NO. CA 10-925

IN THE
ARKANSAS COURT OF APPEALS

STEPHEN "TOOF" BROWN, JOHN ROGERS, AND MID-CENTRAL PLUMBING, INC. — APPELLANTS

VS.

BRIAN KELTON — APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF PULASKI COUNTY
THE HONORABLE CHRIS PIAZZA

BRIEF FOR APPELLEE BRIAN KELTON

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STATEMENT OF THE CASE

This appeal concerns whether or not an attorney (Appellant Brown) employed by an insurance company (Farmers Insurance Exchange, or "FIE") may represent the insurance company's insured (Appellants Rogers and Mid-Central Plumbing Co., Inc., the "Appellant Insureds"). Brown Addendum ("Add.") 248–256. In the underlying case, the Appellee was in a motor vehicle collision caused by the Appellant Insureds. Add. 1–6. FIE provided an insurance policy covering the collision and was under a duty to defend the tortfeasors under such policy. Add. 159. Practically speaking, the damages suffered by Appellee are within the $1,000,000 policy limits underwritten by FIE. Add. 236–37.

Shortly after an attorney with an independent law firm filed an answer on behalf of the Appellant Insureds, Appellant Brown sought to substitute as counsel in the case. Add. 88–89, 105, 182, 236–37. Appellee opposed substitution and sought disqualification of Appellant Brown. Add. 15–48. Appellant Brown and the Appellant Insureds opposed disqualification, although the exact nature of the opposition raised by the Appellant Insureds before the trial court is disputed on appeal. Add. 15, 86, 236–37; Arg. 29–30.

In the trial court, the disqualification issue centered on two issues: (1) would representation by Appellant Brown constitute the unauthorized practice

of law? or (2) would representation by Appellant Brown run afoul of the Arkansas Rules of Professional Conduct relating to informed consent, dual representation, attorney independence, and client confidentiality? Add. 237. The trial court answered both questions in the affirmative and disqualified Appellant Brown. Add. 237.

The trial court interpreted Ark. Code Ann. § 16-22-211(a) and (c) as prohibiting a corporation from representing a third party in litigation. Add. 237–241. Subsection (d) of that statute contains an exception to the general prohibition on corporate representation that permits corporate representation "[1] in and about its own immediate affairs or [2] in litigation to which it is a party." Add. 238. The trial court interpreted these two exceptions disjunctively and rejected the Appellants' proffered interpretation that would permit a corporation to represent third parties in litigation when the representation involved the corporation's "own immediate affairs." Add. 239–241. The trial court reasoned that such an interpretation of the first exception was contrary to the plain meaning of the statute and would render the second exception superfluous in violation of established canons of statutory construction. Add. 239–240.

On appeal, the Appellants challenge the trial court's construction of Ark. Code Ann. § 16-22-211. Add. 248. In order to prevail on this argument, the

Appellants bear the burden of showing that the trial court erred as a matter of law in its statutory construction. Alternatively, the Appellants challenge whether these statutes are constitutional under Ark. Const. Amend. 28. In order to carry their burden, the Appellants will have to overcome the doctrine of *stare decisis* by showing that the Arkansas Supreme Court's prior decisions construing these statutes as consistent with Amendment 28 are now patently unfair or manifestly unjust.

The trial court also concluded that representation by Appellant Brown would violate the Arkansas Rules of Professional Conduct. Add. 242–47. Such ruling necessarily found that the Appellee had standing to challenge Appellant Brown's conflict as affecting the ethical duty of attorneys to report conduct not meeting the guidelines governing the legal profession. Add. 242. The trial court also found that Appellant Brown had a concurrent conflict of interest that had not been waived at the time of substitution. Add. 243–47.

On appeal, the Appellants challenge the trial court's finding of a conflict of interest. In order to prevail, the Appellants must show clear error on the part of the trial court in disagreeing with the Appellants' position that the "perfect alignment" of interests as between Appellant Brown and the Appellant Insureds eliminated any potential conflict.

This Court may affirm if it finds that the trial court was correct in determining either that Appellant Brown's representation constituted the unauthorized practice of law by his employer or that Appellant Brown's representation constituted a conflict of interest as between the insured and his employer. That is, affirmance of just one of the two points ruled upon by the trial court would be sufficient for this Court to affirm the trial court's disqualification of Appellant Brown.

ARGUMENT

I. The trial court properly applied Ark. Code Ann. § 16-22-211 in disqualifying Appellant Brown from representing FIE's insureds.

A. Standard of Review

The standard of review for construction of statutes and constitutional provisions is as follows:

> When interpreting the constitution on appeal, our task is to read the laws as they are written, and interpret them in accordance with established principles of constitutional construction. It is this court's responsibility to decide what a constitutional provision means, and we will review a lower court's construction *de novo*. We are not bound by the decision of the trial court; however, in the absence of a showing that the trial court erred in its interpretation of the law, that interpretation will be accepted as correct on appeal. Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning. Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision.

Edwards v. Campbell, 2010 Ark. 398, at 4 (citations omitted); *see also City of Little Rock v. Carpenter*, 374 Ark. 511, 516–17, 288 S.W.3d 647, 651 (2008) (quoting *Harris v. City of Fort Smith*, 366 Ark. 277, 280, 234 S.W.3d 875, 878 (2006)) (setting forth the same guidelines for reviewing statutory construction).

In addition, this Court looks to additional canons of construction when interpreting the text of a statute:

> The basic rule of statutory construction is to give effect to the intent of the legislature. Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. **We construe the statute so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible**.

Riceland Foods, Inc. v. Pearson, 2009 Ark. 520, at 10 (quoting *Great Lakes Chem. Corp. v. Bruner*, 368 Ark. 74, 82, 243 S.W.3d 285, 291 (2006)) (emphasis added).

B. Ark. Code Ann. § 16-22-211 explicitly defines when a corporation's attorneys may represent a party during litigation — when the corporation itself is a party, only.

The trial court ruled that Ark. Code Ann. § 16-22-211 generally forbids a corporation from practicing law through its employees. This interpretation is consistent with the plain language of such statute, which provides:

> (a) **It shall be unlawful for any corporation … to … appear as an attorney at law for any person in any court in this state** or before any judicial body, to make it a business to practice as an attorney at law for any person in any of the courts, … **to furnish attorneys** or counsel, to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner **to assume to be entitled to practice law or to assume … the title of lawyer or attorney**, attorney at law, or equivalent terms in any language in such a manner as

> to convey the impression that it is entitled to practice law or to furnish legal advice, service, or counsel….
>
> * * *
>
> (c) **The fact that any officer, trustee, director, agent, or employee shall be a duly and regularly admitted attorney at law shall not be held to permit or allow any such corporation or voluntary association to do the acts prohibited in this section**….

Ark. Code Ann. § 16-22-211(a) and (c) (emphasis added). The Appellants concede that Appellant Brown is an employee of Farmers Insurance Exchange ("FIE"), an insurance company, such that Ark. Code Ann. § 16-22-211 applies. Brown Ab. at 2.

The Appellants urge this Court to find that Appellant Brown's representation is permitted by an exception to the general prohibition on the corporate practice of law, set forth below:

> This section shall not … prohibit a corporation or a voluntary association from employing an attorney or attorneys [1] **in and about its own immediate affairs or** [2] **in any litigation to which it is or may become a party**.

Ark. Code Ann. § 16-22-211(d) (numerals and emphasis added). That is, the Appellants argue that because FIE will be liable for any money damages, this litigation involves FIE's own immediate affairs. The trial court rejected this argument and construed the first exception (own immediate affairs) and the

second exception (litigation to which it is a party) as mutually exclusive. That is, the trial court held that the first exception related to non-litigation affairs (i.e., transactional work), and the second exception alone dealt with litigation.

On appeal, the Appellants argue that the two exceptions are not mutually exclusive. That is, the Appellants would have this Court treat the two exceptions, from a grammatical standpoint, as overlapping items intended not to be exclusive, but rather to be merely demonstrative of excepted conduct. *See* Brown's Arg. 9. Such an interpretation would advance a broad construction of the two exceptions. This is contrary to the Arkansas Supreme Court's customarily narrow approach to statutory exceptions, which is to resolve all doubts in favor of the general rule and against the exception. *See Purdy v. Livingston*, 262 Ark. 575, 582, 559 S.W.2d 24, 28 (1971) (worker's compensation exceptions narrowly construed); *see also Orsini v. State*, 340 Ark. 665, 670, 13 S.W.3d 167, 170 (2000) (FOIA exception); *Bailey v. State*, 334 Ark. 43, 59, 972 S.W.2d 239, 248 (1998) (fighting words exception to the First Amendment) (Newbern, J., concurring in part and dissenting in part); *Ragar v. Brown*, 332 Ark. 214, 223, 964 S.W.2d 372, 377 (1998) (exceptions to the occurrence rule in malpractice cases); *BB&B Constr. Co. v. FDIC*, 316 Ark. 663, 672, 875 S.W.2d 48, 51–52 (1994) (lien statutes are specific exceptions to common law and are thus narrowly construed); *Cogburn v. State*, 292 Ark. 564,

577, 732 S.W.2d 807, 814 (1987) (exceptions to the hearsay doctrine "should be narrowly defined and strictly construed against the exception"); *St. Edward Mercy Med. Ctr. v. Ellison*, 58 Ark. App. 100, 106, 946 S.W.2d 726, 728 (1997) (at-will employment doctrine exceptions).

The trial court correctly rejected the Appellant's broad proposed construction as contrary to the plain meaning of the statute. Add. 239–40. Under the Appellant's proposed definition, the "own immediate affairs" exception would be defined for an insurer as "litigation to which it is not a party." If interpreted this way, the subsection of statute containing both exceptions would read:

> This section shall not … prohibit a corporation or a voluntary association from employing an attorney or attorneys [1] **in litigation to which it is not a party or** [2] **in any litigation to which it is a party**.

This absurd result would permit a corporation to litigate regardless of whether it was a party to the lawsuit despite the express language of the statute. A statute must be interpreted consistently with its plain meaning, *Clark v. Johnson Reg'l Med. Ctr.*, 2010 Ark. 115, at 7–8, and the plain meaning of the statute at issue here is that corporations may only represent themselves in litigation.

Furthermore, the trial court found that adopting the Appellants' interpretation of the "own immediate affairs" exception would render the

litigation exception superfluous. Add. 239. Litigation to which a corporation is a party obviously involves that corporation's own immediate affairs. This is demonstrated by an often-quoted statement from the seminal case on this issue, *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954) ("*UNB*"): "**a corporation may represent itself** in connection with its own business or affairs **in the courts of this state**." *All City Glass & Mirror, Inc. v. McGraw Hill Info. Sys.*, 295 Ark. 520, 521, 750 S.W.2d 395, 395 (1988) (quoting *UNB*, 224 Ark. at 51, 273 S.W.2d at 410) (emphasis added). Because it refers to a corporation's own affairs, this statement from the *UNB* case harmonizes the exceptions by explicitly defining which parties a corporation may represent in court: the corporation itself, only. *See Ark. Dep't of Econ. Dev. v. William J. Clinton Pres. Found.*, 364 Ark. 40, 48, 216 S.W.3d 119, 124–25 (2005) (provisions of a statute are interpreted "to make them consistent, harmonious, and sensible in an effort to give effect to every part").

Nothing in the above statement from the *UNB* case supports the proposition that a corporation may represent another in connection with its own affairs. To interpret the "own immediate affairs" exception otherwise would render the litigation exception entirely meaningless and would run afoul of the longstanding rule of statutory construction requiring all words of a statute to be given life and meaning. *See Riceland Foods, Inc. v. Pearson*, 2009 Ark. 520, at

17–18 (applying a plain language construction to a lien statute in order to avoid a construction that would render parts of the statute superfluous); *see also Byrd v. Chase*, 10 Ark. 602, 650 (1850).

Because the only way to interpret Ark. Code Ann. § 16-22-211 according to its plain meaning such that no words are rendered superfluous is to conclude that a corporation may only represent itself in litigation, the Appellants cannot carry their burden of showing that the trial court made an error of law.

C. The facts of the *UNB* case are sufficiently similar to this case such that the trial court's reliance upon the *UNB* case should be affirmed.

The Appellants argue that the *UNB* case is distinguishable because the issue before the Court in that case was not about whether a corporation was representing third parties in and about its own immediate affairs. Brown Arg. 7. To the contrary, that was precisely the issue in the *UNB* case.

In the *UNB* case, a bank's trust department was representing trust and estate clients of the bank through licensed attorneys, and the bank argued that representing trusts and estates as the personal representative involved the bank's own immediate affairs. *UNB*, 224 Ark. at 52, 273 S.W.2d at 411. The Arkansas Supreme Court disagreed and concluded that representation of estates and trusts constituted the unauthorized practice of law under the predecessor to the statute at issue in this case. *Id.* The Court reasoned that the bank was "acting

for others who ordinarily would be the beneficiaries" of the estate or trust, rather than for itself. *Id.* at 52, 273 S.W.2d at 411. Furthermore, the bank could not represent to the public that "it has, owns, conducts or maintains a law office or any office for the practice of law, or for furnishing legal advice, services or counsel.'" *Id.* at 56, 273 S.W.2d at 413.

In this case, FIE (through Appellant Brown) is attempting to represent its insureds, who are merely the beneficiaries of an insurance policy with FIE. The terms of that policy include the right to settle at FIE's sole discretion. Add. 160. As with the bank's interest in the *UNB* case, FIE's interest in this case arises because FIE stands in a fiduciary relationship with the insured to act in the insured's best interests. *S. Farm Bureau Cas. Ins. Co. v. Parker*, 232 Ark. 841, 848–49, 341 S.W.2d 36, 41 (1960) (quoting *Am. Fidelity & Cas. Co. v. Nichols*, 173 F. 2d 830, 832 (10th Cir. 1949)) (an insurer's irrevocable right to settle a claim on behalf of an insured creates a fiduciary duty to act in the insured's best interests). Furthermore, FIE represents to the public that it maintains the law firm of Stewart C. Stallings & Associates. Add. 159. Given these similarities to the *UNB* case, it was proper for the trial court to rely upon the *UNB* case in disqualifying Appellant Brown from representing FIE's insureds.

D. Ark. Code Ann. § 16-22-211 is constitutional under Ark. Const. Amend. 28.

Appellants attempt an end-run around Ark. Code Ann. § 16-22-211 by arguing that this statute is unconstitutional under Ark. Const. Amend. 28. The problem with this argument is that it was expressly addressed and rejected in the *UNB* case. There, the Arkansas Supreme Court considered Amendment 28 in arriving at its decision based upon the predecessor statute to Ark. Code Ann. § 16-22-211. However, in that case the Arkansas Supreme Court stated that the judiciary had "given approval to certain enactments by the legislative body," which were "considered to be in aid of the judicial prerogative to regulate the practice of law and not in derogation thereof." *UNB*, 224 Ark. at 54, 273 S.W.2d at 412.

This practical approach taken by the *UNB* Court has subsequently been followed in a number of Arkansas Supreme Court cases. One later case explained the interplay between statutes affecting the practice of law and Amendment 28 as follows:

> Amendment 28 certainly put to rest for all time any possible question about the power of the courts to regulate the practice of law in the state. There can be no doubt that the power of the judicial department, acting through this court, is, in this respect, exclusive and supreme under this amendment, if the power was not already inherent in the courts. This does not mean, however, that adoption of this amendment had the

> effect of invalidating every act of the General Assembly bearing upon the subject, particularly those passed prior to the effective date of the amendment, if they are not necessarily in irreconcilable conflict with or repugnant to the amendment. An existing statute is superseded by a subsequent constitutional amendment only when there is an irreconcilable conflict or the statute is necessarily repugnant to the new constitutional provision. A basic and fundamental rule applicable in consideration of the effect of both statutes and constitutional amendments is that repeal by implication is not looked upon with favor and is never allowed by the courts except where there is such an invincible repugnancy between the former and later provisions that both cannot stand together.
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> * * *
>
> We seem definitely to have chosen to recognize and apply certain statutes which are not necessarily inconsistent with, or repugnant to, court rules, and do not hinder, interfere with, frustrate, pre-empt or usurp judicial powers, at least when the statutes were, at the time of enactment, clearly within the province of the legislative branch and when the courts have not acted in the particular matter covered by the statute.

McKenzie v. Burris, 255 Ark. 330, 341–42, 500 S.W.2d 357, 364–65 (1973) (citations omitted) (citing *UNB*).

Given the express pronouncement of the *UNB* and later cases, Amendment 28 does not render Ark. Code Ann. § 16-22-211 unconstitutional unless the Arkansas Supreme Court elects to reverse the *UNB* case and other cases relying upon it.

II. The doctrine of *stare decisis* mandates against reversal because the Appellants have not demonstrated that the *UNB* case is patently wrong or manifestly unjust such that a break with precedent is unavoidable.

A. Standard of Review

It is well-settled that all Arkansas courts are bound to follow prior case law under the doctrine of *stare decisis*. *Council of Co-Owners for the Lakeshore Resort & Yacht Club Horizontal Prop. Regime v. Glyneu, LLC*, 367 Ark. 397, 402, 240 S.W.3d 600, 605 (2006) (citing *Low v. Ins. Co. of N. Am.*, 364 Ark. 427, 431, 220 S.W.3d 670, 673 (2005)). This Court has previously held:

> [I]t is necessary, as a matter of public policy, to uphold prior decisions unless great injury or injustice would result. The policy behind *stare decisis* is to lend predictability and stability to the law. In matters of practice, adherence by a court to its own decisions is necessary and proper for the regularity and uniformity of practice, and that litigants may know with certainty the rules by which they must be governed in the conducting of their cases. Precedent governs until it gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable.

Couch v. Farmers Ins. Co., 375 Ark. 255, 263, 289 S.W.3d 909, 916 (2008) (citations omitted).

The burden of proving that this Court should break from the rule of *stare decisis* lies with the Appellants. *State Auto Prop. & Cas. Ins. Co. v. Ark. Dep't of Envtl. Qual.*, 370 Ark. 251, 258–59, 258 S.W.3d 736, 742 (2007).

B. Because two other states prohibit insurers from using in-house counsel to represent insureds, the Appellants cannot meet the strict burden of proof required to overcome *stare decisis*.

The *UNB* case has been well-received over the past 56 years, and was cited by the Arkansas Supreme Court as recently as 2009 for the elements of the unauthorized practice of law. *Union Pac. R.R. v. Vickers*, 2009 Ark. 259, at 13. Accordingly, in order to overturn the *UNB* case and deem Ark. Code Ann. § 16-22-211 unconstitutional, the Arkansas Supreme Court will have to break with 56 years of precedent. For this to happen, the Appellants must carry their burden of proving that the result in the *UNB* case and its progeny is so patently wrong or manifestly unjust that a break from precedent is unavoidable. *State Auto Prop. & Cas. Ins. Co. v. Ark. Dep't of Envtl. Qual.*, 370 Ark. 251, 258–59, 258 S.W.3d 736, 742 (2007) (setting burden of proof in *stare decisis* cases).

The Appellants attempt to carry their burden solely by looking to the law of other states discussing the interplay between the representation of insureds by in-house counsel, the unauthorized practice of law, and ethical prohibitions on trying to serve two clients. This argument might carry the strict burden applicable under the doctrine of *stare decisis* if every single state addressing the issue had decided against the trial court's position. However, this is not the case; both Kentucky and North Carolina have also prohibited insurers from representing insureds with in-house counsel. *Am. Ins. Ass'n v. Ky. Bar Ass'n*,

917 S. W.2d 568 (Ky. 1996); *Gardner v. N.C. State Bar*, 316 N.C. 285, 341 S.E.2d 517 (N.C. 1986). Decades after the *UNB* case, two other state supreme courts came down firmly on the side taken by the trial court in this case. As such, the Appellants cannot show that the trial court's decision is patently unfair or manifestly unjust, or that a break from precedent is unavoidable.

The Appellants rely heavily on *Unauthorized Practice of Law Comm. v. Am. Home Assur. Co.*, 261 S.W.3d 24, 39 (Tex. 2008) ("*AHAC*"), stating that the unauthorized practice of law statute in that case is "similar" to the statute at issue in this case. The Texas statute at issue, Tex. Gov't Code § 81.101(a), defines the practice of law as "the rendering of legal services for someone else." *AHAC*, 261 S.W.3d at 36. After construing the statute in this manner, the Texas Supreme Court then sidestepped the unauthorized practice of law issue by coming to the strange conclusion that an insurer does not practice law when it represents an insured in court. *Id.* at 39.

The Appellants never argued before the trial court that FIE was not practicing law by representing its insured. Rather, the Appellants conceded FIE was practicing law, but argued that Appellant Brown's representation falls within the "own immediate affairs" exception to the general rule prohibiting a corporation from practicing law on behalf of others. Since the argument that ultimately carried the day in the *AHAC* case was neither presented to nor ruled

upon by the trial court, it cannot be considered on appeal. *McQuay v. Guntharp*, 331 Ark. 466, 473, 963 S.W.2d 583, 586 (Ark. 1998); *Hodges v. Gray*, 321 Ark. 7, 18, 901 S.W.2d 1, 6 (1995).

Furthermore, a plain reading of Ark. Code Ann. § 16-22-211 shows the absurdity of the argument that an insurer does not practice law by representing its insured. Again, that section states:

> It shall be unlawful for any corporation … to practice or appear as an attorney at law for any person in any court in this state…, to tender or furnish legal services or advice, to furnish attorneys or counsel, [or] to render legal services of any kind in actions or proceedings of any nature….

Ark. Code Ann. § 16-22-211(a). This subsection unambiguously states that a corporation may not provide counsel to another in any form or fashion, whatsoever. The Texas *AHAC* case is thus distinguishable based upon the differences in the statutes involved. *See Gardner v. N.C. State Bar*, 316 N.C. 285, 293, 341 S.E.2d 517, 522 (N.C. 1986) (distinguishing statutes of other states in prohibiting representation of insureds by in-house counsel).

As in many areas of law, different states take different approaches to protecting their bars from the appearance of impropriety arising from in-house insurance defense work. These different approaches are the subject of "national debate." *See AHAC*, 261 S.W.3d at 27. Some states, like Texas, have taken a lax

approach, apparently buckling to industry pressure to trade attorney independence for pecuniary benefits to insurers. *Id.* at 27–28 ("Insurers contend that staff attorneys are significantly more efficient and economical than private attorneys and thereby reduce defense costs and premiums. Insurers also claim that the availability of staff attorneys is a useful advertising tool for selling policies. But critics of the use of staff attorneys argue that when an insurer controls the insured's attorney as thoroughly as an employer controls an employee, the attorney-client relationship can be impaired to the insured's detriment."). Other states, like Kentucky and North Carolina, under the rubric of avoiding any appearance of impropriety, have stressed the importance of independence of the bar. *Am. Ins. Ass'n v. Ky. Bar Ass'n*, 917 S. W.2d 568, 573 (Ky. 1996); *Gardner v. N.C. State Bar*, 316 N.C. 285, 293–94, 341 S.E.2d 517, 522–23 (N.C. 1986). These two cases turned on their states' "aversion to the practice of law by corporations." *Am. Ins. Ass'n v. Ky. Bar Ass'n*, 917 S. W.2d 568, 573 (Ky. 1996). As indicated by the text of Ark. Code Ann. § 16-22-211 and the *UNB* and later cases, Arkansas shares such an aversion.

Other than arguing one of two sides of case law from around the country, the Appellants produced no evidence before the trial court regarding the fundamental unfairness on the prohibition of in-house insurance counsel. The results reached by Kentucky and North Carolina show that no such fundamental

unfairness exists. The Appellants have not met their burden of proof of proving otherwise. Thus, the doctrine of *stare decisis* mandates adherence to prior cases.

III. The trial court properly concluded the Appellee had standing to object to the Appellants' unauthorized practice of law and the significant risk of a conflict of interest.

A. Standard of Review

"The question of standing is a matter of law for this court to decide, and this court reviews questions of law *de novo*." *See Walker v. Ark. State Bd. of Educ.*, 2010 Ark. 277, at 14. Reviewing courts give deference to the factual findings of the trial court, only overturning such findings if clearly erroneous. *Sturdivant v. Sturdivant*, 367 Ark. 514, 517, 241 S.W.3d 740, 743–44 (2006).

B. An opposing party always has standing to question his opponent's authority to practice law.

It is unclear if the Appellants still contend that the Appellee lacks standing to challenge FIE's unauthorized practice of law through Appellant Brown. While the Appellants admit that any litigant can raise the unauthorized practice of law issue, they go on to argue that this right does not establish broader standing. Rogers Arg. 5.

To the extent this argument still challenges standing relative to the unauthorized practice of law, the Appellee notes that a litigant "has standing to question [his opponent]'s authority to practice law." *Davis v. UAMS*, 262 Ark. 587, 591, 559 S.W.2d 159, 161 (1977); *see also Davenport v. Lee*, 348 Ark.

148, 162, 72 S.W.3d 85, 93 (2002) (listing remedies for the unauthorized practice of law). Standing extends to any litigant, regardless of posture, to challenge the unauthorized practice of law.

C. This Court should not disturb the factual findings underlying the trial court's ruling that the Appellee had standing to challenge Appellant Brown's conflict of interest.

In addressing whether the Appellee had standing to raise ethical challenges to Appellant Brown's representation, the trial court properly looked to the Arkansas Rules of Professional Conduct, which are material in disqualification proceedings. *Sturdivant v. Sturdivant*, 367 Ark. 514, 517, 241 S.W.3d 740, 743–44 (2006).

The trial court relied upon two different portions of the professional conduct rules in finding that the Appellee had standing. Add. 242–43. First, the trial court looked to Ark. R. Prof. Conduct 1.7 cmt. 36, which permits opposing counsel to challenge a conflict of interest when "the conflict is such as clearly to call in question the fair or efficient administration of justice[.]" Add. 242. Next, the trial court relied upon Ark. R. Prof. Conduct 8.3, which highlights the importance of reporting a violation of the professional conduct rules when the victim is unlikely to uncover the offense. Add. 242–43.

Within the framework of these two rules, the trial court made several specific findings of fact. The trial court identified that an insurance company's

motivations are not necessarily aligned with those of the insured; that is, the insurer may wish to delay and minimize payment of the claim (Add. 35–47, 242), whereas the insured likely wishes to resolve the litigation as quickly as possible (at least where coverage is not an issue). The trial court also found that Appellant Brown only sought informed consent for his representation from the Appellant Insureds after the Appellee sought to disqualify Appellant Brown from representation. Add. 237. For the trial court, this raised a significant question of whether the Appellant Insureds would have ever discovered the potential conflict had it not been raised by the Appellee. Add. 243. While the Appellants claim that the lack of consent was cured, after-the-fact actions do nothing to affect Appellee's standing at the time he filed his opposition to representation by Appellant Brown.

The trial court cited specific professional conduct rules permitting a lawyer to raise ethical issues facing opposing counsel, and made specific findings of fact detailing why the trial court believed those ethical rules came into play. While the Appellants disagree with the trial court's findings about the alignment of interests and claim the lack of consent was cured after the fact, these arguments do not rise to the level of showing clear error. Furthermore, the Appellants have not explained why the trial court's reliance upon the Arkansas Rules of Professional Conduct was improper in light of precedent holding that

such rules are material in disqualification proceedings. Accordingly, this Court should not disturb the trial court's conclusion that the Appellee had standing to raise ethical concerns surrounding Appellant Brown's representation.

IV. Appellant Brown has a concurrent conflict of interest due to the appearance of impropriety in trying to serve two masters while trying to maintain confidentiality as between the two.

A. Standard of Review

The standard of review for disqualification orders is as follows:

> The Arkansas Rules of Professional Conduct are material in disqualification proceedings…. [O]ur standard of review is to read the rules as they are written, and interpret them in accordance with established principles of rule construction. It is our responsibility to decide what a rule means, and we will review the circuit court's construction *de novo*. We are not bound by the circuit court's decision; however, in the absence of a showing that the court erred in its interpretation of the rule, that interpretation will be accepted as correct on appeal. Language of a rule that is plain and not ambiguous must be given its obvious and plain meaning. Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a rule provision.
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> Furthermore, in reviewing the circuit court's factual findings, we must determine whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence; a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed.

Sturdivant v. Sturdivant, 367 Ark. 514, 517, 241 S.W.3d 740, 743–44 (2006).

B. This Court need not substantively rule on the ethical prohibitions if it affirms the trial court's holding that FIE engaged in the unauthorized practice of law.

Disqualification is an appropriate remedy for the unauthorized practice of law. *See McKenzie v. Burris*, 255 Ark. 330, 334, 500 S.W.2d 357, 360–61 (1973). If this Court affirms the disqualification of Appellant Brown due to FIE's unauthorized practice of law, this Court could affirm the trial court without considering whether Appellant Brown violated any ethical rules.

C. The potential for a conflict of interest between in-house insurance counsel and insureds is simply too great for the appearance of impropriety to be overcome.

The Appellants concede that the Appellant Insureds are Appellant Brown's clients for purposes of this litigation, and that Appellant Brown owes the Appellant Insureds a duty of undivided fidelity. Brown Arg. 14. This concession is consistent with Arkansas case law on the issue. *First Am. Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 90, 787 S.W.2d 669, 671 (1990). However, the duty owed to the Appellant Insureds conflicts with Ark. R. Prof. Conduct 1.13, which provides that a lawyer employed by an organization represents the organization. This conflict begs the question, who is the client, the insured or the insurer?

The Appellants attempt to sidestep this quandary by arguing that the interests of FIE and the Appellant Insureds are "fully aligned." Brown Arg. 16. Such is not the case for both factual and legal reasons. As identified above, the trial court concluded that the interests of FIE and the Appellant Insureds were not necessarily aligned because FIE may wish to delay and minimize payment of claims. Add. 35–47, 242; *see also* Ark. R. Prof. Conduct 1.8 cmt. 11 ("third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing"). Furthermore, the insurers' interests sometimes require counsel to perform actions without getting paid in order to exercise independent judgment. AD 40. It would be difficult, if not impossible, for in-house counsel to take similar independent action if required.

The trial court found FIE's interests in minimizing expenditures "could lead to protracted litigation and hassle for the policyholder." Add. 38–40, 246. This finding was based upon evidence before the trial court stating that FIE's "internal company documents and testimony from former employees reveal a company that systematically places profits over policyholders." Add. 45. This is a finding of fact showing that the interests of FIE are not fully aligned with those of the Appellant Insureds. This Court should not disturb this factual finding because clear error has not been proven by the Appellants.

From a broader factual perspective, it is at best oversimplified and at worst deceptive to suggest that an insured and an insurer have perfectly aligned interests in any litigation. The very purpose of insurance is to produce economic and emotional security for the insured. 1-1 *Appleman on Insurance* § 1.01[1] (Law Library ed. 2010). Where, as here, the amount of coverage obviates exposure of an excess verdict on the part of the insured, the insured's primary interest is likely to resolve the litigation and move on with his life. It is disingenuous to suggest that in every situation, an insured would willingly expose himself and others around him to years of litigation at the behest of his insurer. This runs contrary to the emotional security element underlying the fundamental concepts of insurance.

In formulating a ruling on this particular issue, this Court should use caution in identifying that this case represents a fairly extreme example. That is, this is an atypical case because the amount of damages will be well within the $1,000,000 policy limits underwritten by FIE. Much more common is the situation where damages are roughly equal to policy limits, and the insured is exposed to the risk of a verdict exceeding policy limits. *See generally S. Farm Bureau Cas. Ins. Co. v. Parker*, 232 Ark. 841, 842, 341 S.W.2d 36, 37 (1960) (bad faith case in which an insurer refused to settle and the insured became personally liable for an excess verdict). While the insured has a remedy for an

excess verdict against him, "[s]uch recourse requires that the insured first suffer a harm, a circumstance which cannot be reconciled with [the] view that the interest of the insured is to be protected." *Am. Ins. Ass'n v. Ky. Bar Ass'n*, 917 S. W.2d 568, 572 (Ky. 1996). Thus, in low policy limit situations, the interests of the insurer and insured are even further apart. Not only does the insured seek to gain emotional security by resolving the case quickly, he also seeks economic security by avoiding person liability for an excess verdict.

It is telling that our bad faith cases instruct an insurer to "give at least equal consideration to the interests of the insured" as to its own interests. *S. Farm Bureau Cas. Ins. Co. v. Parker*, 232 Ark. 841, 848–49, 341 S.W.2d 36, 41 (1960). By implication, this black-letter rule of insurance law identifies that insurers and insureds rarely, if ever, have truly identical interests. Rather than having "fully aligned" interests, a better construct is that insureds and insurers may share some "common interests" during litigation. *Am. Ins. Ass'n v. Ky. Bar Ass'n*, 917 S. W.2d 568, 573 (Ky. 1996).

The trial court made a reasonable factual finding based upon these concepts that the interests of FIE and the Appellant Insureds are not fully aligned. Add. 38–40, 246. While the Appellants disagrees, their arguments do not rise to the level of showing clear error, and this Court should affirm the trial court's findings.

The trial court reasonably found a divergence of interests as between FIE and the Appellant Insureds, so there remains a conflict between Arkansas case law, which identifies the insured as the client, and the Ark. R. Prof. Conduct 1.13, which names the employer of an attorney as the client. Yet, the Appellants argue that no significant risk of a conflict of interest exists between FIE and Appellant Insureds such that Appellant Brown should be disqualified. In order to accept this position, this Court would have to ignore the different duties owed to an insured as between defense counsel and an insurer. An insurer need only give equal consideration to the insured's interests as to its own interests. *S. Farm Bureau Cas. Ins. Co. v. Parker*, 232 Ark. 841, 848–49, 341 S.W.2d 36, 41 (1960). However, an attorney for an insured owes a far greater duty of undivided fidelity to the insured. *First Am. Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 90, 787 S.W.2d 669, 671 (1990). The Appellants suggest that an attorney employed by an insurer can simultaneously juggle both roles. However, as often stated in cases addressing this issue, "**No man can serve two masters**." *USF&G v. Louis A. Roser Co.*, 585 F.2d 932, 938 n.5 (1973); *Am. Ins. Ass'n v. Ky. Bar Ass'n*, 917 S. W.2d 568, 571 (Ky. 1996) (emphasis added).

The trial court identified several concerns leading to a significant risk of a material limitation on Appellant Brown's representation. *See* Ark. R. Prof. Conduct 1.7(a). While Appellant Brown has a duty to represent the Appellant

Insureds with undivided fidelity, basic human nature dictates that he will conform his actions, however unconsciously, to the wishes of his employer in the interests of future employment. Add. 244; *USF&G v. Louis A. Roser Co.*, 585 F.2d 932, 938 n.5 (1973). This creates the presumption of a stake in the litigation and a restraint on his exercise of independent judgment. Add. 244.

The divergent interests of Appellant Insureds and FIE, along with the pressures upon Appellant Brown to conform his judgment to the wishes of his employer, constitute sufficient justification for the trial court to find a significant risk that Appellant Brown's representation of the Appellant Insureds would be materially impaired by his relationship with his employer. The trial court's disqualification of Attorney should thus be affirmed.

D. Complex firewalling rules ignore the practical realities of the employer-employee relationship, which cannot protect the confidentiality of an insured's file.

The Appellants argue that complex firewalling rules are sufficient to maintain the confidentiality of the Appellant Insured's information. Leaving aside the fact that FIE is free to change those firewalling rules at any time, this argument is an apparent concession that Appellant Brown is subject to Ark. R. Prof. Conduct 1.8(f) because he is compensated by someone other than his client. Add. 244–45.

Two facts refute this argument. First, the trial court made a factual finding that the Appellants presented no evidence that anyone other than FIE held legal title to the insured's files (as first-year property professors are known to say, "possession is nine-tenths of the law"). The Appellants do not directly challenge this factual finding on appeal; their argument about theft and computer crimes has nothing to do with confidentiality of files as between Appellant Brown and FIE. This Court cannot overturn the trial court's factual finding because the Appellants have not proven it to be clearly erroneous.

Second, and more telling about how FIE really approaches confidentiality of client information, Appellant Brown's own letter states:

> **It is very important that you discuss this lawsuit only with individuals affiliated with my office or with your insurance company.**

Add. 159 (emphasis in original). Appellant Brown concedes that he has no right to disclose information if disclosure could injure the insured. Brown Arg. 25. One such instance would be a situation where a disclosure by the insured could jeopardize coverage. This line from his letter begs the question of how, exactly, Appellant Brown protects client information when he instructs his client to contact the insurer directly with that information. Despite all the complex firewalling rules, Brown's own letter encourages the client to divulge confidential information to the insurer.

These facts demonstrate that Appellant Brown cannot and does not protect confidential client information as required by Ark. R. Prof. Conduct 1.8(f). The trial court's conclusion to this effect should be affirmed.

E. Appellant Brown's letter to his clients did not give them an opportunity to give informed consent.

Appellants argue that Appellant Brown did not need informed consent, Rogers Arg. 15, and even if he did, he received it from Appellant Insureds. Rogers Arg. 14.

The first argument is contrary to Ark. R. Prof. Conduct 1.8(f), which requires informed consent any time a third party pays for the representation of a client, regardless of whether there is a present conflict. Such rule also requires the lawyer to maintain independent judgment and to protect confidential client information. It strains credulity to argue that a captive employee can maintain complete independence in judgment from his employer, particularly when outside counsel often must perform unpaid work to exercise independent judgment. Add. 40. Were this Court to adopt the Appellants' position, in-house counsel would be subject to a more lax rule than outside counsel concerning independence of professional judgment.

The second argument ignores the actual requirements of Ark. R. Prof. Conduct 1.8(f) when viewed through the lens of the definition of informed

consent. Informed consent requires "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Ark. R. Prof. Conduct 1.0(e). Therefore, in order to obtain the informed consent required by Ark. R. Prof. Conduct 1.8(f), the lawyer must provide adequate information and explanation about the material risks of in-house representation, including the confidentiality concerns raised by Ark. R. Prof. Conduct 1.8(f).

The trial court made a factual finding that Appellant Brown's belated letter to Appellant Insureds contains no adequate information and explanation regarding the material risks of in-house representation over the alternative of outside counsel. Add. 246. Apparently, the required explanation was not provided because Appellant Brown believed that FIE's interests were "fully aligned" with those of the Appellant Insureds. Furthermore, Appellant Brown's letter contains no explanation that he is required to maintain the confidentiality of information relating to the Appellant Insured's representation; to the contrary, he instructs the Appellant Insureds to divulge confidential information only to himself or to FIE. Add. 159. Certainly there is no discussion about implied disclosure of information to FIE, which is a primary focus of the Appellants' briefs.

Given these deficiencies, the trial court made a correct factual finding that Appellant Brown's belated letter was not competent to seek informed consent, and this Court should not disturb that finding on appeal.

V. The Appellants' argument that they were denied the fundamental right to choose their own counsel was waived because it was neither presented to nor ruled upon by the trial court.

Appellate courts "do[] not address arguments raised for the first time on appeal." *Hodges v. Gray*, 321 Ark. 7, 18, 901 S.W.2d 1, 6 (1995). "Even a constitutional issue must be raised to the trial court's attention in order to preserve it for appeal." *Lafont v. Mixon*, 2010 Ark. 450, at 15. Arguments not ruled upon by the trial court will not be addressed by this Court on appeal. *See McQuay v. Guntharp*, 331 Ark. 466, 473, 963 S.W.2d 583, 586 (Ark. 1998). It is incumbent upon an appellant to obtain a ruling from the trial court on an issue in order to preserve it for appeal. *Maddox v. City of Fort Smith*, 346 Ark. 209, 224, 56 S.W.3d 375, 385 (2001).

For the first time on appeal, the Appellant Insureds claim that the disqualification of Brown divests them of a fundamental right to choose their own counsel. Nothing in the Appellants' pleadings or the sole hearing on this matter indicates that this argument was raised in the trial court. Furthermore, the trial court's order disqualifying Brown is silent on this issue. Accordingly, this Court should decline to rule on this newly-presented argument.

Furthermore, this argument is contrary to the Appellants' position that an insurer has the right to direct litigation and select counsel. The only reasonable expectation an insured has from an insurance policy is to be competently and independently represented. If the Appellant Insureds in this case were truly sophisticated in the rules of professional responsibility, they too would likely seek independent outside counsel to represent them at trial.

CONCLUSION

The trial court correctly construed Ark. Code Ann. § 16-22-211 as permitting a corporation to represent itself in litigation, only. In doing so, the trial court properly relied upon the case styled *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954), which held Ark. Code Ann. § 16-22-211 constitutional in light of Ark. Const. Amend. 28. The Appellants have presented no compelling arguments that 56 years of case law relying upon the *UNB* case is so patently wrong and manifestly unjust that a break with precedent is unavoidable.

The trial court also correctly held that Appellant Brown could not serve two masters, both FIE and the Appellant Insureds, because he could not ensure undivided fidelity to the Appellant Insureds.

The trial court's decision should be affirmed in all respects.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2010, I served the foregoing document upon the opposing parties via [ ] facsimile [ ] email [X] first-class mail [ ] courier to the attorneys of record listed below:

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