas Constitution.[91] The following facts were alleged. Smith, the Elkins police chief, appeared at a city council meeting where he voiced issues with a city building moratorium.[92] Smith left the meeting after becoming angry because of a statement made by one of the councilpersons.[93] After the meeting, Smith approached Brt and voiced his anger with the councilperson's remark, even commenting that he (Smith) wanted to physically strike the councilperson.[94] Another city employee informed the mayor that Smith smelled of alcohol at the meeting.[95] Smith later called Brt and apologized for his behavior.[96] Nevertheless, Mayor Brt gave Smith a written reprimand for "drinking at a public meeting and for his unprofessional comments during and after the meeting."[97]

Several days later, based on information provided to Brt that Smith had allegedly failed to file documents in police files regarding break-ins in the city, Brt terminated Smith.[98] Smith filed suit against Brt in both his individual and official capacities under the ACRA claiming that he was terminated in violation of article II, section 6 of the Arkansas Constitution which pro-

88. *Id.* at 454–55, 255 S.W.3d at 843–44. In so ruling, the court recognized that, in his answer, Simons averred that he had conducted a pat-down search on Marshall. *Id.* at 454, 255 S.W.3d at 843–44. The court was not persuaded by Marshall's conclusion that Simons's acts were sexual in nature and, without further facts alleged demonstrating malice, it would not permit Marshall's allegations to overcome Simons's immunity. *Id.* at 454, 255 S.W.3d at 844.

89. *Simons*, 369 Ark. at 455, 255 S.W.3d at 844.

90. *Id.* at 454–55, 255 S.W.3d at 843.

91. 363 Ark. 126, 211 S.W.3d 485 (2005).

92. *Id.* at 126–27, 211 S.W.3d at 486–87.

93. *Id.* at 127, 211 S.W.3d at 487.

94. *Id.* at 127, 211 S.W.3d at 487.

95. *Id.* at 127, 211 S.W.3d at 487.

96. *Id.* at 127, 211 S.W.3d at 487.

97. *Brt*, 363 Ark. at 127, 211 S.W.3d at 487.

98. *Id.* at 127, 211 S.W.3d at 487.

tects free speech.[99] Smith claimed that he was terminated solely in retaliation for the comments he made at the council meeting about the city's building moratorium.[100]

Brt filed a motion for summary judgment, asserting qualified immunity, and argued his entitlement to summary judgment in his individual capacity because Smith's statements were not on a matter of "public concern" and because Smith would have been terminated even in the absence of the statements he made regarding the moratorium.[101]

Brt's defensive claims track federal jurisprudence regarding First Amendment retaliation claims brought pursuant to the Civil Rights Act of 1871,[102] commonly referred to as section 1983. The proper analysis for a retaliation claim under section 1983 and the First Amendment is as follows:[103] First, did the plaintiff show that his or her speech touched on a matter of "public concern" thereby making it protected activity?[104] If the to the first question is no, the inquiry ends and a defendant is entitled to judgment.[105] On the other hand, if the activity in question did involve a matter of public concern, a court then looks to whether the defendant's legitimate interests as employer, deferentially viewed, outweigh First Amendment interests, if there are any at stake—the *Pickering* balancing test.[106] If the employer's interest outweighs any First Amendment interests at stake, the defendant is entitled to judgment.[107]

In conducting the *Pickering* balancing test, the court should take into account the fact that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign, to a significant one when it acts as employer."[108] The *Pickering* balancing test is conducted only if a court finds that the activity touched upon a matter of public concern; both the question

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99. *Id.* at 128, 211 S.W.3d at 487.

100. *Id.* at 128, 211 S.W.3d at 487.

101. *Id.* at 128, 211 S.W.3d at 487.

102. 42 U.S.C. § 1983 (2000).

103. This is based on section 16-123-105(c) of the Arkansas Code, which states that because federal decisions regarding section 1983 are persuasive authority, the Arkansas Supreme Court may employ the two-part test when faced with claims pursuant to article II, section 6 of the Arkansas Constitution.

104. Hoffman v. Mayor of Liberty, 905 F.2d 229, 233 (8th Cir. 1990); *see also* Garcetti v. Ceballos, 547 U.S. 410, 417–21 (2006); Connick v. Myers, 461 U.S. 138 (1983).

105. *See Hoffman*, 905 F.2d at 233; *see also Garcetti*, 547 U.S. at 417–21 ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

106. Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).

107. *Id.*

108. Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality).

of "public concern" and the *Pickering* balancing test are issues of law for a court to decide.[109]

If the plaintiff survives the analysis identified above, then the next question is whether the plaintiff showed that the alleged protected activity was a substantial or motivating factor in the defendant's action against him.[110] If the answer to this question is no, the defendant should likewise prevail.[111] If the answer is yes, then the question becomes would the defendant have taken the same action absent the alleged protected activity, i.e., the "same decision" test?[112] If the defendant would have made the same decision even in the absence of the protected conduct, i.e., speech or petitioning, then the defendant will prevail.[113]

In *Brt*, the mayor claimed in his motion for summary judgment that he should prevail based on the aforementioned test.[114] The Arkansas Supreme Court first reiterated that the claim against Brt in his official capacity was a claim against the city of Elkins, not against Brt personally; however, Brt was also sued in his individual capacity.[115] Regarding Brt's claim of immunity, the court found that the entitlement to qualified immunity for a municipal official emanates from section 21-9-301 of the Arkansas Code; however, the court said:

Our interpretation of section 21-9-301 must begin with the analysis this court has used in interpreting the counterpart qualified-immunity statute that applies to state employees, codified at section 19-10-305. Section 19-10-305 provides state employees with qualified immunity from civil liability for non-malicious acts occurring within the scope of their employment.[116]

109. Sparr v. Ward, 306 F.3d 589, 594 (8th Cir. 2002).

110. *Hoffman*, 905 F.2d at 233.

111. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

112. *Id.*

113. *See id.*

114. Smith v. Brt, 363 Ark. 126, 128, 211 S.W.3d 485, 487–88 (2005).

115. *Id.* at 130, 211 S.W.3d at 488–89.

116. *Id.* at 130, 211 S.W.3d at 489. From this statement, a municipal or county official claiming immunity pursuant to section 21-9-301 of the Arkansas Code could arguably assert that not only are they entitled to immunity where it is not alleged or shown that they have committed the violation of clearly established law, but also where a plaintiff has failed to allege facts demonstrating malice, as in *Simons v. Marshall*. However, the argument was foreclosed in *City of Fayetteville v. Romine*, where the Arkansas Supreme Court found that because section 21-9-301 of the Arkansas Code does not explicitly reference immunity for nonmalicious acts, as section 19-10-305 does, the presence or absence of malice is "irrelevant." 373 Ark. 318, 325, 284 S.W.3d 10, 16 (2008). Interestingly, although the court has routinely held that section 21-9-301 of the Arkansas Code provides immunity only from negligence, and not intentional acts, the statute does not make such a distinction; rather, it provides immunity from "liability and from suit for damages" and states that "[n]o tort action shall lie . . . ." *See* City of Farmington v. Smith, 366 Ark. 473, 478, 237 S.W.3d 1 (2006) (citing Deitsch v. Tillery, 309 Ark. 401, 833 S.W.2d 760 (1992)). Indeed, the history of the distinction between negligence and intentional torts under section 21-9-301 is not helpful. In

Section 21-9-301 of the Arkansas Code states:

> (a) It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.
>
> (b) No tort action shall lie against any such political subdivision because of the acts of its agents and employees.[117]

The court in *Brt* stated the standards for the defense of qualified immunity which mirror those used by the federal courts.[118] The court noted that the question of whether an official is entitled to qualified immunity is a question of law.[119]

Next, the court found that Smith had sufficiently pled the violation of a clearly established constitutional right under the ACRA.[120] In so finding, the court then essentially employed the third prong identified in *Burnham v. Ianni*,[121] which the federal courts have found applies when a defendant asserts qualified immunity in the context of a motion for summary judgment: "[W]hether, given the facts most favorable to the plaintiffs, there are no

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Deitsch, the court cites *Waire v. Joseph*, 308 Ark. 528, 825 S.W.2d 594 (1992), for the proposition that immunity only extends to negligence. *Deitsch*, 309 Ark. at 407, 833 S.W.2d at 762 (1992). Yet, the court in *Waire* cites to *Cousins v. Dennis*, 298 Ark. 310, 767 S.W.2d 296 (1989), which does not state that immunity only applies to negligence actions; rather, *Cousins* only involved a claim for negligence, thus the court had no need to rule on whether immunity under section 21-9-301 applies to intentional torts. *See Waire*, 308 Ark. at 534, 825 S.W.2d at 598; *Cousins*, 298 Ark. at 312, 767 S.W.2d at 297. Reading the plain language of the statute it is arguable that the intent of the legislature was to provide immunity for county and municipal governments and their officials, for all actions involving liability or damages, except those for which the legislature specifically provides a private right of action, i.e., ACRA claims, claims for illegal exactions, the Arkansas Whistle-blower Act, the inverse condemnation statute, etc. Consequently, if this interpretation of section 21-9-301 were adopted, a plaintiff could not state a tort claim of any nature against a governmental entity or official listed in the statute, but could sue where the legislature has created specific causes of action or the governmental entity has liability insurance which would cover such claims.

117. ARK. CODE ANN. § 21-9-301 (LEXIS Repl. 2004).

118. *Brt*, 363 Ark. at 130–31, 211 S.W.3d 485, 489–90.

119. *Id.* at 131, 211 S.W.3d at 490. *See also Gentry v. Robinson*, 2009 Ark. 634, ___ S.W.3d ___ (Dec. 17, 2009).

120. *Id.* at 131, 211 S.W.3d at 490 ("[W]e have no doubt that Smith has alleged a violation of a clearly established constitutional right—the right to freedom of speech under the Arkansas Constitution.").

121. 119 F.3d 668, 673–74 (8th Cir. 1997) (en banc). Furthermore, "courts deciding questions of immunity must also recognize that whether summary judgment on such grounds is appropriate from a particular set of facts is a question of law." *Gentry v. Robinson*, 2009 Ark. 634, ___ S.W.3d___ (Dec. 17, 2009).

genuine issues of material fact as to whether a reasonable official would have known that the alleged action violated that right."[122]

In *Brt*, the undisputed facts, as reported by the court, demonstrated that Smith's termination occurred fifteen days after his statements at the council meeting, and that Brt found that Smith had allegedly failed to document break-ins in the community.[123] Consequently, the court found that a reasonable official in Brt's position would not know that terminating Smith under the circumstances would violate the Arkansas Constitution.[124]

When considering the aforementioned standards employed by federal courts reviewing retaliation claims under the First Amendment and section 1983, the Arkansas Supreme Court's holding appears to embrace the "substantial or motivating factor" element of a plaintiff's prima facie case of discrimination. That is, the decision can be read as finding that the undisputed facts revealed Smith's termination was not substantially motivated by his speech.[125] Arguably, the decision also embraces the "same-decision" test announced in *Board of Education v. Doyle*, where a defendant–employer is entitled to judgment if it would have taken the same action against the employee even in the absence of the employee's protected conduct.[126]

In a more recent decision, the Arkansas Supreme Court found an official for the city of Fayetteville was entitled to qualified immunity for a takings claim under article II, section 22 of the Arkansas Constitution.[127] In

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122. *Brt*, 363 Ark. at 131–32, 211 S.W.3d at 490. Indeed, in *Gentry v. Robinson*, the court noted that, "as a precursor to the immunity analysis, this court must first find that [a plaintiff] alleged facts *or met proof with proof sufficient to raise a fact question* concerning a constitutional violation. . . ." 2009 Ark. 634, ___ S.W.3d ___ (Dec. 17, 2009) (emphasis added).

123. *Id.* at 131, 211 S.W.3d at 490.

124. *Id.* at 131, 211 S.W.3d at 490. The court refers to whether Mayor Brt could have reasonably known that his termination violated the Arkansas Constitution. The ruling is in harmony with the standard for qualified immunity which seeks to identify if a reasonable official in the position of the particular defendant would conclude that the defendant's actions violated a constitutional or statutory right. *See id.* at 131, 211 S.W.3d at 489 (citing Baldridge v. Cordes, 350 Ark. 114, 120–21, 85 S.W.3d 511, 514–15 (2002)).

125. *See id.* at 131–32, 211 S.W.3d at 489–90. *See also* Hoffman v. Mayor of Liberty, 905 F.2d 229, 233 (8th Cir. 1990).

126. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977).

127. City of Fayetteville v. Romine, 373 Ark. 318, 284 S.W.3d 10 (2008). Although the court noted that appellant David Jurgens, the city's water and sewer superintendent, claimed immunity under section 21-9-301 of the Arkansas Code in his "official capacity," and that Romine explicitly claimed she was suing Jurgens in his official capacity, it appears the court actually adjudicated whether Jurgens was entitled to qualified immunity in his personal capacity. Thus, the reference to "official capacity" can be read, not as an indication that the claim was only against the City, but rather that the claim was against a governmental official acting pursuant to his or her "official duties' as was discussed in *Cousins v. Dennis*, 298 Ark. 310, 767 S.W.2d 296 (1989). This is the only logical way to interpret the opinion because the City was a separate defendant and, after the appeal, the case went to trial against the City where the City was found liable. Ron Wood, *Fayetteville Ordered to Pay for Raw Sewage in*

City of Fayetteville v. Romine, a private citizen, Romine sued both the city and Jurgens, the water and sewer superintendent, claiming that they were responsible for not fixing an overflow of sewage across her property that occurred for a number of years.[128] The court again accepted an interlocutory appeal from the denial of Jurgens's motion for summary judgment based on qualified immunity and noted that Romine's claim was one essentially for inverse condemnation pursuant to article II, section 22 of the Arkansas Constitution.[129] To prevail in an action for a "taking" or inverse condemnation,

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Woman's Yard, THE MORNING NEWS, Oct. 28, 2008, *available at* http://nwaonline.com/articles/2008/10/28/news/102908fzromine.txt, *but see Gentry v. Robinson*, 2009 Ark. 634, ___ S.W.3d ___ (Dec. 17, 2009) (discussing *Romine*). Had the court adjudicated the claim against Jurgens in his official capacity, it would have, in effect, adjudicated the issue against the City, and the case would have ended in toto on appeal. *See* Simons v. Marshall, 369 Ark. 447, 451, 225 S.W.3d 838, 841–42 (2007) (stating that official capacity suits are against the entity for which the official works, not the official personally). In order to sue a governmental official personally, that official must be sued in his or her "individual" or "personal" capacity. *Id.* at 452, 255 S.W.3d at 842. *See also* Kentucky v. Graham, 473 U.S. 159, 165 (1985); Johnson v. Outboard Marine Corp., 172 F.3d 531, 535 (8th Cir. 1999) ("In order to sue a public official in his or her individual capacity, a plaintiff must expressly and unambiguously state so in the pleadings, otherwise, it will be assumed that the defendant is sued only in his or her official capacity.").

128. *Romine*, 373 Ark. at 320, 284 S.W.3d at 12.

129. *Id.* at 320–23, 284 S.W.3d at 12–15. The courts have held that a plaintiff cannot state a "takings" claim without seeking and being denied just compensation by and through the state's available remedies. Williamson County Reg'l Planning Comm'n. v. Hamilton Bank, 473 U.S. 172, 194–95 (1985) ("If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." . . . "[I]f a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."); Cormack v. Settle-Beshears, 474 F.3d 528 (8th Cir. 2007) (finding that in order to state a claim, landowner was required to bring suit under the Arkansas inverse condemnation statute first); Collier v. City of Springdale, 733 F.2d 1311 (8th Cir. 1984). Consequently, a claim under the Fifth Amendment that the government has substantially diminished the value of one's property, with a prayer for just compensation, must first be brought under section 18-15-102 of the Arkansas Code, and only where that process fails to yield just compensation may a plaintiff state a claim for a "taking." *Williamson County*, 473 U.S. at 194–95. There is no substantive reason the result should be different in an Arkansas state court, where a landowner seeks to state a takings claim under the Arkansas Constitution. *See* DeBoer v. Entergy Arkansas, Inc., 82 Ark. App. 400, 404, 109 S.W.3d 142, 145 (2004) (remedies under the act are exclusive). Only in the event that a landowner has brought suit under that statute and been denied just compensation, should the landowner be able to bring suit claiming a taking without just compensation.

The federal courts have explained that a plaintiff cannot state a claim for a taking unless he or she has sought and been denied just compensation, as the denial of just compensation is an essential element of a takings claim. The State of Arkansas has provided an adequate remedy for damage to one's property. This is conceptually different from whether a plaintiff has exhausted his or her remedies; rather, a plaintiff cannot state a claim unless he or

the plaintiff was required to prove, inter alia, that the government or its officials intentionally undertook actions that substantially diminished the value of the plaintiff's land.[130]

Under the previously established standard for qualified immunity, the court found that Romine had alleged the violation of a constitutional right, and that the right was clearly established, i.e., "the right to be free from government action that diminishes the value of [one's] land."[131] The court then focused on the third factor, which is proper for consideration if the defense of qualified immunity is interposed in conjunction with a motion for summary judgment: whether the plaintiff has "raised a genuine issue of fact as to whether the official would have known that the conduct violated that clearly established right."[132]

The court noted that Jurgens had proffered deposition testimony in support of his motion, wherein he testified that it was his belief, based on various facts, that the sewer line in question was not a public sewer line.[133] Romine failed to offer any evidence to refute that fact.[134] The court ruled that Romine had failed to raise a genuine issue of fact that an official in Jurgen's position would know that failing to fix the nonpublic sewer line violated Romine's constitutional right.[135] Thus, the court reversed the trial court's order denying Jurgens summary judgment on the basis of qualified immunity.[136]

C. Claims Against an Entity

The Arkansas Supreme Court has had very few opportunities to discuss claims brought against a governmental entity under the ACRA. If the entity is the State of Arkansas, sovereign immunity precludes the claim under the Act.[137] Otherwise, "local governments can be sued directly under [section

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she has sought redress under the state inverse condemnation statute and has been denied just compensation.

130. *Romine*, 373 Ark. at 326, 284 S.W.3d at 16.

131. *Id.* at 323, 284 S.W.3d at 14.

132. *Id.* at 323, 284 S.W.3d at 15; *see also Gentry v. Robinson*, 2009 Ark. 634, ___ S.W.3d ___ (Dec. 17, 2009).

133. *Id.* at 324, 284 S.W.3d at 15.

134. *Id.* at 325, 284 S.W.3d at 15.

135. *Id.* at 325, 284 S.W.3d at 16. Interestingly, Romine's claim that the city and Jurgens owed her a duty conjures up a theory of negligence, rather than a claim of intentional wrongdoing, as negligence claims embrace the theories of duty and breach. In that event, even though the claim was brought under the ACRA, Romine's claim should have failed. Hart v. City of Little Rock, 432 F.3d 801, 805–06 (8th Cir. 2005) (finding that claims of negligence, even gross negligence, under the United States Constitution by and through 42 U.S.C. section 1983, fell short of stating a claim upon which relief could be granted).

136. *Romine*, 373 Ark. at 326, 284 S.W.3d at 16–17.

137. Simons v. Marshall, 369 Ark. 447, 451, 225 S.W.3d 838, 841 (2007).

1983] if the alleged unconstitutional action implements or executes a 'policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.' Liability may also attach pursuant to governmental 'custom,' even though such a custom has not received formal approval."[138] Under either theory—"policy" or "custom"—if the court finds the absence of an underlying constitutional violation, the court's inquiry is at an end and the entity is entitled to judgment.[139] Furthermore, "'[a] local government may not be sued under [section 1983] for an injury inflicted solely by its employees or agents' on a theory of respondeat superior."[140]

For claims that an entity's policy should bind that entity to liability, the United States District Court for the Eastern District of Arkansas has said that "a municipal policy is not unconstitutional if it might *permit* unconstitutional conduct in some circumstances; it is unconstitutional only if it '*require*[s] its officers to act unconstitutionally.'"[141] A plaintiff must also show that the policy at issue was the "moving force" behind the alleged constitutional violation.[142] It is also true that a single official might bind a governmental entity to liability for his or her actions as a "policy," but only where it can be said that the particular official possesses final policy-making authority.[143] The question of who has the final authority to make policy with respect to a particular issue is a question of state law.[144]

The United States Court of Appeals for the Eighth Circuit has stated three elements for determining, in the absence of policy, whether an uncons-

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138. Deitsch v. Tillery, 309 Ark. 401, 409, 833 S.W.2d 760, 764 (1992) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978)). Based on the Arkansas Supreme Court's discussion of the federal standard for claims in *Deitsch*, which was rendered prior to the enactment of the ACRA, such claims brought under the ACRA should also employ this standard. As of this writing, the Arkansas Supreme Court decided *Gentry v. Robinson*, employing this standard in the context of a claim of rape by a county jail inmate, allegedly by a jailer, who sued the county and the county judge based on allegations that the county had a policy or custom of failing to adequately screen applicants for jailer positions. 2009 Ark. 634, ___ S.W.3d ___ (Dec. 17, 2009).

139. City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986).

140. Andrews v. Fowler, F.3d 1069, 1074 (8th Cir. 1996) (quoting *Monell*, 436 U.S. at 694).

141. Handle v. City of Little Rock, 772 F. Supp. 434, 438 (E.D. Ark. 1991) (citing Kerr v. City of West Palm Beach, 875 F.2d 1546, 1554 (11th Cir. 1989)).

142. Wedemeier v. City of Ballwin, 931 F.2d 24, 26 (8th Cir. 1991) (citing *Monell*, 436 U.S. at 694); *Gentry v. Robinson*, 2009 Ark. 634, ___ S.W.3d ___ (Dec. 17, 2009).

143. McGautha v. Jackson County Collections Dep't, 36 F.3d 53, 56 (8th Cir. 1994) (citing Angarita v. St. Louis County, 981 F.2d 1537, 1547 (8th Cir. 1992)).

144. Jett. v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989). *Compare* Wolfe v. Fayetteville Ark. Sch. Dist., 600 F. Supp. 2d 1011, 1019 (W.D. Ark. 2009) (noting that a school board is the entity possessing final policymaking authority for the school district) *with* Lewis v. Thomason, No. 07-6033 (W.D. Ark. Feb. 20, 2009) (finding that a chief of police for a city of the second class in the State of Arkansas is not a final policymaker).

titutional custom exists so as to hold a city, county, or political subdivision liable.[145] Plaintiffs are required to show:

> (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) that the plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation.[146]

An isolated violation by one who is not a final policymaker is insufficient to establish a municipal policy or custom.[147] In *Deitsch v. Tillery*, the Arkansas Supreme Court held that allegations against a school district and the school board members that they had repeatedly ignored regulations regarding the proper handling of asbestos allegedly leading to the aggravation of asbestos tiles, failed to state a "custom" such as the appellees could be held liable under a civil rights claim.[148]

Recently, in *Gentry v. Robinson*, the Arkansas Supreme Court examined two other theories which a Plaintiff may allege to sue an entity. A plaintiff may assert that an entity's failure to train employees has led to a constitutional violation and in some instances bind the entity to liability.[149] Finally, the Court discussed the plaintiff's claim that a county made an inadequate hiring decision that led to her alleged constitutional violation. The Court noted that, as compared to a failure-to-train claim, where "the claim is

145. *See* Ryan v. Bd. of Police Comm'rs, 96 F.3d 1076 (8th Cir. 1996).

146. *Id.* at 1084.

147. *See* City of Oklahoma City v. Tuttle, 471 U.S. 808, 823–24 (1985) (plurality).

148. 309 Ark. 401, 410, 833 S.W.2d 760, 764 (1992). The court noted that a "custom" is defined as a "habitual way of behaving" or "usual practice." *Id.* at 410, 833 S.W.2d at 764 (quoting WEBSTER'S NEW WORLD DICTIONARY (2d ed. 1984)). In *Gentry v. Robinson*, the court noted a single allegation of rape by a jailer, against a county, failed to create an issue of fact to preclude summary judgment on a "custom" theory. 2009 Ark. 634, ___ S.W.3d ___ (Dec. 17, 2009).

149. *Gentry v. Robinson*, 2009 Ark. 634, ___S.W.3d___ (Dec. 17, 2009). There, the court adopted the following standards regarding a failure-to-train claim:

> In a situation where a municipality has a training program for numerous employees that, over a period of time, results in constitutional violations, municipalities could 'be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability.

Id. (quoting *Bd. Of County Comm'rs of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 407 (1997)).

that a municipality made an individual hiring decision [that has allegedly led to a constitutional violation], the burden on the plaintiff is much higher."[150]

V. DUE PROCESS

The ARCA provides an individual a means to redress the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution.[151] "[Article II, section 2], of the Arkansas Constitution of 1874 provides in part that '[a]ll men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty[.]'"[152] "[Article II, section 8], of the Arkansas Constitution guarantees that no person shall be 'deprived of life, liberty or property, without due process of law.'"[153] This section includes discussion of the Arkansas cases considering due process claims brought pursuant to the ACRA.

A. Duty to Protect

In *Shepherd v. Washington County*, the Arkansas Supreme Court first addressed the issue of whether a state actor owed a duty to protect the plaintiffs from harm by a third person in an action brought pursuant to the ACRA for alleged due process violations.[154] The court went on to decide what standard of conduct applied once a duty of care was found to exist.[155]

The court adopted the following facts from the complaint. Plaintiff Peggy Sue Shepherd brought the action personally and as administratrix of

150. *Id.* The court noted that such a high standard was necessary because "every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a 'but-for' sense," but that was not sufficient to create liability for the entity. Rather, the court found the Plaintiff was required to allege and put forth sufficient facts demonstrating that "the municipal actor disregarded a known or obvious consequence of his action." For liability to potentially attach, the court must find that the hiring decision disclosed to the individual responsible for hiring for the entity "that *this* officer was highly likely to inflict the *particular injury* suffered by the plaintiff." *Id.* There, despite the Plaintiff's affidavit that the jailer allegedly responsible for raping her had allegedly inappropriate hugged and kissed a sixteen year old girl two years before being hired as a jailer, the court found the county and county judge were not liable on an inadequate hiring theory. *Id.*

151. ARK. CODE ANN. § 16-123-105(a) (LEXIS Repl. 2006).

152. Shepherd v. Washington County, 331 Ark. 480, 499–500, 962 S.W.2d 779, 788 (1998) (quoting ARK. CONST. art. II, § 2).

153. *Id.* at 500, 962 S.W.2d at 788 (quoting ARK. CONST. art. II, § 8).

154. *Id.* at 490, 962 S.W.2d at 783. Ordinarily, "duty" is a concept employed in negligence cases which cannot bind a government or government official to liability. *See* Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989). "Duty to protect" cases represent a limited line of cases where the concept of a "duty" may apply in civil rights litigation. *See, e.g.*, Gregory v. City of Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992).

155. *Shepherd*, 331 Ark. at 490, 962 S.W.2d at 783.

the estate of George Shepherd.[156] On November 7, 1995, an inmate of the Washington County jail was taken by Washington County Deputy Pete Williamson to a private medical clinic for medical treatment.[157] While at the clinic, in an attempt to escape, the inmate disarmed, shot, and killed Deputy Williamson.[158] As the inmate attempted to leave the clinic, he attempted to take Peggy Shepherd hostage.[159] Mrs. Shepherd's husband, George Shepherd, was shot and killed by the inmate when Mr. Shepherd attempted to intervene.[160] The inmate stole and wrecked the Shepherd's truck while attempting to flee.[161] Ultimately, the inmate turned the gun on himself and committed suicide before he could be taken back into custody.[162]

One day preceding the incident at the medical clinic, Deputy Williamson had taken the same inmate to the hospital emergency room after the inmate had been injured in a fight.[163] During the emergency room visit, while Deputy Williamson was being relieved by another deputy, the inmate attempted to escape.[164] Later, the inmate talked of committing suicide by shooting himself.[165] When the inmate and deputy returned to the jail, the deputy informed his supervisors that the inmate was a flight risk and that the inmate should not be escorted by only one deputy.[166]

Based on these facts, the court first considered whether the defendants owed a duty of care to the plaintiffs.[167] The court turned to federal case decisions for guidance.[168]

During a significant portion of the opinion, the court reviewed various federal opinions detailing the evolution of the civil rights claims and liability pursuant to section 1983.[169] At the end of the discussion, the court provided

156. *Id.* at 485, 962 S.W.2d at 780.
157. *Id.* at 486, 962 S.W.2d at 780.
158. *Id.* at 486, 962 S.W.2d at 780.
159. *Id.* at 486, 962 S.W.2d at 780.
160. *Id.* at 486, 962 S.W.2d at 780.
161. *Shepherd*, 331 Ark. at 486, 962 S.W.2d at 780.
162. *Id.* at 486, 962 S.W.2d at 780.
163. *Id.* at 489, 962 S.W.2d at 782.
164. *Id.* at 489, 962 S.W.2d at 782.
165. *Id.* at 489, 962 S.W.2d at 782.
166. *Id.* at 489–90, 962 S.W.2d at 782.
167. *Shepherd*, 331 Ark. at 490, 962 S.W.2d at 783.
168. *Id.* at 490, 962 S.W.2d at 783.
169. *Id.* at 491–98, 962 S.W.2d at 783–87 (citing Martinez v. California, 444 U.S. 277 (1980); Baker v. McCollan, 443 U.S. 137 (1979); Screws v. United States, 325 U.S. 91 (1945); Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989); Wells v. Walker, 852 F.2d 368 (8th Cir. 1988); Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987); Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1986); Wright v. City of Ozark, 715 F.2d 1513, 1515 (11th Cir. 1983); Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982)).

a convenient synopsis of the portions of the federal decisions the court deemed relevant before rendering its decision.[170]

Specifically, the court relied upon *Bowers v. DeVito*[171] when it warned "that even though the state action was not the direct cause of the deprivation of the individual's rights, where the state puts an individual in a position of danger from the acts of a third party, the state may be liable under section 1983."[172] In considering the ACRA, the court recognized:

> [T]wo situations in which the state could be held liable under section 1983 for the deprivation of an individual's civil rights by a third party: (1) where the state has assumed a 'special custodial or other relationship' with respect to the individual or (2) where the state has affirmatively placed an individual in a place of danger from third parties.[173]

The court also relied upon federal findings that an individual does not have to be personally known to the state actors; rather, "the fact that he or she is part of an identifiable group of potential victims satisfies the requirement under the due process clause that there be a deprivation of a particular individual's rights."[174] Moreover, the court noted the importance of deciding whether an inmate was in the custody and control of the state defendants at the time the harmful action was committed.[175] Finally, the court looked back to previous state law decision and recognized, "[t]his court has often stated that ordinarily one is not liable for the acts of another party *unless* a special relationship exists between the tortfeasor and the victim."[176]

When the court applied the facts as alleged in the *Shepherd* complaint, the court concluded that the county defendants relocated the "custodial environment" from the "secured confines of the jail" to an unsecured private medical clinic.[177] The court found that the relocation supported a finding between the county defendants and the Shepherds sufficient to establish a duty to protect the Shepherds from the violent actions committed by the

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170. *Shepherd*, 331 Ark. at 497–99, 962 S.W.2d at 786–87.

171. 686 F.2d 616 (7th Cir. 1992).

172. *Shepherd*, 331 Ark. at 498, 962 S.W.2d at 787 (citing *Bowers*, 686 F.2d at 616).

173. *Id.* at 498, 962 S.W.2d at 787 (quoting Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1996)). These are referred to as the "special relationship" and the "state-created danger" doctrines, respectively.

174. *Id.* at 498, 962 S.W.2d at 787 (citing Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987)).

175. *Id.* at 498, 962 S.W.2d at 787 (citing *Nishiyama*, 814 F.2d at 277).

176. *Id.* at 499, 962 S.W.2d at 787 (citing First Commercial Trust Co. v. Lorcin Eng'g, Inc., 321 Ark. 210, 900 S.W.2d 202 (1995); Bartley v. Sweetser, 319 Ark. 117, 890 S.W.2d 250 (1994); Keck v. Am. Employment Agency, Inc., 279 Ark. 294, 652 S.W.2d 2 (1983). *See also* Smith v. Hansen, 323 Ark. 188, 196, 914 S.W.2d 285, 289 (1996) (quoting RESTATEMENT (SECOND) OF TORTS § 315 (1965)).

177. *Shepherd*, 331 Ark. at 501, 962 S.W.2d at 788.

inmate.[178] The court also noted that even though the Shepherds were not known personally by the defendants, the Shepherds were part of an "identifiable group of potential victims of which [defendants] were aware."[179]

Once the court determined that the defendants owed a duty to protect the Shepherds, the court moved to a discussion of the appropriate standard of conduct that a plaintiff must demonstrate on the part of a defendant to hold the defendant liable.[180] The Shepherds argued that the appropriate standard of conduct should have been "gross negligence," while the defendants asserted that the federal standard of "deliberate indifference" should be adopted.[181] Rather than adopt either of these standards, the court decided to craft a new standard.[182] Before stating the new standard, the court recognized that negligence was not enough to implicate the Due Process Clause.[183] The court recognized that the federal standard of care required that the "official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[184] However, after recognizing the standard, the court stated "we do not agree that such standard of conduct is appropriate under our State's civil rights law."[185]

Instead, the court applied the standard of "conscious indifference."[186] The court relied on previous state law decisions for a standard of conscious indifference:

> [I]n order to show that a defendant acted with conscious indifference, it must appear that he knew or had reason to believe that his actions were about to inflict injury, and that he continued in his course with a conscious indifference to the consequences of his actions, from which malice may be inferred.[187]

"Such a disposition or mental state is shown by a person, when, notwithstanding his conscious and timely knowledge of an approach to an un-

178. *Id.* at 501, 962 S.W.2d at 788.

179. *Id.* at 501, 962 S.W.2d at 788.

180. *Id.* at 501, 962 S.W.2d at 789. The portion of the *Shepherd* decision regarding the appropriate standard of conduct is later limited to the specific facts of the *Shepherd* decision in *Grayson v. Ross*, 369 Ark. 241, 253 S.W.3d 428 (2007).

181. *Shepherd*, 331 Ark. at 502, 962 S.W.2d at 789.

182. *Id.* at 502, 962 S.W.2d at 789.

183. *Id.* at 502–03, 962 S.W.2d at 789 (citing Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344, 347 (1986)). Presumably, the same is true under the Arkansas Constitution in a claim brought under the ACRA.

184. *Id.* at 503, 962 S.W.2d at 790 (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

185. *Id.* at 503, 962 S.W.2d at 790.

186. *Id.* at 503, 962 S.W.2d at 790.

187. *Shepherd*, 331 Ark. at 504, 962 S.W.2d at 790 (citing Freeman v. Anderson, 279 Ark. 282, 651 S.W.2d 450 (1983)).

usual danger and of common probability of injury to others, he proceeds into the presence of danger, with indifference to consequences and with absence of care."[188] The court specifically stated that it was "not necessary to prove that the defendant deliberately intended to injure the plaintiff."[189]

> [I]n order to demonstrate that a defendant acted with conscious indifference, a plaintiff must show that the defendant 'knew or ought to have known, in the light of the surrounding circumstances, that his conduct would naturally or probably result in injury and that he continued such conduct in the reckless disregard of the consequences from which malice can be inferred.[190]

Applying the conscious indifference standard to the facts alleged, the court found that the plaintiff's pleadings were sufficient to support a showing that the defendants acted with "conscious indifference to the probable consequences of their actions or inactions in handling [the inmate] at the clinic."[191] In reaching this conclusion, the court specifically considered the allegations that defendants:

> [K]new [the inmate] had violent tendencies, had previously attempted to escape custody, had fought with other inmates and jailers, had intentionally injured himself on two separate occasions, had attempted to commit suicide in his jail cell, and had talked about committing suicide by shooting himself the day before the incident in question.[192]

The defendants' argument that the "complaint failed to allege actual knowledge of [the inmate's] violent tendencies on the part of the sheriff" failed.[193] Ultimately, the court reversed the trial court's decision and remanded the issues for further proceedings.[194]

The next case addressing the duty to protect issue was *Rudd v. Pulaski County Special School District.*[195] In *Rudd*, the court reported the following facts. Allegedly, a student at Jacksonville High School, referred to as W.J. throughout the opinion, brought a handgun to school, stored it in his locker, and shot and killed another student on the bus ride home from school.[196]

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188. *Id.* at 504, 962 S.W.2d at 790 (citing Nat'l By-Products, Inc. v. Search House Moving Co., 292 Ark. 491, 493–94, 731 S.W.2d 194, 195–96 (1987)).

189. *Id.* at 504, 962 S.W.2d at 790 (quoting *Nat'l By-Products*, 292 Ark. at 493–94, 731 S.W.2d at 195–96).

190. *Id.* at 504, 962 S.W.2d at 790 (quoting Stein v. Lukas, 308 Ark. 74, 78, 823 S.W.2d 832, 834 (1992)).

191. *Id.* at 504–05, 962 S.W.2d at 790.

192. *Id.* at 505, 962 S.W.2d at 790.

193. *Shepherd*, 351 Ark. at 505, 962 S.W.2d at 791.

194. *Id.* at 505, 962 S.W.2d at 791.

195. 341 Ark. 794, 20 S.W.3d 310 (2000).

196. *Id.* at 796, 20 S.W.3d at 312.

According to the court, W.J. and the student he shot had previously had frequent confrontations, and the bus driver had admonished both students.[197] During the preceding year, W.J. attended Sylvan Hills Junior High School where his discipline record included "expulsion from school for bringing a knife to school and assaulting another student with that knife on a school bus . . . fighting in class; disorderly conduct; roughhousing in class; being a member of a gang that had violent initiation rites; and persistent disregard for the school rules and authority."[198] Joe Rudd brought suit personally and as administrator of the Estate of Earl Jameson Routt, the deceased student, asserting theories of liability under the ACRA and for negligence.[199] The case went to the Arkansas Supreme Court on appeal after a trial court granted defendant's motion for summary judgment.[200]

After reviewing the language of the ACRA, the *Shepherd* decision, and the federal cases reviewed in *Shepherd*, the court found the circumstances in *Rudd* distinguishable from those in *Shepherd*.[201] According to the *Rudd* court, in *Shepherd* there existed a custodial relationship between the inmate and the state actor which imposed a duty upon the state actor "to protect third persons from injury inflicted by the inmate who escaped from custody."[202] The court found the relationship between a bus driver and student to be significantly different than the relationship between a prisoner and his warden.[203] Specifically, the court found that neither the school district nor the driver had "police authority to deprive W.J. of his liberty by placing physical restraints upon his actions."[204] The court stated further that "[w]hile schools should foster a sense of safety for students in order to provide an environment in which students can learn, school officials should not be placed in a position where enforcing physical restraints takes precedence over their primary purpose of teaching and carrying out administrative duties."[205] The court held that W.J., the assailant, was not a state actor, and that the "school district's failure to impose and maintain restraints upon him did not trigger the provisions of the ACRA."[206] Thus, the claim failed under the "state-created danger" doctrine.

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197. *Id.* at 796, 20 S.W.3d at 311.
198. *Id.* at 796, 20 S.W.3d at 311.
199. *Id.* at 795, 20 S.W.3d at 311. While the court discussed the facts of *Shepherd* in detail, the *Rudd* decision does not mention what turns out to be the most controversial issue in *Shepherd*, i.e., "the conscious indifference standard." In fact, the court's conclusion that no duty existed prevented the court from discussing the appropriate standard of care.
200. *Id.* at 796, 20 S.W.3d at 311.
201. *Rudd*, 341 Ark. at 797–99, 20 S.W.3d at 312–13.
202. *Id.* at 799, 20 S.W.3d at 313.
203. *Id.* at 799, 20 S.W.3d at 313.
204. *Id.* at 799, 20 S.W.3d at 313.
205. *Id.* at 799, 20 S.W.3d at 313.
206. *Id.* at 799–800, 20 S.W.3d at 313–14.

The court then considered the issue of whether the school had a special relationship with the victim that imposed a duty to protect the victim from violent acts pursuant to the ACRA.[207] The court turned to federal case law, and noted that the United States Supreme Court had not "extended the duty of protection beyond the cases of incarcerated prisoners and involuntarily committed mental patients."[208]

The court recognized and rejected the plaintiff's contention that the Jacksonville High School officials should have prevented the victim from being placed in a dangerous position based upon W.J.'s alleged violent history at Sylvan Hills Junior High School.[209] In part, the court relied upon the lack of evidence of any similar behavior while W.J. was enrolled at Jacksonville High School.[210] The court concluded that no special relationship existed between the school and the victim that would impose a duty on the state to protect the victim pursuant to the ACRA.[211]

B. Inmate Lawsuits

The Arkansas Supreme Court first addressed what is known as a "denial of medical care" claim in *Williams v. Arkansas Department of Corrections*.[212] Williams alleged that he was denied prescribed medical care after he was provided a wool blanket with sheets sewn over it rather than a non-wool blanket as he alleged he was prescribed.[213]

To determine whether Williams had pled sufficient facts to establish a finding of a constitutional violation, the court first turned to *Estelle v. Gamble*,[214] for the proposition that a violation of the Eighth Amendment right to be free from cruel and unusual punishment was violated where there was deliberate indifference to serious medical needs of prisoners.[215] The court then recognized that in *Shepherd* it had previously rejected the federal standard of deliberate indifference for cases arising out of the ACRA and instead had accepted the standard of conscious indifference.[216] The court then

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207. *Rudd*, 341 Ark. at 800, 20 S.W.3d at 314.
208. *Id.* at 801, 20 S.W.3d at 314 (citing Dorothy v. Little Rock Sch. Dist., 794 F. Supp. 1405 (E.D. Ark. 1992)).
209. *Id.* at 801, 20 S.W.3d at 314–15.
210. *Id.* at 801, 20 S.W.3d at 315.
211. *Id.* at 801, 20 S.W.3d at 315.
212. 362 Ark. 134, 207 S.W.3d 519 (2005).
213. *Id.* at 136, 207 S.W.3d at 521.
214. 429 U.S. 97 (1976).
215. *Williams*, 362 Ark. at 138–39, 207 S.W.3d at 523. The Arkansas Constitution's analogue to the Eighth Amendment is article II, section 9.
216. *Id.* at 138–39, 207 S.W.3d at 523 (citing Shepherd v. Washington County, 331 Ark. 480, 962 S.W.2d 779 (1998)). However, despite recognizing the "conscious indifference" standard, the court ultimately did not reach the issue of whether the defendant violated the

turned back to federal law and defined a serious medical need as "a condition that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."[217] The court stated further that "[n]ot every ache and pain or medically recognized condition supports a claim of Eighth Amendment violation and the claim must involve a substantial risk of serious harm to the inmate."[218]

The court held that Williams had not shown a serious medical condition to support a violation of his rights pursuant to article II, section 9 of the Arkansas Constitution, because "his condition [was] not one that mandat[ed] treatment, even though it may have been diagnosed by a doctor."[219] Importantly, the Arkansas Supreme Court appears to be in lockstep with federal jurisprudence under the Eighth Amendment regarding what constitutes a "serious medical need" for a claim under the Arkansas Constitution.

In *Bayless v. Beck*, the Arkansas Supreme Court considered an inmate's claims that her due process rights were violated because the disciplinary appeals process in the privately owned prison where she was incarcerated differed from the disciplinary appeals process utilized in state operated prisons.[220] The plaintiff argued that her constitutional rights had been violated because the Arkansas Department of Corrections did not provide her the process provided in its own regulations.[221] According to the court, the plaintiff "essentially claimed a liberty interest in having state officers and those employed by the state follow state law."[222] The court cited federal case law for the proposition that while the plaintiff "may have a liberty interest in the nature of her confinement, she does not have a liberty interest in the actual procedures to be administered."[223] The court decided that the plaintiff did not show that the different procedure was defective, and consequently, the plaintiff did not show that her substantive due process rights were violated.[224] The court also referred to federal authority for its conclusion that, to state a claim for substantive due process, the plaintiff was required to

conscious indifference standard because the court determined that the plaintiff failed to show a serious medical need. *Id.* at 140, 207 S.W.3d at 524.

217. *Id.* at 139, 207 S.W.3d at 523 (citing Blackmore v. Kalamazoo County, 390 F.3d 890 (6th Cir. 2004); Hunt v. Uphoff, 199 F.3d 1220 (10th Cir. 1999); Mahan v. Plymouth County House of Corr., 64 F.3d 14 (1st Cir. 1995); Johnson v. Busby, 953 F.2d 349 (8th Cir. 1991)).

218. *Id.* at 139–40, 207 S.W.3d at 523–24 (citing Roberson v. Goodman, 293 F. Supp. 2d 1075 (D.N.D. 2003)).

219. *Id.* at 140, 207 S.W.3d at 524.

220. No. 04-69, 2005 WL 1411656, at *1–2 (Ark. June 16, 2005) (per curiam).

221. *Id.* at *2.

222. *Id.*

223. *Id.* (citing Kennedy v. Blankenship, 100 F.3d 640 (8th Cir. 1996)).

224. *Id.*

show "an atypical and substantive deprivation that was a dramatic departure from the basic conditions of confinement."[225]

In *Grayson v. Ross*, the Arkansas Supreme Court was called upon to decide a question certified by the Eighth Circuit Court of Appeals: "Whether the conscious indifference standard announced by this court in *Shepherd v. Washington County* . . . affords greater protection to pretrial detainees than the federal deliberate indifference standard."[226] In *Grayson*, a pretrial detainee was incarcerated after his arrest for DWI.[227] Grayson "died in jail within hours of his arrest as a result of methamphetamine intoxication and physical struggle, with idiopathic cardiomyopathy as a contributing condition."[228]

The lawsuit was originally filed in federal court, and two defendants went to trial after the balance of the defendants were dismissed on summary judgment.[229] The jury returned in favor of the defendants and the plaintiff appealed in part asserting that the jury was improperly instructed on the appropriate standard under the ACRA.[230] The plaintiff argued that the jury should have been instructed on the conscious indifference standard rather than the federal standard of deliberate indifference.[231] The Eighth Circuit affirmed the trial court on all other points and held the decision on this point in abeyance pending the court's response to the certified question.[232]

In consideration of the certified question, the court first examined federal case law and recognized that "the Eighth Amendment's proscription against cruel and unusual punishment does not apply to pretrial detainees."[233] However, the court concluded that because the due process rights of pretrial detainees are "at least as great as the Eighth Amendment protections available to a convicted prisoner,"[234] federal courts had applied the "deliberate-indifference standard to claims by pretrial detainees that their serious medical needs have been ignored or that state officials have failed to protect them from a serious risk of harm."[235]

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225. *Id.* The court also noted that because "meritorious good time" does not apply in Arkansas to reduce the length of a sentence, Arkansas has not created a liberty interest in "meritorious good time." *Id.* (citing Wolff v. McDonnell, 418 U.S. 539 (1974)).

226. 369 Ark. 241, 242–43, 253 S.W.3d 428, 429–30 (2007).

227. *Id.* at 242, 253 S.W.3d at 429.

228. *Id.* at 242, 253 S.W.3d at 429.

229. *Id.* at 242–43, 253 S.W.3d at 429.

230. *Id.* at 243, 253 S.W.3d at 429.

231. *Id.* at 243, 253 S.W.3d at 429.

232. *Grayson*, 369 Ark. at 243, 253 S.W.3d at 429.

233. *Id.* at 245, 253 S.W.3d at 431 (citing City of Revere v. Mass. Gen. Hosp., 463 U.S. 239 (1983)).

234. *Id.* at 245, 253 S.W.3d at 431 (quoting *City of Revere*, 463 U.S. at 244).

235. *Id.* at 246, 253 S.W.3d at 431 (citing Butler v. Fletcher, 465 F.3d 340 (8th Cir. 2006)).

The court next examined *Shepherd v. Washington County*[236] and noted that decision involved neither a pretrial detainee nor any unmet medical needs.[237] Next, the court dissected *Williams v. Arkansas Department of Corrections*,[238] and determined that although the *Shepherd* conscious indifference standard was mentioned in the *Williams* decision, the *Williams* decision did not apply the standard because the court found that the "inmate did not establish that he had a serious medical need."[239] The court found that "the use of the conscious-indifference standard is limited to the facts of the *Shepherd* case," and overruled *Williams* to the extent that it can be interpreted as holding that the conscious indifference standard is appropriate for all inmate claims brought under the ACRA.[240] Finally, because the court adopted deliberate indifference as the proper standard, the court found no need to answer the specific question certified by the Eighth Circuit.[241]

C. Property Interests

There is scarce precedent in Arkansas regarding property rights and due process under the ACRA. However, at least two cases have discussed the issue. In *Robinson v. Langdon*, the court reported the following facts. A houseparent at a residential children's center was placed in the registry of child abusers that was maintained by the Department of Human Services.[242] The houseparent appealed the decision and his name was ultimately removed from the registry.[243] The houseparent then filed suit pursuant to the ACRA.[244] Although the bulk of the opinion was decided on immunity grounds,[245] the court briefly recognized that "the law does not support a claim that potential injury to reputation constitutes a deprivation of a property interest."[246]

The court again addressed due process as it relates to property rights in *Ingram v. City of Pine Bluff*.[247] There, Ingram brought suit based in part on a

236. 331 Ark. 480, 962 S.W.2d 779 (1988).
237. *Grayson*, 369 Ark. at 247, 253 S.W.3d at 432.
238. 362 Ark. 134, 207 S.W.3d 519 (2005).
239. *Grayson*, 369 Ark. at 248, 253 S.W.3d at 433.
240. *Id.* at 248, 253 S.W.3d at 433.
241. *Id.* at 249, 253 S.W.3d at 433–34.
242. 333 Ark. 662, 665, 970 S.W.2d 292, 293 (1998).
243. *Id.* at 665, 970 S.W.2d at 293–94.
244. *Id.* at 665, 970 S.W.2d at 294.
245. *Id.* at 667–72, 970 S.W.2d at 294–97.
246. *Id.* at 671–72, 970 S.W.2d at 297 (citing Ark. Dep't of Human Services v. Heath, 312 Ark. 206, 848 S.W.2d 927 (1993)).
247. 335 Ark. 129, 133 S.W.3d 382 (2003).

claim of denial of due process pursuant to the ACRA after the city of Pine Bluff passed a resolution and ultimately demolished his rental property.[248]

In March of 1997, Ingram was notified that the Pine Bluff City Council would be considering the potential demolition of his rental property during a city council meeting.[249] Through his agent, Ingram contacted a city council member who stated that he would have. Ingram's property removed from consideration, and that there was no need for Ingram to appear at the meeting.[250] Neither Ingram nor his agent went to the meeting, and the council member did not have the matter removed from consideration.[251] The council passed a resolution to raze the property, and gave Mr. Ingram ten days to raze the building.[252] Neither the council member nor the city of Pine Bluff notified Ingram or his agent of the resolution.[253] The city demolished the house approximately four months later.[254]

Ingram claimed that he was denied due process because the city never gave him notice of its decision to demolish his house after the city council meeting.[255] However, the court found that it was undisputed that Ingram did receive notice of the meeting, which neither he nor his agent attended.[256]

The court agreed with the defendant's argument that "due process does not require notice of intent to abate the nuisance after the city council meeting."[257] The court quoted federal precedent, stating "[w]here a property owner is given written notice to abate a hazard on his property and has been given an opportunity to appear before the proper municipal body considering condemnation of the property, no due process violation occurs when the municipality abates the nuisance pursuant to the condemnation notice."[258] The court stated that "Mr. Ingram had an opportunity to be heard at a meaningful time in a meaning manner."[259] The court adopted federal rationale, concluding that "[d]ue process does not require additional opportunities to abate nuisances or to meet with city officials after the notice and hearing

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248. *Id.* at 132, 133 S.W.3d at 383–84. The suit was originally brought in federal court, but the case returned to state court after the federal court ruled that Mr. Ingram had not exhausted his state court remedies. *Id.* at 132–33, 133 S.W.3d at 384.

249. *Id.* at 132, 133 S.W.3d at 384.

250. *Id.* at 132, 133 S.W.3d at 384.

251. *Id.* at 132, 133 S.W.3d at 384.

252. *Id.* at 132, 133 S.W.3d at 384.

253. *Ingram*, 355 Ark. at 132, 133 S.W.3d at 384.

254. *Id.* at 132, 133 S.W.3d at 384.

255. *Id.* at 135, 133 S.W.3d at 386.

256. *Id.* at 135, 133 S.W.3d at 386.

257. *Id.* at 135, 133 S.W.3d at 386.

258. *Id.* at 136, 133 S.W.3d at 386 (quoting Samuels v. Meriwether, 94 F.3d 1163, 1166–67 (8th Cir. 1996) (citations omitted)).

259. *Ingram*, 355 Ark. at 136, 133 S.W.3d at 386.

have been provided."[260] The court upheld the trial court's dismissal of Ingram's due process claims.[261]

VI. SEARCH AND SEIZURE

The Arkansas Supreme Court has addressed a few cases involving article II, section 15 of the Arkansas Constitution which protects the citizenry of Arkansas from unreasonable searches and seizures. This section will discuss where the Arkansas courts have addressed the differences between their interpretation of the Arkansas Constitution and federal court interpretations of the Fourth Amendment.

A. *Rainey v. Hartness*

In 1999, the Arkansas Supreme Court rendered a decision in *Rainey v. Hartness*.[262] Appellants Rainey and Harton filed suit against appellee Hartness, a wildlife enforcement officer employed by the Arkansas Game and Fish Commission, an entity of state government.[263] The appellants claimed that Hartness had entered their property unlawfully, seized appellant Harton's rifle "through an illegal search," converted the rifle "without due process of law and just compensation," and damaged their crops.[264]

In *Rainey*, the appellants were hunting deer on wooded land "owned by Rainey and leased by Harton."[265] James Hartness, who was on patrol at the time, noticed two unattended vehicles on Rainey's land, leading him to the conclusion that people were hunting on the land.[266] Hartness entered the property and first encountered Rainey.[267] According to the opinion, upon request by Hartness, Rainey produced a hunting license belonging to some-

260. *Id.* at 136, 133 S.W.3d at 386 (citing *Samuels*, 94 F.3d at 1167).
261. *Id.* at 136, 133 S.W.3d at 386.
262. 339 Ark. 293, 5 S.W.3d 410 (1999).
263. *Id.* at 296, 5 S.W.3d at 413. The suit named Hartness in his capacity as a wildlife officer for Grant County. Had the issue been presented, it is likely the court would have construed the suit as a suit against the State of Arkansas only because the appellants did not sue Hartness expressly in his individual capacity. *See* Johnson v. Outboard Marine Corp., 172 F.3d 531, 535 (8th Cir. 1999) ("[I]n order to sue a public official in his or her individual capacity, a plaintiff must expressly and unambiguously state so in the pleadings, otherwise, it will be assumed that the defendant is sued only in his or her official capacity."); Egerdahl v. Hibbing Community College, 72 F.3d 615 (8th Cir. 1995). However, the capacity issue was not presented in this case.
264. *Rainey*, 339 Ark. at 296, 5 S.W.3d at 413.
265. *Id.* at 296, 5 S.W.3d at 413.
266. *Id.* at 296, 5 S.W.3d at 413.
267. *Id.* at 296, 5 S.W.3d at 413.

one else.[268] Hartness wrote Rainey a citation for violating a regulation prohibiting the possession of the hunting license of another.[269]

Hartness then found Harton at a second location on the property.[270] The court noted that Harton climbed down from his deer stand and approached Hartness—rather than waiting for Hartness to first approach him—and produced his muzzleloader license.[271] According to Hartness, this behavior was unusual.[272] Given Harton's unusual behavior, Hartness climbed the deer stand where he found a rifle.[273] The deer season at the time was only open for hunting by muzzleloader, not modern guns, so Hartness issued Harton a citation for hunting with an improper weapon.[274]

Both men were convicted, but only Harton appealed his conviction.[275] During Harton's appeal, the State dismissed the prosecution.[276] Neverthe-

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268. *Id.* at 296, 5 S.W.3d at 413.
269. *Id.* at 296, 5 S.W.3d at 413.
270. *Rainey*, 339 Ark. at 297, 5 S.W.3d at 413.
271. *Id.* at 297, 5 S.W.3d at 413.
272. *Id.* at 297, 5 S.W.3d at 413.
273. *Id.* at 297, 5 S.W.3d at 413.
274. *Id.* at 297, 5 S.W.3d at 413.
275. *Id.* at 297, 5 S.W.3d at 413. Rainey's failure to appeal and successfully overturn his conviction, had it been argued, would be a defense to the lawsuit under various theories. The *Rooker–Feldman* doctrine applies "to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005). The *Rooker–Feldman* doctrine bars a plaintiff's claims if "the requested federal relief would void the state court's judgment or amount to basically a reversal of the state court's holding." Ace Const. v. City of St. Louis, 263 F.3d 831, 833 (8th Cir. 2001).

While it is true that the doctrine is applied in the context of federal court proceedings, the doctrine should have no less applicability in the context of a state court civil suit which seeks to void a state court criminal conviction; indeed, collateral attacks are prohibited. Furthermore, the *Rooker–Feldman* doctrine is not mutually exclusive of claim and issue preclusion, which would also justify its application in the context of this case. Rainey should have been required to appeal and overturn his conviction before he could collaterally attack the conviction by way of a Civil Rights Act lawsuit. Various justifications exist for this rule, not the least of which is claim preclusion based on arguments presented and litigated in the criminal prosecution, i.e., whether or not the Arkansas Constitution was violated by the actions of Hartness which might justify suppression of crucial prosecution evidence.

Another similar defense is based on the United States Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), where the Court held that:

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, *or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid*, a [section 1983] plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

less, allegedly upon instruction of the deputy prosecuting attorney, Hartness retained possession of Harton's gun.[277] The gun was later returned in good condition, but not before the appellants brought the aforementioned claims under both the federal and state civil rights acts.[278]

The court addressed the case under both section 1983 and the ACRA.[279] The court noted that, before it would undertake a review of the substance of appellants' claims, it first was required to address the defense of qualified immunity interposed by Hartness.[280] The court stated:

> Generally, government officials performing discretionary functions are granted a qualified immunity from suit under section 1983 and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' Courts evaluating a claim of immunity must determine whether the plaintiff alleged the deprivation of an actual constitutional right and, if so, whether that right was clearly established at the time of the alleged violation.[281]

Heck, 512 U.S. at 486–87 (emphasis added).

276. *Rainey*, 339 Ark. at 297, 5 S.W.3d at 413.

277. *Id.* at 297, 5 S.W.3d at 413.

278. *Id.* at 297, 5 S.W.3d at 413–14. Based on the inclusion of the appellants' claims under section 1983, Hartness was entitled to remove the case to federal court; however, there is no indication in the procedural history of whether this was attempted.

279. *Id.* at 299, 5 S.W.3d at 415. The Appellant's first claimed, as Harton had successfully claimed on appeal of his conviction, that Hartness was not an elected wildlife enforcement officer as required by amendment 35 to the Arkansas Constitution. *Id.* at 297–98, 5 S.W.3d at 413–14. Interestingly, this argument potentially belies the Appellants' claims under both Acts. Appellants would have been required to prove as an essential element of the claims, under either Act, that Hartness acted under color of state law when he allegedly violated their constitutional rights. *See* West v. Atkins, 487 U.S. 42, 49–50 (1988); *see also* ARK. CODE ANN. § 16-123-105(a) (LEXIS Repl. 2006) ("Every person who, *under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions* subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action in circuit court for legal and equitable relief or other proper redress.") (emphasis added). If Hartness was not properly elected and, as the trial court found, "was not authorized to issue citations for Game and Fish violations," then Hartness could have argued that he did not act under color of state law and the claims should have failed pursuant to ARK. R. CIV. P. 12(b)(6). *Rainey*, 339 Ark. at 298, 5 S.W.3d at 414. The Arkansas Supreme Court noted that the Game and Fish Commission did elect Hartness, but that their meeting minutes ten months prior to the citations issued by Hartness failed to recognize this election. *Id.* at 298, 5 S.W.3d at 414. Consequently, the court held that the undisputed facts demonstrated Hartness was elected and the appellants' claim regarding amendment 35 was properly adjudicated on summary judgment in favor of Hartness. *Id.* at 298–99, 5 S.W.3d at 414.

280. *Rainey*, 339 Ark. at 299, 5 S.W.3d at 415.

281. *Id.* at 299, 5 S.W.3d at 415 (citing Wilson v. Layne, 526 U.S. 603 (1999)).

. . .

The issue of whether the official's conduct violated clearly established constitutional rights is a question of law that may be resolved by summary judgment.[282]

The court then discussed the claims brought by the appellants under the Fourth Amendment relating to Hartness's entry onto the land and search of the deer stand.[283] The court found that the "open fields" doctrine applied—which is an exception to the requirement that an officer possess a warrant for either a search or seizure.[284] The court said, "protection afforded by the Fourth Amendment does not extend to open fields or lands."[285] Therefore, the court held that the entry onto open land did not violate the Fourth Amendment.[286]

The court also held that Harton did not possess a legitimate expectation of privacy in the deer stand because, even if he subjectively had an expectation of privacy, it was not an objectively reasonable one.[287] The court noted that the deer stand was essentially a "metal box, with sides three to four feet high and a roof elevated on poles at each corner of the box."[288] Because the stand was crude, open, functionally accessible to others, and because no private activities of consequence occurred in the stand, the court found that Harton's Fourth Amendment rights were not violated due to the lack of a legitimate expectation of privacy.[289] Consequently, under the first prong of the qualified immunity analysis, the trial court's grant of summary judgment was affirmed as the appellants failed to demonstrate the violation of any constitutional right.[290]

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282. *Id.* at 299–300, 5 S.W.3d at 415.

283. *Id.* at 300, 5 S.W.3d at 415.

284. *Id.* at 300, 5 S.W.3d at 415 (citing Sanders v. State, 264 Ark. 433, 572 S.W.2d 397 (1978); *see also* ARK. R. CRIM. P. 14.2 (stating at the time of decision: "An officer may, without a search warrant, search open lands and seize things which he reasonably believes subject to seizure.").

285. *Rainey*, 339 Ark. at 300, 5 S.W.3d at 415 (citing United States v. Dunn, 480 U.S. 294 (1987)).

286. *Id.* at 300, 5 S.W.3d at 416.

287. *Id.* at 301, 5 S.W.3d at 416.

288. *Id.* at 301, 5 S.W.3d at 416.

289. *See id.* at 301–02, 5 S.W.3d at 416–17.

290. *Id.* at 302–03, 5 S.W.3d at 417. The court briefly addressed the takings claim and held that Hartness was lawfully present and observed the rifle which was evidence of a violation subject to seizure under ARK. R. CRIM. P. 10.2. *Id.* at 302–03, 5 S.W.3d at 417. The appellants' claim regarding the rifle was brought under the takings clause of the Arkansas Constitution and the due process clause. Based on interpretation of the United States Constitution, Hartness would have also had the defense that Harton failed to first unsuccessfully seek redress for the deprivation under an available state remedy other than the ACRA. Indeed, ARK. R. CRIM. P. 15.2 grants post-deprivation due process by allowing for a criminal defendant to move for the return of the property. Ali v. Ramsdell, 423 F.3d 810, 814 (8th Cir. 2005) (quot-

The court next addressed the appellants' claims under state law involving the damage to Rainey's crops.[291] The court discussed section 19-10-305 of the Arkansas Code, which affords statutory immunity from suit for alleged damages caused by state officials (a) who are acting within the course and scope of their employment, (b) who are not alleged to have acted maliciously, and (c) to the extent they are not covered by liability insurance for such nonmalicious acts.[292] Since the appellants did not allege that Hartness had acted maliciously or had liability insurance, the court found that Hartness was entitled to statutory immunity from the appellants' state law conversion claim.[293]

Most interestingly, the court held that article II, section 15 of the Arkansas Constitution was "virtually identical to the Fourth Amendment" and that it would interpret the state provision "in the same manner" as the United States Supreme Court interpreted the Fourth Amendment.[294] However, *Rainey* is likely abrogated or partially modified on this point given the court's later decisions in *State v. Sullivan* and *State v. Brown*.[295]

B. *City of Farmington v. Smith*

In *City of Farmington v. Smith*, the Arkansas Supreme Court was again presented with a suit brought, inter alia, under article II, section 15 of the Arkansas Constitution by and through the ACRA.[296] Smith, an employee of the city, brought suit challenging a police entry into her home.[297]

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ing Hudson v. Palmer, 468 U.S. 517, 539 (1984) ("'[I]n challenging a property deprivation [under the Fourth Amendment or the Due Process Clause], the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate'")). However, the issue does not appear to have been presented in this case.

291. *Rainey*, 339 Ark. at 303, 5 S.W.3d at 417.

292. *Id.* at 303, 5 S.W.3d at 417 (quoting ARK. CODE ANN. § 19-10-305 (LEXIS Repl. 2007)).

293. *Id.* at 303, 5 S.W.3d at 417.

294. *Id.* at 300, 5 S.W.3d at 415. *But see* State v. Sullivan, 348 Ark. 647, 655–56, 74 S.W.3d 215, 220–21 (2002) (holding that article II, section 15 of the Arkansas Constitution provided greater protection to the citizenry of Arkansas than that provided under the Fourth Amendment of the United States Constitution and finding that a pretextual arrest is violative of that section).

295. *Sullivan*, 348 Ark. at 655–56, 74 S.W.3d at 220–21; State v. Brown, 356 U.S. 460, 474, 156 S.W.3d 722, 732 (2004) (holding that the Arkansas Constitution provided greater protection than the Fourth Amendment in the area of knock-and-talk police entries into homes and requiring officers to inform a home dweller of his or her right to refuse consent as an absolute prerequisite to the constitutionality of a home entry based on the consent exception to the warrant requirement).

296. 356 Ark. 473, 479–80, 237 S.W.3d 1, 6 (2006).

297. *Id.* at 475, 237 S.W.3d at 3. Smith's children allegedly matched the description of suspects in an armed robbery and the police arrived at Smith's home for the purpose of investigating that crime. *Id.* at 474–75, 237 S.W.3d at 3.

The Arkansas Supreme Court again announced that it would follow the federal qualified immunity standards in deciding the individual appellants' claims of immunity from suit.[298] In reviewing the claim of immunity, the court noted its prior decision in *State v. Brown*, [299] where the court held that in order for officers to enter a home lawfully, without a warrant, and on the basis of purported consent of the home-dweller, officer must first inform the home-dweller of his or her right to refuse consent.[300] In *Smith*, the officers had not informed Smith or the other occupants of the home that they had the right to refuse consent.[301]

The court found that because the ruling in *Brown* came down in 2004, a reasonable officer in the position of the appellants should have known that entering a home without a warrant, and without informing the home-dweller of his or her right to refuse consent, would violate the Arkansas Constitution.[302] Consequently, the court found that the trial court did not err when it denied qualified immunity to the individual appellants.[303]

VII. OBSERVATIONS

The process used by the Arkansas Supreme Court in interpreting the Arkansas Constitution by and through the ACRA consistently with the interpretation by the United States Supreme Court of the United States Constitution should be adhered to because it lends predictability to the law and is justified by the similarity between the two documents.[304] In *Rainey v. Hartness*,[305] the court noted that the text of the state constitutional provision at issue was virtually identical to that of the United States Constitution, and consequently, found that the interpretation should proceed in lockstep with the federal courts' interpretation of the United States Constitution.[306] Thus, where the text of a provision of the Arkansas Constitution is "virtually identical" to the text of a provision of the federal Constitution,[307] a court adjudi-

298. *Id.* at 478–79, 237 S.W.3d at 5. Again, the court noted that in its view, qualified immunity emanates from section 21-9-301 of the Arkansas Code, rather than the common law, as it does in federal jurisprudence. *Id.* at 478, 237 S.W.3d at 5.

299. 356 Ark. 460, 156 S.W.3d 722 (2004).

300. *Id.* at 480, 237 S.W.3d at 6. Under federal jurisprudence, an officer need not inform a home-dweller of the right to refuse consent in order for consent to enter the home absent a warrant to be valid. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

301. *Smith*, 356 Ark. at 479, 237 S.W.3d at 6.

302. *Id.* at 480, 237 S.W.3d at 6.

303. *Id.* at 480, 237 S.W.3d at 6.

304. *Compare* U.S. CONST. amend. IV *with* ARK. CONST. art. XV; *compare* U.S. CONST. amend. XIV *with* ARK. CONST. art. II, § 8.

305. 339 Ark. 293, 5 S.W.3d 410 (1999).

306. *See id.* at 303, 5 S.W.3d at 418.

307. The same rule should apply where the text of the ACRA is virtually identical to a federal statute such as Title VII.

cating a claim under the ACRA should look largely to federal decisions under section 1983. Indeed, the issue of qualified immunity as discussed in *Rainey* dictates this approach as officials are bound by the "clearly established law."[308]

While it is true that public officials are required to adhere to the clearly established law, it is unreasonable to expect such officials to learn, digest, recognize, and apply divergent bodies of constitutional jurisprudence. Of course, where our courts have previously given a unique interpretation to our laws, an official will be bound to know that interpretation, as in *City of Farmington v. Smith*.[309]

The court has recently limited its departure from federal interpretation of the United States Constitution in the area of due process under the Arkansas Constitution when, in *Grayson v. Ross*, it limited its previously announced standard of "conscious indifference" in favor of the federal standard of "deliberate indifference."[310] Thus, again, it can be seen that the Arkansas Supreme Court has relied upon the federal courts' interpretation of the United States Constitution in reviewing cases brought under the ACRA.

Although sixteen years have passed since the enactment of the ACRA, many questions remain regarding the proper interpretation and application of the Act. Indeed, the issue of whether an individual may be sued for retaliation under the ACRA, as opposed to the just an entity, has resulted in differing answers in the United States district courts for the two districts in Arkansas.[311] This issue was once certified to the Arkansas Supreme Court, but the case was resolved before the court rendered its decision.[312] Once again, a motion has been made in federal court for the issue to be certified to the Arkansas Supreme Court, and perhaps, the issue will have a final resolution.[313]

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308. *Rainey*, 339 Ark. at 299, 5 S.W.3d at 415.

309. 366 Ark. 473, 237 S.W.3d 1 (2006).

310. 369 Ark. 241, 249, 253 S.W.3d 428, 433 (2007).

311. *Compare* Vineyard v. EWI, Inc., No. 02-609 (E.D. Ark. Dec. 16, 2002) (order granting in part and denying in part a motion to dismiss) (holding that a supervisor may be held individually liable under the ACRA for retaliation against an employee) *with* Whitney v. Unibar Maint. Serv. Inc., No. 04-561 (E.D. Ark. June 23, 2004) (order denying motion to remand) (holding that a supervisor may not be held individually liable under the ACRA for retaliation against an employee).

312. *See* Battles v. Townsend, No. 08-117 (E.D. Ark. May 20, 2008) (order certifying question).

313. The United States Court of Appeals for the Eighth Circuit has said that, in order for a plaintiff to beat summary judgment on a ACRA retaliation claim, he or she must make the same showing as is required for a similar claim under Title VII. Wallace v. Sparks Health Sys., 415 F.3d 853 (8th Cir. 2005) (citing Island v. Buena Vista Resort, 352 Ark. 548, 103 S.W.3d 671, 676 (2003)). However, the issue of whether an individual may be sued personally under the ACRA for retaliation was not presented there. Furthermore, the statutes differ in

Another interesting issue concerns what rights the Arkansas courts are prepared to recognize as cognizable under the ACRA. For instance, the Arkansas Court of Appeals held, in *Carmical v. McAfee*, that one does not have a right to be free from a lawsuit where the lawsuit is based upon probable cause.[314] The court appears to have linked its discussion of the state tort of malicious prosecution into its discussion of the civil rights claim.[315] Consequently, the claim failed for the same reason as the malicious prosecution claim failed, i.e., probable cause existed for the lawsuit.[316] In any event, the case foreshadows what might be the next battleground for litigation under the ACRA: what rights, statutory or constitutional, may be redressed under the ACRA.

The federal courts have placed various limits on litigation under section 1983. For example, one may not seek redress for the failure to be given *Miranda* warnings under section 1983, even though those warnings are linked to the Fifth Amendment.[317] Furthermore, equal protection, procedural and substantive due process, the right to free speech, and the right to petition the government, are all fertile areas for litigation under the ACRA. In the absence of a textual or historical justification for unique interpretation, as the court in *Rainey* suggested, the courts should largely interpret our laws consistent with the United States Constitution in order to avoid the confusion that would ensue to public officials applying those laws.

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that Title VII proscribes an "employer" from retaliating, while the ACRA prohibits a "person" from retaliating. Consequently the issue is ripe for decision.

314. 68 Ark. App. 313, 327–28, 7 S.W.3d 350, 360 (1999).

315. *See id.* at 327–28, 7 S.W.3d at 360.

316. *See id.* at 327–28, 7 S.W.3d at 360.

317. *See* Weaver v. Brenner, 40 F.3d 527, 534 (2nd Cir. 1994) (" . . . [T]he failure to read the warnings does not standing alone give rise to a constitutional violation . . . [because the *Miranda* warnings are merely a prophylactic measure devised to protect one's Fifth Amendment rights].).