

# ARKANSAS COURT OF APPEALS

DIVISION I

No. CA10-665

DAVE SMITH

APPELLANT

V.

DECATUR SCHOOL DISTRICT

APPELLEE

Opinion Delivered FEBRUARY 16, 2011

APPEAL FROM THE BENTON  
COUNTY CIRCUIT COURT  
[NO. CV2008-3046-6]

HONORABLE DOUG SCHRANTZ,  
JUDGE

AFFIRMED

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**RITA W. GRUBER, Judge**

Appellant Dave Smith brings this appeal from the order of the Benton County Circuit Court granting summary judgment to the appellee Decatur School District on the basis that it was impossible for the district to perform its contractual obligations to Smith. Smith argues that the district failed to establish its defense of impossibility. We disagree and affirm.

On April 10, 2007, the Arkansas Department of Education (ADE) sent a letter to Mike Parrish, the then-superintendent of the district, noting the district's declining fund balance and submitting a questionnaire to address ADE's concerns.

On June 13, 2007, the district's board voted to hire Smith as its superintendent for a term of three years, through June 30, 2010. Smith's contract incorporated the district's personnel policies as terms of the contract, as provided in Arkansas Code Annotated section

6-17-204 (Repl. 2007).<sup>1</sup> The contract further required Smith to maintain his certification as required by ADE and to refund any salary received for which no services were provided. The termination section of the contract was left blank. On January 21, 2008, Smith's contract was extended to cover the 2010-11 school year. The terms of the new contract were identical to the original contract.

By letter dated June 4, 2008, ADE notified Smith and the district that the district met the criteria found in Arkansas Code Annotated section 6-20-1905 (Repl. 2007)<sup>2</sup> for being identified as a district in fiscal distress. The letter also served notice that the State Board of Education would consider classifying the district as fiscally distressed at a July 14, 2008 meeting.

At a July 2, 2008 special meeting, the district's board voted to suspend Smith with pay. Although Smith had verbal notice of the meeting, he did not attend. He was notified of the suspension by letter dated July 7, 2008.

Following a July 31, 2008 meeting of the State Board of Education, ADE sent a letter to Smith and the president of the district's board notifying them that it was taking immediate fiscal control of the district. This letter stated that assumption of control included requiring Smith to relinquish all administrative authority with respect to the district. ADE was to

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<sup>1</sup>Section 6-17-204 was amended in 2009, after the present litigation was commenced. The amendment is not germane to this appeal.

<sup>2</sup>Section 6-20-1905 was amended in 2009, after the present litigation was commenced. The amendment is not germane to this appeal.

operate the district without a local school board under the direction of a person appointed by the commissioner of education. Leroy Ortman was appointed as interim superintendent by ADE.

On November 21, 2008, Smith filed suit against the district, alleging that the district had breached the contract between the parties by failing to pay his compensation since the district's management was assumed by ADE. The complaint also alleged that the termination section of the contract was left blank and contained no provisions relating to termination. The complaint sought damages for the breach, together with attorney's fees and costs.

After an unsuccessful motion to have the case dismissed because of failure to join ADE as an indispensable party, the district filed an answer and alleged that the terms of the contract precluded recovery by Smith. After obtaining new counsel, the district amended its answer to assert the defense of impossibility of performance as a result of ADE's actions.<sup>3</sup>

On January 11, 2010, the district filed its motion for summary judgment. In its supporting brief, the district argued that its performance was made impossible by the actions ADE took in reconstituting the district. In his brief opposing the district's motion, Smith

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<sup>3</sup>The amended answer contained other affirmative defenses such as a set-off and waiver. The amended answer also included a counterclaim against Smith for breach of contract and misfeasance. Smith responded by seeking permission to file a third-party complaint against the district's former bookkeepers and treasurers, the previous superintendent, and the individual board members. The district took a nonsuit of its counterclaim. The court denied Smith's motion for leave to file the third-party complaint. No issue is raised in this appeal about these matters.

Smith also filed a motion for partial summary judgment as to the district's request for a set-off. Because of the circuit court's resolution of the case, this disposition is not at issue in this appeal.

argued that the defense of impossibility did not apply because the district did not prove that it had diligently performed the contract and because no legally recognized event had occurred. This was based on Smith's contention that, despite ADE's assumption of management of the district, the district retained its separate corporate existence.

On February 22, 2010, the circuit court issued a letter opinion granting the district's motion for summary judgment. The court found that ADE's action in directing that Smith no longer be paid made it impossible for the district to perform its contract with Smith. The court's written order was entered on March 19, 2010. This appeal followed.

This case comes to us from an order of summary judgment. A circuit court may grant summary judgment only when it is clear that there are no genuine issues of material fact to be litigated and that the party is entitled to judgment as a matter of law. *Southwestern Energy Prod. Co. v. Elkins*, 2010 Ark. 481, 374 S.W.3d 678. Normally, we determine if summary judgment is proper based on whether evidentiary items presented by the moving party leave a material fact unanswered, viewing all evidence in favor of the nonmoving party. *Hisaw v. State Farm Mut. Auto. Ins. Co.*, 353 Ark. 668, 122 S.W.3d 1 (2003). However, in cases such as this where the parties do not dispute the essential facts, we simply determine whether the moving party was entitled to judgment as a matter of law. *Jackson v. Blytheville Civ. Serv. Comm'n*, 345 Ark. 56, 43 S.W.3d 748 (2001).

For reversal, Smith argues that it was not impossible for the district to perform and, therefore, summary judgment in favor of the district was improper. Impossibility is a

common-law contract doctrine that excuses what would otherwise be a breach of contract. The law of impossibility has evolved into a broader and more equitable rule of impracticability. *Miller v. Mills Constr., Inc.*, 352 F.3d 1166 (8th Cir. 2003); Williston on Contracts § 77.1 (4th ed. 2004). Impracticability of performance may excuse a party from performing contractual obligations. *Restatement (Second) of Contracts* § 261. Prevention of performance by a government order or regulation may qualify as an impracticability-of-performance defense. *Mathews v. Garner*, 25 Ark. App. 27, 751 S.W.2d 359 (1988); *Restatement (Second) of Contracts* § 264. The Arkansas Supreme Court has set out the standard to determine impossibility of performance:

The burden of proving impossibility of performance, its nature and extent and causative effect rests upon the party alleging it. He must show that he took virtually every action within his power to perform his duty under the contract. It must be shown that the thing to be done cannot be effected by any means. Resolution of the question requires an examination into the conduct of the party pleading the defense in order to determine the presence or absence of fault on his part in failing to perform.

*Frigillana v. Frigillana*, 266 Ark. 296, 302-03, 584 S.W.2d 30, 33 (1979) (citations omitted).

The supreme court has drawn a “distinction between objective impossibility, which amounts to saying, ‘[t]he thing cannot be done,’ and subjective impossibility[,] ‘I cannot do it.’” *Christy v. Pilkinton*, 224 Ark. 407, 407, 273 S.W.2d 533, 533 (1954) (quoting *Restatement (First) of Contracts* § 455 cmt. a (1932)). It is only in cases of objective impossibility that performance is excused. *Id.*

In this case, it is undisputed that ADE, acting through the State Board of Education, placed the district on its fiscally distressed list. It is also undisputed that ADE reconstituted the

district and assumed fiscal control of the district. Under Arkansas Code Annotated section 6-20-1903(6) (Repl. 2007), “reconstitution” means the reorganization of the administrative unit or the governing school board of directors of a school district, including, but not limited to, the replacement or removal of a current superintendent or the removal or replacement of a current school board of directors or both. As part of its efforts in addressing school districts in fiscal distress, ADE may require the superintendent to relinquish all administrative authority over the district. Ark. Code Ann. § 6-20-1909(a)(1) (Repl. 2007). Here, ADE permanently removed Smith as superintendent of the district when it assumed control. ADE may also appoint an individual in place of the superintendent to administer the district under the supervision and approval of ADE without a local school board. Ark. Code Ann. § 6-20-1909(a)(2), (6). Leroy Ortman was so appointed.

Smith argues that section 6-20-1909 does not allow ADE, in reconstituting the district, to terminate, cancel, void, or otherwise breach contracts. However, section 6-20-1903, in defining “reconstitution,” includes removal of a superintendent as one of ADE’s options. We believe that it is implicit in the statutory scheme that ADE does have the authority to terminate superintendents’ contracts. To accede to Smith’s position would lead to an absurd result in that ADE would be placed in the anomalous position of, after having taken over the management of a district in fiscal distress, having to pay two individuals to act as superintendent of that district. We will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. *Burford Distrib., Inc. v. Starr*, 341

Ark. 914, 20 S.W.3d 363 (2000).

Both the school district and the circuit court relied on our decision in *Mathews v. Garner, supra*, as controlling in this case. We agree. In *Mathews*, we held that the defense of impossibility of performance was available where contracts are not performed because of valid orders of state or federal regulatory agencies. 25 Ark. App. at 31, 751 S.W.2d at 361. Smith attempts to distinguish *Mathews* on the basis that it involved two private entities independent of the governmental agency that issued the order preventing performance of the contract, while in the present case the state agency actually assumed management of the fiscal operations of one of the contracting parties. While that is true enough, it still remains that, in both cases, a state agency issued an order that prevented one of the parties from complying with the terms of its contract. Moreover, in both *Mathews* and the present case, that party could not perform its contract without violating the state order. Smith's argument appears to be that ADE's assumption of management of the district did not change things because the district as a "body corporate" still maintained its existence. That argument fails to recognize the fact that ADE's recommendations as to staffing and the fiscal practices of the district are binding on the district. See Ark. Code Ann. § 6-20-1908(f) (Repl. 2007). As such, the district had no choice but to comply with ADE's order to remove Smith as superintendent and to cease paying him.

Because the district established, as a matter of law, the defense of impossibility of performance, the circuit court correctly granted the district summary judgment.

Cite as 2011 Ark. App. 126

Affirmed.

PITTMAN and ROBBINS, JJ., agree.