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COMMON PROCEDURAL AND JURISDICTIONAL PITFALLS TO AVOID IN PRACTICING BEFORE THE ARKANSAS SUPREME COURT

*Megan Hargraves**

I. INTRODUCTION

Effective practice before the Arkansas Supreme Court requires an awareness of many rules and concepts unique to appeals.¹ An appellate practitioner must also be aware of specific procedural rules at the trial level in order to ensure that an appellate court will have jurisdiction over a subsequent appeal and that the arguments are properly preserved for appeal.² This article is not a comprehensive review of all matters relevant to appellate practice in Arkansas.³ Rather, it will address some of the most common procedural and jurisdictional appellate mistakes. The article will also focus on recent rule changes and case law relevant to Arkansas appellate practice.

The article will first look at the issue of appellate jurisdiction, initially discussing the rules regarding timeliness. The section will then turn to the question of whether the lower court had jurisdiction to hear the matter, specifically addressing the recent changes to Arkansas District Court Rule 9. Finally, the section will address a frequent jurisdictional hurdle to appellate review—the finality of a lower court order. The section will review the requirements of Arkansas Rule of Appellate Procedure Civil 2(a)(1) and Arkansas Rule of Civil Procedure 54(b), focusing on rule changes, as well as recent cases relevant to finality.

The article will then discuss the Arkansas Supreme Court's briefing rules and its concern in recent years about the number of cases in which it has ordered rebriefing due to noncompliance with its rules.⁴ In response to the noncompliance, the court recently made significant revisions to the Ar-

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1. See, e.g., ARK. R. SUP. CT.; ARK. R. APP. P. CIV.; ARK. R. APP. P. CRIM.; SUP. CT. ADMIN. ORDERS.

2. The specific rules discussed in this article are ARK. R. CIV. P. 54(b), DIST. CT. R. 9, ARK. R. CRIM. P. 33.1, and ARK. R. CIV. P. 50.

3. See ARK. BAR ASS'N, HANDLING APPEALS IN ARKANSAS (2007).

4. See *In re* Ark. Sup. Ct. and Ct. of App. R. 4-1 & 4-2, 2009 Ark. 350, at 1, 2009 Ark. LEXIS 359, at *1 (per curiam) (“Two years ago, this court highlighted problems relating to attorneys’ failure to comply with the rules for appellate briefs. *In re* Appellate Practice Concerning Defective Briefs, 369 Ark. App’x 553, 2007 Ark. LEXIS 187. Our warning apparently went unheeded.”).

kansas Supreme Court Rules.⁵ This section of the article will highlight some of the important rule changes.

Finally, the article will look at preservation issues. Specifically, this section of the article will review the requirements that an appellant make a specific, contemporaneous objection at the trial court; that the appellant make the same argument on appeal as was made below; and that the appellant obtain a ruling from the trial court. The section will also address the rule that an appellate court will not address the merits of an argument if it is not sufficiently argued and developed on appeal. Finally, the section will look at the rules regarding how a party can preserve a sufficiency-of-the-evidence argument, specifically focusing on the differences between civil and criminal cases and jury and bench trials.

It is the author's hope that by highlighting some of the common procedural and jurisdictional problems arising in practice before the Arkansas Supreme Court, attorneys will be able to avoid these pitfalls in the future.

II. JURISDICTION

It is well settled that subject matter jurisdiction is a court's authority to hear and to decide a particular type of case.⁶ A court lacks subject matter jurisdiction when it cannot hear the matter "under any circumstances" and it is "wholly incompetent to grant the relief sought."⁷ A court obtains subject matter jurisdiction "by the Arkansas Constitution, by constitutionally authorized statutes, or by court rules."⁸ The Arkansas Supreme Court has made it clear that it will raise issues of subject matter jurisdiction *sua sponte*, regardless of whether briefed or argued by the parties.⁹

A. Timeliness of a Notice of Appeal

The issue of whether a notice of appeal is timely filed is jurisdictional in nature.¹⁰ An appellate court cannot acquire jurisdiction without a timely-filed notice of appeal.¹¹ It is critical for practitioners to ensure that they file

5. *In re* Ark. Sup. Ct. R. 4-1, 4-2, 4-3, 4-4, 4-7, & 6-9, 2009 Ark. 534, at 1, 2009 Ark. LEXIS 700, at *1 (per curiam).

6. See DAVID NEWBURN & JOHN WATKINS, CIVIL PRACTICE AND PROCEDURE 19 (4th ed. 2006).

7. *Id.* (quoting *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 352-53, 836 S.W.2d 853, 858 (1992)).

8. *Id.* at 19-20.

9. See, e.g., *Barrows v. City of Fort Smith*, 2010 Ark. 73, at 5, ___ S.W.3d ___, ___.

10. See, e.g., *Ellis v. Ark. State Highway Comm'n*, 2010 Ark. 196, at 4, ___ S.W.3d

___, ___.

11. *Id.* at 6-7, ___ S.W.3d at ___.

all notices of appeal in a timely fashion because an untimely appeal must be dismissed with prejudice.¹²

To perfect an appeal under Arkansas Rule of Appellate Procedure 4, a notice of appeal shall be filed within thirty days from the entry of the judgment, decree or order appealed from. A notice of cross-appeal shall be filed within ten days after receipt of the notice of appeal, except in no event shall a cross-appellant have less than thirty days from the entry of the judgment, decree or order within which to file a notice of cross-appeal.¹³

This rule contemplates an extension in cases where there is a timely-filed motion for judgment notwithstanding the verdict under Arkansas Rule of Civil Procedure 50(b), a motion to amend the court's findings of fact or to make additional findings under Arkansas Rule of Civil Procedure 52(b), a motion for new trial under Arkansas Rule of Civil Procedure 59(a), or any other motion to vacate, alter, or amend the judgment.¹⁴ In such cases, the appellant has thirty days from entry of the order disposing of the last outstanding motion to file a notice of appeal.¹⁵ If, however, the trial court does not rule on the motion within thirty days of its filing, it is deemed denied, and an appellant must file a notice of appeal within thirty days from that date to perfect an appeal.¹⁶

The Arkansas Rules of Appellate Procedure also make clear that “[a]n appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment.”¹⁷ Thus, it is not necessary to file a notice of appeal from each order on which the appellant intends to allege error. However, collateral orders, which are filed after a judgment, do not extend the time for filing a notice of appeal.¹⁸ An order granting or denying a motion for attorney's fees is an example of a collateral order.¹⁹ Therefore, the filing of a motion for attorney's fees after a judgment or final order is entered does not extend the time to file a notice of appeal, and a notice of appeal from the order on attorney's fees does not bring up for appeal any prior judgment on the substantive issues.²⁰

12. See, e.g., *Seay v. C.A.R. Transp. Brokerage Co., Inc.*, 366 Ark. 527, 530, 237 S.W.3d 48, 51 (2006).

13. ARK. R. APP. P. CIV. 4(a).

14. *Id.* R. 4(b)(1).

15. *Id.*

16. *Id.*

17. ARK. R. APP. P. CIV. 2(b).

18. See *Ellis v. Ark. State Highway Comm'n*, 2010 Ark. 196, at 5, ___ S.W.3d ___, ___.

19. *Id.*, ___ S.W.3d at ___.

20. *Id.*, ___ S.W.3d at ___.

1. *Lower Court's Jurisdiction*

If a trial court lacks subject matter jurisdiction to hear a case, the appellate court will also lack jurisdiction to consider the appeal.²¹ A lower court may lack jurisdiction to hear a case for many reasons, and this issue recently came before the Arkansas Supreme Court with respect to appeals from district court to circuit court, which are governed by Arkansas District Court Rule 9. This section will address these cases and will discuss recent amendments to Rule 9.

a. District Court Rule 9

The requirements of Rule 9 are mandatory and jurisdictional.²² If an appellant fails to comply with the requirements of Rule 9, the circuit court has no authority to accept the appeal.²³ Furthermore, an appellant must strictly comply with Rule 9, and the failure to do so precludes the circuit court from acquiring jurisdiction over the appeal.²⁴ If the circuit court did not have jurisdiction over the appeal, the appellate court also lacks jurisdiction over the appeal.²⁵

According to District Court Rule 9, “[a]ll appeals in civil cases from district courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within 30 days from the date of a docket entry awarding judgment regardless of whether a formal judgment is entered.”²⁶ However, this rule also makes clear that “the 30-day period is not extended by a motion for new trial, a motion to amend the court’s findings of fact or to make additional findings, or any other motion to vacate, alter or amend the judgment.”²⁷

In *Arkansas State University v. Professional Credit Management Inc.*,²⁸ the Arkansas Supreme Court dismissed an appeal where the appeal from the district court to the circuit court was untimely.²⁹ In that case, the district court entered a written order in favor of Professional Credit Man-

21. See, e.g., *Barrows v. City of Fort Smith*, 2010 Ark. 73, at 5, ___ S.W.3d ___, ___.

22. See, e.g., *Ark. Game & Fish Comm’n v. Eddings*, 2009 Ark. 359, at 12, ___ S.W.3d ___, ___.

23. *Id.*, ___ S.W.3d at ___.

24. *Id.*, ___ S.W.3d at ___; see also *J&M Mobile Homes, Inc. v. Hampton*, 347 Ark. 126, 129, 60 S.W.3d 481, 483 (2001) (noting “substantial compliance” is insufficient to perfect an appeal from inferior court).

25. *Barrows*, 2010 Ark. at 5, ___ S.W.3d at ___.

26. ARK. DIST. CT. R. 9(a).

27. *Id.*

28. 2009 Ark. 153, 299 S.W.3d 535.

29. *Id.* at 5, 299 S.W.3d at 537.

agement Inc. on May 3, 2007.³⁰ Arkansas State University subsequently filed a motion to set aside the district court's order, but the Arkansas Supreme Court held that Rule 9 did not permit for the extension of time to file a notice of appeal.³¹ Instead, the court stated that "the rules governing appeals from district court to circuit court are in marked contrast to the rules governing appeals from circuit court to this Court and the court of appeals."³² Thus, the language of Rule 9 and the holding in *Arkansas State University* make clear that, unlike in appeals from circuit court to the Arkansas Supreme Court or to the Arkansas Court of Appeals, a motion filed after the entry of judgment does not extend the time to file an appeal from district court to circuit court.

Another question with respect to jurisdiction under Rule 9 relates to how an appellant perfects an appeal from district court to circuit court. This portion of Rule 9 was amended on October 9, 2008 and became effective January 1, 2009.³³ Prior to the amendment, Rule 9 provided that "[a]n appeal from a district court to the circuit court shall be taken by filing a record of the proceedings had in district court. Neither a notice of appeal nor an order granting an appeal shall be required."³⁴ The rule further stated that it was "the duty of the clerk to prepare and certify such record when requested by the appellant and upon payment of any fees authorized by law therefore."³⁵ The appellant, however, had the responsibility to file the record in the office of the circuit clerk.³⁶

Rule 9(b), as amended, reads as follows:

How Taken From District Court. A party may take an appeal from a district court by filing a certified copy of the district court's docket sheet, which shows the awarding of judgment and all prior entries, with the clerk of the circuit court having jurisdiction over the matter. Neither a notice of appeal nor an order granting leave to appeal shall be required. The appealing party shall serve a copy of the certified docket sheet upon counsel for all other parties, and any party proceeding pro se, by any form of mail that requires a signed receipt.³⁷

In a pre-amendment case, the Arkansas Supreme Court was faced with the question of whether a certified copy of the district court's docket sheet

30. *Id.* at 2, 299 S.W.3d at 536.

31. *Id.* at 5, 299 S.W.3d at 537.

32. *Id.* at 4, 299 S.W.3d at 536-37.

33. *In re Ark. Dist. Ct. R.; R. of Civ. P.; R. of Evid.; R. of Sup. Ct. & Ct. of App. & R. of App. P. Civ.*, 374 Ark. App'x 653, 2008 Ark. LEXIS 510.

34. ARK. DIST. CT. R. 9(b) (2008) (repealed 2010).

35. *Id.*

36. *Id.*

37. ARK. DIST. CT. R. 9(b).

was a “record of the proceedings had in the district court.”³⁸ The court held that it was.³⁹ However, the court was recently presented, in a post-amendment case, with the question of whether an appellant strictly complied with Rule 9’s requirement that he file a “certified copy of the district court’s docket sheet” where he filed an appeal transcript in the circuit court.⁴⁰ The court held that he did not and that “by not filing a certified copy of the docket sheet from the district court proceedings,” the appellant failed to perfect his appeal.⁴¹

Thus, according to the current version of Arkansas District Court Rule 9 and case law interpreting its language,⁴² appellants in civil cases from district court to circuit court must file a certified copy of the district court’s docket sheet in the circuit court of jurisdiction within thirty days from the date of the docket entry awarding judgment regardless of whether a motion is subsequently filed.

b. Final Order Rule

Pursuant to Arkansas Rule of Appellate Procedure Civil 2(a)(1), a party may appeal from a final judgment or decree of the circuit court.⁴³ Furthermore, unless a circuit judge expressly directs that a judgment is final, in accordance with Arkansas Rule of Civil Procedure 54(b)(1), “any judgment, order, or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties.”⁴⁴ Because the finality of an order is a jurisdictional issue, it will be considered by the appellate court even where the parties do not raise it.⁴⁵

i. General rules regarding a final order

Any time a claim or party remains “dangling” in the case, an order is not final for purposes of appeal.⁴⁶ Unresolved claims by an intervenor will also defeat finality.⁴⁷ Furthermore, an order is not final where parties were

38. *McNabb v. State*, 367 Ark. 93, 97, 238 S.W.3d 119, 122 (2006).

39. *Id.* at 101, 238 S.W.3d at 125.

40. *Johnson v. Dawson*, 2010 Ark. 308, at 2, ___ S.W.3d ___, ___.

41. *Id.* at 9, ___ S.W.3d at ___.

42. *Id.*, ___ S.W.3d at ___.

43. ARK. R. APP. P. CIV. 2(a)(1).

44. ARK. R. CIV. P. 54(b).

45. *See, e.g., Bevans v. Deutsche Bank Nat’l Trust Co.*, 373 Ark. 105, 108, 281 S.W.3d 740, 743 (2008).

46. *See generally* *Crockett v. C.A.G. Invs., Inc.*, 2010 Ark. 90, ___ S.W.3d ___.

47. *Schubert v. Target Stores, Inc.*, 2009 Ark. 89, at 3, 302 S.W.3d 33, 35.

dismissed orally from the bench but where the circuit judge failed to reduce the ruling to a written order.⁴⁸

One problem related to finality occurs where parties or claims are dismissed from a lawsuit without prejudice, and the Arkansas Supreme Court has addressed the effect of a voluntary nonsuit on the finality of an order many times. A partial summary judgment does not become a final, appealable order where a plaintiff requests the voluntary nonsuit of additional counts initially brought against the same defendant.⁴⁹ However, the court has also held that a summary judgment order is final and appealable where it dispenses with all claims against one defendant, even if the plaintiff takes a voluntary nonsuit against another named defendant.⁵⁰ In *Driggers v. Locke*, the court noted that an order was final under the circumstances of that case because “nothing requires a plaintiff to sue the prospective defendants simultaneously.”⁵¹ A subsequent decision reiterated the *Driggers*’s holding that a voluntary nonsuit with respect to an opposing party does not destroy the finality of an order as to the remaining parties.⁵²

In 2008, the court decided another case with finality implications under Rule 54(b).⁵³ In *Bevans v. Deutsche Bank National Trust Co.*, the court considered whether a circuit court order was final and appealable where the appellant/defendant had nonsuited all of her compulsory counterclaims against the appellee/plaintiff, and the order appealed from addressed only the appellee/plaintiff’s claims.⁵⁴ Because a defendant who nonsuits all of his or her compulsory counterclaims is not barred from bringing those claims against the plaintiffs again,⁵⁵ the *Bevans* court held that “an order or judgment providing for the nonsuit of those counterclaims, while entertaining a judgment on the plaintiff’s claims is not a final, appealable order under Rule 54(b).”⁵⁶ In *Crockett v. C.A.G. Investments, Inc.*,⁵⁷ the court relied on *Bevans* and dismissed an appeal without prejudice for failure to comply with Rule 54(b) where the defendant/appellee had voluntarily dismissed a compulsory counterclaim.⁵⁸

48. See *Cart v. Nance*, 2010 Ark. 25, at 5, ___ S.W.3d ___, ___; see also ARK. SUP. CT. ADMIN. ORDER No. 2(b)(2) (2010).

49. See *Ratzlaff v. Franz Foods of Ark.*, 255 Ark. 373, 500 S.W.2d 379 (1973); see also *Haile v. Ark. Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995).

50. *Driggers v. Locke*, 323 Ark. 63, 66, 913 S.W.2d 269, 270 (1996).

51. *Id.*, 913 S.W.2d at 270.

52. *Renfro v. Adkins*, 323 Ark. 288, 293, 914 S.W.2d 306, 308–09 (1996).

53. *Bevans v. Deutsche Bank Nat’l Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008).

54. *Id.* at 105–06, 281 S.W.3d at 741.

55. See *Linn v. NationsBank*, 341 Ark. 57, 14 S.W.3d 500 (2000).

56. *Bevans*, 373 Ark. at 109, 281 S.W.3d at 744; see also *Bell v. Simms*, 2010 Ark. App. 48, 1–2, 2010 Ark. LEXIS 27 at *1–2 (per curiam).

57. 2010 Ark. 90, ___ S.W.3d ___.

58. *Id.* at 8–10, ___ S.W.3d at ___.

ii. *Sufficiency of a 54(b) certificate*

Despite remaining claims or parties, Rule 54(b) permits a court to “direct the entry of a final judgment as to one or more but fewer than all of the claims or parties” if the judge makes “an express determination, supported by specific factual findings, that there is no just reason for delay.”⁵⁹ The Rule includes the following template:

Rule 54(b) Certificate With respect to the issues determined by the above judgment, the court finds:

[Set forth specific factual findings.]

Upon the basis of the foregoing factual findings, the court hereby certifies, in accordance with Rule 54(b)(1), Ark. R. Civ. P., that it has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the judgment shall be a final judgment for all purposes.⁶⁰

Recently, the Arkansas Supreme Court has dismissed multiple appeals because, while the order appealed from included a Rule 54(b) certificate, the certificate itself was insufficient under the rule.⁶¹ In *Kowalski v. Rose Drugs of Dardanelle, Inc.*, the court made clear that a judge “must *factually* set forth reasons in the final judgment, order, or on the record, which can then be abstracted, explaining why a hardship or injustice would result if an appeal is not permitted.”⁶² The court dismissed the appeal in *Kowalski* because, while the circuit judge attempted to include specific factual findings, those findings supported his decision to grant summary judgment, not his decision to certify a final order under Rule 54(b).⁶³ There have been a number of post-*Kowalski* cases dismissed for failing to include sufficient factual findings in the Rule 54(b) certificate.⁶⁴

59. ARK. R. CIV. P. 54(b).

60. *Id.* R. 54(b).

61. See generally *Zolliecoffer v. Beebe*, 2010 Ark. 329, ___ S.W.3d ___; *Smith v. Ark. Midstream Gas Servs. Corp.*, 2010 Ark. 32, ___ S.W.3d ___; *Ralph Lloyd Martin Revocable Trust v. Ark. Midstream Servs. Corp.*, 2009 Ark. 563, ___ S.W.3d ___; *Kowalski v. Rose Drugs of Dardanelle*, 2009 Ark. 524, ___ S.W.3d ___.

62. *Kowalski*, 2009 Ark. at 3, ___ S.W.3d at ___ (quoting *Franklin v. Osca, Inc.*, 308 Ark. 409, 411, 825 S.W.2d 812, 814 (1992)0).

63. *Id.* at 4–6, ___ S.W.3d at ___.

64. ARK. R. CIV. P. 54(b)(5).

iii. *Amendments to finality rules*

In order to address the jurisdictional problems caused by noncompliance with Rule 54(b), the Supreme Court recently amended Arkansas Rule of Civil Procedure 54(b) and Rule 3 of the Rules of Appellate Procedure.⁶⁵ Prior to January 1, 2009, when Rule 54(b)(5) became effective, finality was often destroyed because defendants who had been named but not served remained pending in the lawsuit.⁶⁶ Section 54(b)(5) was thus added and now provides that “Any claim against a named but unserved defendant, including a ‘John Doe’ defendant, is dismissed by the circuit court’s final judgment or decree.”⁶⁷

As a further effort to reduce finality problems on appeal, the Arkansas Supreme Court amended Rule 3 of the Rules of Appellate Procedure to include the following requirement:

(e) *Content of notice of appeal or cross-appeal.*

A notice of appeal or cross-appeal shall:

(vi) state that the appealing party abandons any pending but unresolved claim. This abandonment shall operate as a dismissal with prejudice effective on the date that the otherwise final order or judgment appealed from was entered. An appealing party shall not be obligated to make this statement if the party is appealing an interlocutory order under Arkansas Rule of Appellate Procedure Civil 2(a)(2)–(a)(13), Arkansas Rule of Appellate Procedure Civil 2(c), or Arkansas Supreme Court and Court of Appeals Rule 6-9(a), or is appealing a partial judgment certified as final pursuant to Arkansas Rule of Civil Procedure 54(b).⁶⁸

In the amendment to the reporter’s notes, the court made clear that subdivision (e) of the rule was amended to add the new requirement that every notice of appeal and cross-appeal include a statement that the appealing party is abandoning any pending but unresolved claim and that the abandonment operates as a dismissal with prejudice of the stray claims.⁶⁹ According to the notes, the rule was amended in order to “cure a recurring finality problem,” noting that “[t]oo often—after the parties have paid for the

65. *In re* Ark. R. Sup. Ct. & Ct. of App.; R. App. P. Civ.; & R. Civ. P., 2010 Ark. 288, 2010 Ark. LEXIS 320 (per curiam).

66. *See, e.g.*, *Downing v. Lawrence Hall Nursing Ctr.*, 368 Ark. 51, 243 S.W.3d 263 (2006) (noting “John Doe” defendant remained and defeated finality).

67. ARK. R. CIV. P. 54(b)(5).

68. *In re* Ark. R. Sup. Ct. & Ct. of App.; R. App. P. Civ.; & R. Civ. P., 2010 Ark. 288, at 19–20, 2010 Ark. LEXIS 320, at 20–21 (per curiam); ARK. R. APP. P. CIV. 3(e)(vi) (effective July 1, 2010).

69. *In re* Ark. R. Sup. Ct. & Ct. App., 2010 Ark. at 21, 2010 Ark. LEXIS at *22.

record, filed it, and filed all their briefs on appeal—the appellate court will discover that what appears to be a final order or judgment is not final.”⁷⁰

III. SUPREME COURT RULES – NEW ABSTRACT AND ADDENDUM RULES

In the 2006–07 term of the Arkansas Supreme Court, rebriefing was ordered in eleven cases; in the 2007–08 term, in nine; in the 2008–09 term, in nineteen; in the 2009–10 term, in seven; and thus far in the 2010–11 term, in three.⁷¹ In 2007, the Arkansas Supreme Court issued a per curiam opinion related to the recurring problem of deficient briefs.⁷² However, the problem persisted, and on June 4, 2009, the Court adopted changes to its briefing rules, effective January 1, 2010.⁷³ This section will focus on the changes to Rule 4-2, which governs the contents of briefs before the Arkansas Supreme Court and Court of Appeals.⁷⁴

All appellate briefs must include these eight sections, in the following order: (1) Table of Contents; (2) Information Statement and Jurisdictional Statement; (3) Points on Appeal; (4) Table of Authorities; (5) Abstract; (6) Statement of the Case; (7) Argument; and (8) Addendum.⁷⁵ Because most rebriefing is ordered due to deficiencies in the abstract and addendum, this section will address the important requirements related to those sections and will highlight changes from the previous rules.

Rule 4-2(a)(5) provides that “[t]he appellant shall create an abstract of the material parts of all the transcripts (stenographically reported material) in the record.”⁷⁶ The new rule expressly states that “[i]nformation in a transcript is material if the information is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal.”⁷⁷ The rule as amended is broken into three subsections: (A) Con-

70. *Id.*, 2010 Ark. LEXIS at *22.

71. *In re* Ark. Sup. Ct. & Ct. of App. R. 4-1 and 4-2, 2009 Ark. 350, at 3, 2009 Ark. LEXIS 350, at *1 (per curiam); Per Curiam Opinions by the Ark. Sup. Ct., available at <http://opinions.aoc.arkansas.gov>, (follow “Supreme Court Opinions Spring Term 2009 to present” hyperlink, then search the submission date for each, then search the syllabus, and finally look to see how many per curiam opinions were handed down ordering rebriefing). The 2010–11 term number is accurate as of October 1, 2010.

72. *In re* Appellate Practice Concerning Defective Briefs, 369 Ark. App’x 553, 2007 Ark. LEXIS 187 (2007).

73. *In re* Ark. Sup. Ct. and Ct. of App. R. 4-1 and 4-2, 2009 Ark. 350, 2009 Ark. LEXIS 350 (per curiam).

74. It is also worth noting, however, that Rule 4-1 was amended to require that briefs be submitted in a 14-point serif font. The length of the argument section was extended to thirty double-spaced pages. ARK. R. SUP. CT. 4-1(a)–(b).

75. ARK. SUP. CT. R. 4-1(a)(1)–(8).

76. *Id.* R. 4-2(a)(5).

77. *Id.*

tents; (B) Form; and (3) Miscellaneous.⁷⁸ Unlike the pre-amended rule, the current version provides examples of where, depending on the case, material information may be found: “counsel’s statements and arguments, voir dire, testimony, objections, admissions of evidence, proffers, colloquies between the court and counsel, jury instructions (if transcribed), and rulings.”⁷⁹

Another difference between the old and the new rule is that previously, exhibits were to be included in the addendum, not in the abstract.⁸⁰ Now, all exhibits, other than transcripts, are to be included in the addendum, while exhibits in transcript form must be included in the abstract.⁸¹ Finally, the new version of the rule permits an appellant to bind an abstract and addendum separately if it exceeds 250 pages without filing a motion seeking permission to do so.⁸²

Rule 4-2(a)(8), regarding the brief’s addendum, has also undergone significant substantive and organizational changes. Under the old version of the rule, an appellant was required to include in the addendum “true and legible photocopies of the order, judgment, or decree, ruling, letter opinion, or Workers’ Compensation Commission opinion from which the appeal is taken, along with any other relevant pleadings, documents, or exhibits essential to an understanding of the case and the Court’s jurisdiction on appeal.”⁸³ The rule then listed material that may be necessary to include in the addendum.⁸⁴

Like the new rule on abstracting, the current version of Rule 4-2(a)(8) is organized into subsections: (A) Contents, (B) Form, (C) Supplemental Addendum, and (D) Miscellaneous.⁸⁵ Some of what was included in the old version of Rule 4-2(a)(8) remains, but the new version of Rule 4-2(a)(8)(A) is much more comprehensive. Because the problem of rebriefing for deficient addendums has been so common in recent years, Rule 4-2(a)(8)(A) is included in its entirety:⁸⁶

78. *Id.*

79. *Id.* R. 4-2(a)(5)(A).

80. *Id.* R. 4-2(a)(5)(A) (2009) (repealed 2010).

81. ARK. SUP. CT. R. 4-2(a)(5)(A).

82. *Id.* R. 4-2(a)(5)(C)(ii).

83. ARK. SUP. CT. R. 4-2(a)(8) (2008) (repealed 2010).

84. *Id.* (noting “a contract, will, lease, or any other document; proffers of evidence; jury instructions or proffered jury instructions; the court’s findings and conclusions of law; orders; administrative law judge’s opinion; discovery documents; requests for admissions; and relevant pleadings or documents essential to the Court’s jurisdiction on appeal such as the notice of appeal.”).

85. *Id.* R. 4-2(a)(8)(A)–(D).

86. The bullets were included by the author for clarity. They do not exist in the rule itself.

(A) *Contents.*

(i) The addendum must include the following documents:

- the pleadings (as defined by Rule of Civil Procedure 7(a)) on which the circuit court decided each issue: complaint, answer, counterclaim, reply to counterclaim, cross-claim, answer to cross-claim, third-party complaint, and answer to third-party complaint. If any pleading was amended, the final version and any earlier version incorporated therein shall be included;
- all motions (including posttrial and postjudgment motions), responses, replies, exhibits, and related briefs, concerning the order, judgment, or ruling challenged on appeal. But if a transcript (stenographically reported material) of a hearing, deposition, or testimony is an exhibit to a motion or related paper, then the material parts of the transcript shall be abstracted, not included in the addendum. The addendum shall also contain a reference to the abstract pages where the transcript exhibit appears as abstracted;
- any document essential to an understanding of the case and the issues on appeal, such as a will, contract, lease, note, insurance policy, trust, or other writing;
- in a case where there was a jury trial, the jury's verdict forms;
- defendant's written waiver of right to trial by a jury;
- in a case where there was a bench trial, the court's findings of fact and conclusions of law, if any;
- the order, judgment, decree, ruling, letter opinion, or administrative agency decision from which the appeal is taken. In workers' compensation appeals, the administrative law judge's opinion shall be included when it is adopted in the order of the full commission. If the order (however named) incorporates a bench ruling, then that ruling must be abstracted and the addendum must contain a reference to the abstract pages where the information appears as abstracted. The transcript (stenographically reported material) containing the ruling may also be copied in the addendum or omitted, at the appellant's choice;
- all versions of the order (however named) being challenged on appeal if the court amended the order;
- any order adjudicating any claim against any party with or without prejudice;
- any Rule of Civil Procedure 54(b) certificate making an otherwise interlocutory order a final judgment;

- all notices of appeal;
- any postjudgment motion that may have tolled the time for appeal, and is therefore necessary to decide whether a notice of appeal was timely filed;
- any motion to extend the time to file the record on appeal, and any related response, reply, or exhibit;
- any order extending the time to file the record on appeal; and
- any other pleading or document in the record that is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. For example, docket sheets, superseded pleadings, discovery related documents, proffers of documentary evidence, jury instructions given or proffered, and exhibits (such as maps, plats, photographs, computer disks, CDs, DVDs).⁸⁷

The portion of the rule related to the procedures to be followed when an insufficient abstract or addendum is filed remains largely unchanged. The problem can be dealt with in one of three ways: (1) an appellee may call defective briefs “to the court’s attention and may, at the appellee’s option, contain a supplemental abstract or addendum”; (2) “[i]f the case has not yet been submitted to the court for decision, an appellant may file a motion to supplement the abstract or addendum and file a substituted brief”; or (3) “the court may address the question at any time” and can afford the appellant an opportunity to cure any deficiencies within fifteen days.⁸⁸ However, the rule also provides that, “[i]f after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, Addendum and brief within the prescribed time, the judgment or decree may be affirmed for noncompliance with the Rule.”⁸⁹

Rule 4-2(c) contemplates any type of briefing deficiency, other than with respect to the abstract and addendum, and states that the Clerk of the Supreme Court shall not accept briefs that do not comply with the format requirements of Rules 4-1 and 4-2, but “shall mark the brief ‘tendered’ [and shall] grant the part a seven-day compliance extension.”⁹⁰ If a brief is accepted for filing and subsequently format deficiencies are discovered, the court may grant the party fifteen days to cure the noncompliance under the

87. *Id.* R. 4-2(a)(8)(A).

88. *Id.* R. 4-2(b)(1)–(3).

89. *Id.* R. 4-2(b)(3); *see also* Meyer v. CDI Contractors, LLC, 2009 Ark. 304, 318 S.W.3d 87 (per curiam) (*aff’d* for noncompliance with Rule 4-2).

90. ARK. SUP. CT. R. 4-2(c)(1).

procedure addressed in Rule 4-2(b)(3).⁹¹ However, the new version of Rule 4-2 includes the following language:

After the opportunity to cure deficiencies has been afforded pursuant to Rule 4-2(b)(3) or (c)(2), attorneys who fail to comply with the requirements of this rule may be referred to the Office of Professional Conduct, and in addition, may be subject to any of the following: (A) contempt, (B) suspension of the privilege to practice before the Supreme Court or Court of Appeals for a specified time or until the attorney can demonstrate a satisfactory competency of the rules, or (C) imposition of any of the sanctions listed in Rule 11(c) of the Rules of Appellate Procedure-Civil.⁹²

Attorneys practicing before the Arkansas Supreme Court and the Arkansas Court of Appeals should take the time to familiarize themselves with the courts' rules. Furthermore, as this article has noted, the rules are frequently amended, and appellate practitioners should make sure to educate themselves on any rule changes adopted by the Arkansas Supreme Court. Otherwise, precious time and resources are wasted when the court is required to delay an appeal due to noncompliant briefs.

IV. PRESERVATION

Thus far, this article has largely focused on rules-based procedural and jurisdictional pitfalls. However, some of the most common mistakes result from a failure to preserve issues and arguments for appellate review. These preservation requirements arise from rules and from case law. Some of the most frequent problems include the following: the failure to make a specific, contemporaneous objection in the trial court; the failure to make the same argument on appeal as was made to the trial court; and the failure to obtain a ruling below. A specific difficulty arises in preserving challenges to the sufficiency of the evidence. This section will address each issue in turn.

The Arkansas Supreme Court has uniformly held that while objections do not need to cite specific rules, a party must specifically object at the trial court in order to preserve an issue for appeal.⁹³ To preserve an argument for appeal, the objection must be "sufficient to apprise the [trial] court of the particular error alleged."⁹⁴ On a related point, it is, likewise, well settled

91. *Id.* R. 4-2(c)(2).

92. *Id.* R. 4-2(c)(3); *see also* Lee v. State, 375 Ark. 421, 291 S.W.3d 188 (2009) (attorneys were referred to the Committee on Professional Conduct because rebriefing was ordered two times).

93. *See, e.g.*, Gilliland v. State, 2010 Ark. 135, at 10, ___ S.W.3d ___, ___; *see also* Bell v. Misenheimer, 2009 Ark. 222, 3-4, 308 S.W.3d 120, 122.

94. *Gilliland*, 2010 Ark. at 10, ___ S.W.3d at ___.

that an appellate court will not consider an argument raised for the first time on appeal.⁹⁵ In *Exigence, LLC v. Baylark*, the court made clear that “a party cannot change the grounds for an objection or motion on appeal, but is bound by the scope and nature of the arguments made at trial.”⁹⁶ Finally, appellate courts will not consider arguments on appeal if the party failed to obtain a ruling from the trial court.⁹⁷

The court has explained the rules of preservation as follows:

It is elementary that this court will not consider arguments that are not preserved for appellate review. We will not do so because it is incumbent upon the parties to raise arguments initially to the trial court in order to give that court an opportunity to consider them. Otherwise, we would be placed in the position of possibly reversing a trial court for reasons not addressed by that court.⁹⁸

As a final point, this article will address preserving a sufficiency-of-the-evidence argument because there are subtle differences between the criminal and civil rules.⁹⁹ The rules also distinguish between jury trials and bench trials.¹⁰⁰

According to Arkansas Rule of Criminal Procedure 33.1, “[i]n a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution *and* at the close of all of the evidence.”¹⁰¹ In nonjury trials, the motion is called a motion for dismissal, and “it shall be made at the close of all of the evidence.”¹⁰² Thus, in a bench trial, a criminal defendant is not required to move for dismissal at the close of the prosecution’s case and again at the close of all of the evidence. If, however, a motion for dismissal is made at the close of the prosecution’s case, it must be renewed at the close of all of the evidence.¹⁰³ The Arkansas Supreme Court has also made clear that a motion for directed verdict or for dismissal made during closing arguments instead of at the close of evidence does not satisfy Rule 33.1 and, thus, does not preserve a sufficiency-of-the-evidence argument for appellate review.¹⁰⁴

95. See, e.g., *Exigence, LLC v. Baylark*, 2010 Ark. 306, at 10, ___ S.W.3d ___, ___.

96. *Id.*, ___ S.W.3d at ___.

97. See, e.g., *Simpson Hous. Solutions, LLC v. Hernandez*, 2009 Ark. 480, at 22, ___ S.W.3d ___, ___.

98. *Bell*, 2009 Ark. at 3–4, 308 S.W.3d at 122 (internal citations omitted).

99. ARK. R. CRIM. P. 33.1; ARK. R. CIV. P. 50.

100. ARK. R. CRIM. P. 33.1; ARK. R. CIV. P. 50.

101. ARK. R. CRIM. P. 33.1(a) (emphasis added).

102. *Id.* R. 33.1(b).

103. *Id.*

104. See, e.g., *Grube v. State*, 2010 Ark. 171, at 12–13, ___ S.W.3d ___, ___; see also *McClina v. State*, 354 Ark. 384, 123 S.W.3d. 883 (2003).

Whether a motion for directed verdict in a jury trial or a motion for dismissal in a bench trial, the defendant's motion "must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense."¹⁰⁵

Arkansas Rule of Civil Procedure 50(a) provides as follows:

(a) *Motion for Directed Verdict or Dismissal When Made; Effect.* A party may move for a directed verdict at the close of the evidence offered by an opponent and may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the extent as if the motion had not been made. A party may also move for a directed verdict at the close of all of the evidence. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. In nonjury cases a party may challenge the sufficiency of the evidence at the conclusion of the opponent's evidence by moving either orally or in writing to dismiss the opposing party's claim for relief. The motion may also be made at the close of all of the evidence and in every instance the motion shall state the specific grounds therefor.¹⁰⁶

Rule 50(e) gives further guidance about preserving a sufficiency-of-the-evidence challenge in civil cases, stating that "[i]n a jury trial, a party who does not have the burden of proof on a claim or defense must move for a directed verdict based on insufficient evidence at the conclusion of all the evidence to preserve a challenge to the sufficiency of the evidence for appellate review."¹⁰⁷

Therefore, according to Rule 50, in a civil case, a party may move for directed verdict or for dismissal at the close of the opponent's case or at the close of all of the evidence,¹⁰⁸ but to preserve the issue for appellate review in a jury trial, the motion must be made at the close of the evidence.¹⁰⁹ Case law from the Arkansas Supreme Court also makes clear that a party is not required to move for dismissal in a civil bench trial to preserve a sufficiency-of-the-evidence claim for appellate review.¹¹⁰

105. ARK. R. CRIM. P. 33.1(c).

106. ARK. R. CIV. P. 50(a).

107. *Id.* R. 50(e).

108. *Id.* R. 50(a).

109. *Id.* R. 50(e).

110. *Oates v. Oates*, 340 Ark. 431, 435, 10 S.W.3d 861, 864 (2000); *see also Grube v. State*, 2010 Ark. 171, at 12, ___ S.W.3d at ___ (distinguishing ARK. R. CRIM. P. 33.1 from ARK. R. CIV. P. 50 and citing *Oates*).

V. CONCLUSION

In sum, there are many procedural and jurisdictional pitfalls to avoid in Arkansas appellate practice. While this article has not covered all of the possible mistakes a practitioner can make, it has addressed some of the most common. In addition, the author hopes that it will bring to the attention of the practicing bar important case law regarding these issues and relevant rule changes so that our state's appellate courts can function as efficiently as possible.

