RECENT DEVELOPMENTS

Eighth Circuit Affirms Arkansas District Court Decision that Juvenile Adjudications Can Qualify as Prior Convictions

United States v. Gauld, 833 F.3d 941 (8th Cir. 2016).

William Gauld of Texarkana, Arkansas was sentenced to 180 months in prison without the possibility of parole after pleading guilty to one count of receiving child pornography. Using the screen name "lovesboys81" on a photo-sharing website, Gauld downloaded the illegal child pornography on his cell phone and laptop computer. He was indicted for five counts of child pornography after law enforcement discovered 921 images and sixty-six videos on his devices. As a juvenile, Gauld was adjudicated for a sexual offense involving a seven-year-old child. At sentencing, the Honorable Susan O. Hickey held that his juvenile adjudication qualified as a prior conviction under 18 U.S.C. § 2252(b) triggering a mandatory minimum sentence. This past December, the Eighth Circuit affirmed the district court's decision.

On appeal, Gauld attempted to distinguish his case from a previous Eighth Circuit decision dealing with mandatory minimums, *United States v. Woodard*.[1] The main issue was whether courts should count juvenile adjudications as prior convictions for purposes of mandatory minimums. He argued that (1) *Woodard* was not controlling precedent applicable to his sentencing; and (2) in the alternative, *Woodard* was wrongly decided. In *Woodard*, the defendant had a prior juvenile adjudication for second-degree sexual abuse.[2] The defendant in *Woodard* argued, like Gauld later would, that "Congress expressly includes juvenile adjudication in other statutory schemes where Congress determines such previous conduct should [qualify as a prior conviction]."[3] For instance, statutes

1. 694 F.3d 950 (8th Cir. 2012).
2. *Id*. at 952.
3. United States v. Gauld, 833 F.3d 941, 943-44 (8th Cir. 2016).

such as the Armed Career Criminal Act (ACCA) expressly include "juvenile adjudications" within the definition of a prior conviction, whereas § 2252(b) does not.[4] However, the Eighth Circuit concluded that "Congress's characterization [of a juvenile adjudication as a prior conviction] was not dispositive," and held that juvenile adjudications "may" still be considered a prior conviction under § 2252(b).[5]

In the majority opinion for *Gauld*, the Eighth Circuit disagrees with the defendant's narrow reading of *Woodard*. The court points to a footnote in *Woodard*, which relies on an Eleventh Circuit opinion upholding a "district court's determination that the defendant's youthful offender adjudication was a prior conviction under 18 U.S.C. § 2252(b)."[6] The dissent, who agreed with the defendant, noted that *Woodard* did not fully address the question whether juvenile adjudications were prior convictions, only that they "'may be considered a prior conviction' consistent with the Sixth Amendment."[7] To employ his logic, the dissent explains, "[w]hen a statute refers to 'convictions' without qualification or redefinition, then, we should presume that the term does not encompass juvenile adjudications."[8]

Gauld also objected to Judge Hickey's special condition that he "shall not possess or use a computer, nor any other means of internet access." Under 18 U.S.C. § 3583(d) judges are given wide discretion to impose special conditions. The majority applied a plain meaning interpretation to the special condition, noting that it should not be construed as a total ban on all computer use. In other words, the court refused to broadly read the condition "as to prevent Gauld from using a non-internet-connected computing device."[9] Given the circumstances of Gauld's crimes, the court concluded it was not plain error for the district court to ban his use of the internet. The dissent concurred with the majority on this second issue.

4. *Woodard,* 694 F.3d at 953.

5. *Id*.

6. *Id*. at 953 n.2 (citing *United States v. Loomis*, 230 F. App'x 938, 939 (11th Cir. 2007)).

7. *Gauld*, 833 F.3d at 948 (Kelly, J., dissenting).

8. *See* United States v. Huggins, 467 F.3d 359, 361 (3d Cir. 2006).

9. *Gauld*, 833 F.3d at 945.

Arkansas Supreme Court Upholds Three-Year Statute of Limitations for Latent Diseases

Hendrix v. Alcoa, Inc., 2016 Ark. 453, ___ S.W.3d ____.

In a divided four to three opinion, the Arkansas Supreme Court upheld the exclusive-remedy provision of the Arkansas Workers' Compensation Act (the "Act") barring tort action against an employer in a case where the employee's disease manifested after the statutory period for filing a claim. The case arose following the death of Guy D. Hendrix who retired from Alcoa, Inc. in 1995 and was diagnosed with mesothelioma in June 2012. Mesothelioma is an asbestos-related cancer. Hendrix filed a claim against his former employer for workers' compensation benefits in September 2012. Later that fall, an administrative law judge barred his claim, pointing to a three-year statute of limitations "from the date of the last injurious exposure to the hazard of silicosis or asbestosis." Hendrix died a year later, and his estate filed a wrongful-death and survival action against Alcoa. At issue was the exclusive-remedy provision enumerated in §11-9-105(a):

> The rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall *be exclusive of all other rights and remedies* of the employee, his legal representative, dependents, next of kin, or anyone otherwise entitled to recover damages from the employer.[10]

Citing the exclusive remedy provision, the circuit court dismissed all claims against Alcoa with prejudice and Hendrix's estate appealed. The state's highest court accepted the case from the Court of Appeals noting that the case revolved around a matter of "substantial public interest."

The estate argued that the Act provided no remedy for Hendrix's occupational disease, since mesothelioma has a long latency period. Jurisdiction was proper, the estate said, because a civil action against an employer is allowed when the employee has no remedy under the Act. In this case, Hendrix's inability to

10. ARK. CODE ANN. § 11-9-105(a) (repealed 2013) (emphasis added).

obtain workers' compensation benefits barred him from any remedy. The court framed the issue as whether Hendrix had a remedy pursuant to the Act's provision. The majority opinion, authored by Justice Courtney Goodson, discussed the policy reasons behind workers' compensation laws and why the court takes a narrow view of any damages beyond the exclusive remedy. Exceptions do exist, the court noted, and pointed to three cases where there was no remedy.

In one case, an "employee suffered a gradual-onset injury caused by heavy lifting" at work, and the court found that the injury did not meet the definition of a compensable injury—thus barring him any remedy.[11] The court referenced another asbestos case, *Porocel*, resulting in an employee's lung disease and silicosis.[12] Like Hendrix's case, an administrative law judge concluded the employee's claim was barred because it was not filed within the statutory period. However, distinguishing this employee's claim from Hendrix's was that Porocel's disablement had occurred within three years of the last injurious exposure on the job.[13] In revisiting *Porocel*, the court recognized the question of whether the Act provides a remedy if the time of disablement does not occur within three years. However, the court concluded that "the temporal limitation on recovery does not equate to the absence of a remedy under the Act." Thus, there is a difference between injuries that come within the fundamental coverage provisions of the Act and injuries covered by definition but barred from compensation under a specific set of facts. The majority maintained that finding otherwise would mean the General Assembly immunized employers from suit after three years, only to reimpose liability in special circumstances and "eviscerating" the Act's protections. The divided court affirmed the decision in favor of Alcoa; however, the four-person majority lamented the injustice, writing "[t]he result smacks of unfairness" and asked the General Assembly to address the harsh inequity.

In his dissent, Justice Paul E. Danielson, maintained that the majority deprived Hendrix's estate from pursuing its only

11. Automated Conveyor Sys., Inc. v. Hill, 362 Ark. 215, 208 S.W.3d 136 (2005).

12. Porocel Corp. v. Cir. Ct. of Saline Cty., 2013 Ark. 172, at 6, 2013 WL 1776648, at *3.

13. *Id.*

remedy. He disagreed with the majority's treatment of the three-year provision as a statute of limitations, arguing that it is fundamentally a statute of repose. The majority, he wrote, relied too heavily on *Porocel* by holding a claimant's lack of knowledge about a disease against the claimant's ability to seek recovery. The worker in *Porocel*, Danielson explained, failed to file a claim within the prescribed time, but "Hendrix never had a remedy to lose." In punting the issue to the General Assembly, the court's decision merely shifted the blame.

A separate dissent, authored by Justice Josephine Linker Hart, placed further emphasis on the statute of repose discussed by Danielson. Hendrix had no option but to pursue his claim in circuit court, writes Hart, "because the claim was extinguished by the Act before it ever accrued" and, therefore, was never covered by the Act. Hart compared Hendrix's case to the employee in the gradual-onset neck injury case referenced by the majority, *Automated Conveyor Systems*.[14] Just as the specific neck injury fell outside the scope of the Act's enumerated injuries, so does Hendrix's injury, as it manifested too late. To quote the court's language in *Automated Conveyor Systems*, "An interpretation of the [Act] that would disallow any right of recovery for injuries that are not expressly covered by the Act is not in line with its stated purpose and, in addition, would contravene Article 2, section 13 of the Arkansas Constitution."[15]

14. *Id*.
15. *Hill*, 362 Ark. 215, 219, 208 S.W.3d at 139.

Arkansas Supreme Court Revisits Class Action Certification in Two SEECO Cases

SEECO Inc. v. Stewmon, 2016 Ark. 435, ___ S.W.3d ___.
SEECO Inc. v. Snow, 2016 Ark. 444, ___ S.W. 3d ___.

This past December, the Arkansas Supreme Court upheld two circuit court decisions certifying class actions against Southern Electric Equipment Company (SEECO), a natural gas company that operates across the state. These two decisions, *SEECO Inc. v. Stewmon* and *SEECO Inc. v. Snow*, are two of three lawsuits[16] filed by Arkansas landowners who leased mineral rights on their land and now maintain they were defrauded of proper payments. In all cases, the plaintiffs allege that SEECO fraudulently deducted expenses from the royalty owners' monthly checks. The provision in dispute appears in more than 16,000 of SEECO's standard gas leases. In the *Snow* case, the defendants appealed the circuit court's decision to limit the class to Arkansas residents. In the *Stewmon* case, SEECO and its subsidiaries similarly argue that the class definition given by the circuit court was erroneous, and more specifically, that the substitute class representative was unqualified. As both cases resulted from interlocutory appeals, the Arkansas Supreme Court limited its review to the class action certifications. Justices Karen Baker, Paul Danielson, and Courtney Goodson recused from both decisions.

In the two cases before the circuit court, SEECO maintained that the company only deducted "reasonable" costs from royalties that were incurred in gathering, treating and marketing the natural gas across the "Fayetteville Shale." This geological region covers 5,853 square miles and extends "north of Little Rock from Sebastian and Washington Counties to Phillips County." The plaintiffs contend that these deductions were not reasonable—rather "artificial inflation of deductions"—and they claim breach of contract, unjust

16. The federal case, *Smith v. SEECO,* is not on appeal as of publication. *See* Smith v. Seeco, Inc., No. 4:15CV00147 BSM, 2016 WL 3541412, at *1 (E.D. Ark. Mar. 11, 2016).

enrichment, breach of statutory duty of good faith, and an underpayment of royalties. In the *Stewmon* case, a St. Francis County Circuit Court judge granted class certification to "[a]ll residents of the State of Arkansas who entered into leases with Defendant SEECO (up through September 27, 2013)," going on to specifically exclude non-Arkansas residents who may be parties on the lease. In the *Snow* case, a Conway County Circuit Court judge granted class certification to "citizens of the State of Arkansas as of the commencement date of this civil action (that is, the date of filing of the original Complaint.)"

Under Rule 23 of the Arkansas Rules of Civil Procedure, there are six requirements for class action certification: (1) numerosity; (2) commonality; (3) typicality; (4) adequacy; (5) predominance; and (6) superiority.[17] On appeal in the *Snow* case, SEECO argued that restricting the class to Arkansas residents "is an artifice with no logical relationship to the class or its interests." In total, SEECO made eight arguments, challenging all but the numerosity requirement. Writing for the majority, Justice Robin Wynne underscored how circuit courts have broad discretion in creating classes and affirmed the class certification. Justice Rhonda Wood wrote a concurring opinion, joined by Chief Justice Howard Brill, noting the "significant manageability problems going forward" of limiting the class action to citizens of Arkansas. Justice Wood acknowledged that the circuit court's class definition helps keep this case within state court, cautioning future courts to refrain from such "forum-shopping concerns." She concluded that while given the green light to proceed, the circuit court may need to decertify the class once an Arkansas citizen joins the class who co-owns the lease with a non-Arkansas resident. Justices Wood and Brill concurred on similar grounds in the *Stewmon* decision.

Justice Josephine Hart, writing for the majority in *Stewmon*, echoed the high court's reasoning in *Snow*. In addressing SEECO's arguments against the substitute class representative—the daughter of the now-deceased Sara Stewmon—the majority remained unpersuaded. The court held that the daughter satisfied the typicality requirement even if her lease had a notice-of-breach clause different from other members of the

17. *See* Campbell v. Asbury Auto., Inc., 2011 Ark. 157, at 14, 381 S.W.3d 21, 33.

class. The court further ignored SEECO's concerns about competing lawsuits, emphasizing that their review was limited to the class certification. By allowing these two cases to proceed, there will likely be a race to judgment, as the fate of these cases will carry tremendous impact on the individual plaintiffs in each case.

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