

Cite as 2009 Ark. 417

SUPREME COURT OF ARKANSAS

No. 08-543

LANDMARK NOVELTIES, INC.
APPELLANT

V.

ARKANSAS STATE BOARD OF
PHARMACY
APPELLEE

Opinion Delivered September 17, 2009

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, NO.
CV-2004-8762, HON.
CHRISTOPHER CHARLES PIAZZA,
JUDGE

CERTIFIED, SUPPLEMENTAL
RECORD ORDERED;
SUBSTITUTED BRIEF ORDERED.

PER CURIAM

Appellant Landmark Novelties, Inc., appeals from an order of the Pulaski County Circuit Court affirming a decision of Appellee Arkansas State Board of Pharmacy to revoke Landmark's license to sell List 1 chemicals for a period of three years and imposing a \$175,000 fine. The Board action stemmed from an investigation into whether Landmark was properly reporting suspicious transactions involving List 1 chemicals, particularly ephedrine and pseudoephedrine, pursuant to Ark. Code Ann. § 5-64-1006 (Repl. 2005) and Board regulation 08-02-0008. The Board ultimately determined that Landmark had violated section 5-64-1006 and regulation 08-02-0008 by failing to report suspicious transactions.

Landmark, pursuant to the Arkansas Administrative Procedure Act, filed a petition for review in circuit court, arguing that (1) the Board's application of the statute and regulation violated its rights of due process under article 2, section 8 of the Arkansas Constitution; and (2) the Board's decision was arbitrary, capricious, and not supported by substantial evidence.

After a hearing on the petition, the circuit court affirmed the Board, holding that its decision was supported by substantial evidence and was not arbitrary or capricious. Furthermore, the court found that the Board's enforcement of the statute and regulation satisfied due process under article 2, section 8.

Landmark filed an appeal with the Arkansas Court of Appeals, reiterating the arguments it advanced in its petition for review. The court of appeals ordered correction of the record and rebriefing by Landmark because the record was out of sequence, and Appellant failed to abstract the constitutional objections it raised at the administrative hearing.

This court subsequently assumed jurisdiction of the appeal but is unable to address the merits of the appeal. In reviewing the record, this court discovered that when Landmark filed its notice of appeal, it designated the entire record, "except the transcript of the motion argument herein," as the contents of the record on appeal. The "transcript of the motion argument herein" refers to a hearing held before the circuit court on or about November 26, 2007.¹

Landmark's first point on appeal is that section 5-64-1006 and regulation 08-02-0008 are impermissibly vague and, as applied, violated its rights of due process. Presumably, Landmark decided to omit the transcript of the circuit court hearing based on its belief that this court would review only the action of the Board. As evidenced by this court's decision in *Arkansas Tobacco Control Board v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004), when presented with an allegation that a statute or regulation is unconstitutional, this court must

¹The circuit court's order of January 9, 2008 reflected this date.

review the decision of the circuit court. This is because an administrative agency lacks the authority to rule on a constitutional argument. *Id.* Thus, where the instant record lacks the transcript and abstract of the circuit court hearing, we are unable to address Landmark's first point on appeal involving the constitutionality of the statute and regulation.

Pursuant to Ark. R. App. P.–Civ. 6(c) and (e), this court can sua sponte direct the parties to supply any omitted material by filing a certified, supplemental record. *See* Ark. R. App. P.–Civ. 6(e). Therefore, we order Landmark to supply this court with a certified, supplemental record that includes a complete transcript of the motion hearing held before the circuit court, within sixty days of the issuance of this opinion. Appellant is further ordered to file a substituted brief that includes an abstract of the transcript as required by Ark. Sup. Ct. R. 4-2(a)(5).

Certified, supplemental record ordered; substituted brief ordered.

Wright, Lindsey & Jennings, LLP, by: *N.M. Norton, Bettina E. Brownstein*, and *Troy A. Price*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Erika Gee*, Ass't Att'y Gen., for appellee.