CV-18-601

IN THE ARKANSAS SUPREME COURT

LARRY WALTHER, Director of the Arkansas Department of Finance and Administration; *et al*. **APPELLANTS**

v.

MIKE WILSON **APPELLEE**

On Appeal from the Circuit Court of Pulaski County, Arkansas
The Honorable Chris Piazza, Circuit Judge

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellee Mike Wilson fails to refute the Appellants' showing that the circuit court erred in awarding Wilson attorney's fees in excess of $323,000. Wilson's arguments are irreconcilably inconsistent with Ark. Const. art. 5 § 20, Ark. Code Ann. §26-35-902, and a plethora of this Court's prior decisions—including *Lake View School Dist. No. 25 of Phillips County v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000), the *sole* basis for his claim for attorney's fees.

Wilson fails to address the key difference in this Court's sovereign immunity jurisprudence between suits seeking declaratory and injunctive relief and suits seeking monetary recovery. He likewise fails to support his argument that his request for attorney's fees is not precluded as a matter of law. Finally, this Court has repeatedly held that attorney's fees cannot be awarded in public funds illegal exaction cases like this one in which only declaratory or injunctive relief is sought. Wilson's attempt to distinguish his case on the basis of *Lake View*'s economic benefit exception falls flat. Wilson fails to explain how the State receiving a return of its own money creates a substantial economic benefit for the class of taxpayers he purports to represent, how the fee award of over $323,000 from the State treasury benefits the taxpayers, or why his past legal efforts bear any relevance in this case (which they do not). As such, the circuit court's decision to award Wilson $323,266.53 in attorney's fees should be reversed.

ARGUMENT

I. Sovereign immunity bars Wilson's request for attorney's fees.

A. Sovereign immunity bars monetary recovery against the State.

Wilson argues that sovereign immunity does not preclude him from receiving over $323,000 in attorney's fees from the State treasury because this case involved an illegal act of the legislature, an exception to sovereign immunity. Appellee's Br. at Arg. 6-7. Wilson's response misses the point and, indeed, wholly fails to address Appellants' main argument that a distinction exists between sovereign immunity from *suit* and sovereign immunity from *monetary recovery*, a distinction this Court recognized in *Lake View*, the very case Wilson cites as grounds for his recovery. *See Lake View*, 340 Ark. at 496, 10 S.W.3d at 901; Appellee's Br. at Arg. 10-13; Appellants' Br. at Arg. 2-4.

Appellants have never argued that sovereign immunity precludes illegal exaction suits altogether. It is well settled law that Ark. Const. art. 16 § 13 permits illegal exaction suits against the State for declaratory and injunctive relief. *Carson v. Weiss*, 333 Ark. 561, 565, 972 S.W.2d 933, 935 (1998). But as Appellants argue in section one of their principal brief, there is a critical difference between an illegal exaction *suit* and *recovery* of monetary damages, including attorney's fees and costs, in an illegal exaction claim. *See* Appellants' Br. at Arg. 2-4. The State concedes that Article 16 § 13 of the Arkansas Constitution provides taxpayers a

right to bring suit challenging a specific tax or expenditure of the State, and sovereign immunity does not bar such a suit. Ark. Const. art. 16 § 13; *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). However, because an award of attorney's fees exposes the State to financial liability, sovereign immunity precludes the awarding of fees unless the State waives its defense *to the claim of attorney's fees*, as was the case in *Lake View*.[1] *Lake View*, 340 Ark. at 496-97, 10 S.W. 3d at 901-02. Here, unlike *Lake View*, Appellants have consistently and repeatedly asserted their sovereign immunity defense, and accordingly, attorney's fees cannot be awarded against them.

A more recent case from this Court affirms this important distinction between sovereign immunity from suit and sovereign immunity from monetary damages. In *Arkansas Department of Human Services v. Fort Smith School District*, a school district challenged a DHS rule requiring all licensed child care centers to carry general liability insurance. 2015 Ark. 81, 455 S.W.3d 294. Like Wilson, the school district sought declaratory and injunctive relief against the

[1] As noted in the State's opening brief, the State denies that any State agency or official can waive its constitutional immunity from monetary liability. *See* Appellants' Br. at Arg. 5 n.1. But even if the State could validly waive its sovereign immunity from a request for attorney's fees, it has not done so here.

legislative act and the administrative rules and regulations promulgated under the act, and an award of attorney's fees against the State. *Id*. at 2-3; 455 S.W.3d 297. This Court held that sovereign immunity did not bar the school district's request for declaratory and injunctive relief, *but it did bar the school district's request for attorney's fees.* 2015 Ark. 81 at 8, 455 S.W.3d at 299-300. This Court specifically stated by seeking attorney's fees in the action, the school district exposed the State to financial liability, and therefore sovereign immunity barred that second claim. *Id*. at 9, 455 S.W.3d 300. Thus, it follows that a suit against the State not barred by sovereign immunity does not necessarily provide the plaintiff a path to monetary recovery against the State. Indeed, this Court has repeatedly confirmed that attorney's fees are *not* available in public-funds illegal-exaction cases like this one. *See, e.g.*, *Hamilton v. Villines*, 323 Ark. 492, 495-96, 915 S.W.2d 271, 272-73 (1996); *City of Hot Springs v. Creviston*, 288 Ark. 286, 290, 705 S.W.2d 415, 418 (1986). This Court should follow its decisions in *Ft. Smith* and *Lake View* and hold Wilson's claim for attorney's fees is barred by sovereign immunity.

B. The law-of-the-case doctrine does not apply.

Instead of addressing the distinction between sovereign immunity from suit and sovereign immunity from monetary recovery, Wilson erroneously claims that the law-of-the-case doctrine prevents Appellants from raising sovereign immunity at all. Appellee's Br. at Arg. 4-5. While Appellants did raise the defense of

sovereign immunity in response to Wilson's motion for brief costs in a prior appeal, this Court has *never* addressed whether Wilson is entitled to attorney's fees for his efforts in this case, let alone a windfall award of $323,266.53 from the State treasury. Law-of-the-case only applies where the appellate court has previously decided an issue of law or fact. *Carmargo v. State*, 337 Ark. 105, 109-110, 987 S.W.2d 680, 683 (1999). This Court's previous taxation of costs to the Appellants under Ark. Sup. Ct. R. 6-7 is irrelevant to the legal issue of whether Wilson may recover attorney's fees, and accordingly, law-of-the-case doctrine does not apply.

C. Appellants have not abandoned their rights to the GIF funds.

Finally, in his response brief, Wilson cherry-picks quotes from the transcript of the circuit court's hearing on remand in an attempt to support a claim that the State has abandoned all right to the remaining GIF funds. Appellee's Br. at Arg. 5. Nothing can be further from the truth. On remand, the circuit court held a hearing regarding, among other issues, whether and to what amount CAPDD still held remaining GIF funds in its possession. Appellants argued at the hearing that the circuit court was presented with a choice between two possible dispositions of the remaining GIF funds. First, Appellants argued that one reasonable outcome would be to require the planning district to return any unexpended funds to the State. Ab. 4. Second, Appellants suggested that another reasonable and equitable outcome would be for the circuit court to conclude that, in reality, the planning district had

been holding the funds in trust for innocent third-party grant recipients, who had taken significant actions in reliance on grant applications that were approved *before* this Court invalidated the appropriation acts. Ab. 4-5. Indeed, the evidence showed that CAPDD had already issued grant checks the day before this Court's ruling but had not yet mailed them. Ab. 11. Under those unique circumstances, Appellants stated that the circuit court could reasonably conclude that there were not any unexpended or unallocated funds left to be returned to the State. Ab. 5. It is preposterous for Wilson now to claim that the State abandoned its right to any remaining GIF funds. The State has never done so and instead advised the circuit court that it "certainly stand[s] ready to accept the Court's ruling whatever it may be" with regard to the disposition of the remaining GIF funds. Ab. 5.

An order by the circuit court that CAPDD could retain the balance of undistributed GIF funds would have cut off the State's interest in the remaining GIF funds because CAPDD had already awarded those funds to grant recipients. Ab. 4. That was not the circuit court's order, however. The circuit court ordered on remand that CAPDD was required to return the undistributed GIF funds it held to the State treasury (Add. 44) and, as a result, the State retained all of its interest in those funds. This Court should disregard Wilson's attempt to claim the State voluntarily forfeited its interest in the funds at issue, affirm its previous holdings

that sovereign immunity precludes an award of attorney's fees in this case, and reverse the circuit court's award of attorney's fees to Wilson.

II. Wilson's recovery is precluded as a matter of law.

A. The State preserved this point for appeal.

Wilson argues that the issue of whether Ark. Code Ann. § 26-35-902 precludes his recovery is not preserved for appeal because the circuit court's final order did not expressly address its applicability. Appellee's Br. at Arg. 9. That argument is without merit. The absence of a specific reference to Ark. Code Ann. § 26-35-902 in the circuit court's order is not preclusive. In opposing Wilson's fee motion, Appellants repeatedly argued that the request was inconsistent with § 26-35-902. Ab. 7; Add. 28-30. In its oral ruling and written order, the circuit court rejected Appellants' arguments and granted the fee motion. Ab. 15-17; Add.43-44. This appeal contests the court's adverse rulings. By explicitly rejecting Appellants' asserted grounds in opposition to the fee request, the circuit court did, in fact, rule on the applicability of the illegal-exaction fee statute. *See Kelley v. Johnson*, 2016 Ark. 268, at 10-11, 496 S.W.3d 346, 354-55 (rejecting argument that appeal was improper where circuit court failed to expressly rule on all arguments raised by the State). Appellants briefed and argued this issue below, and the circuit court implicitly rejected Appellants' arguments when it granted Wilson's fee motion. As such, Appellants preserved this argument for appeal.

B. There is no provision in the law for the circuit court to award Wilson fees.

Wilson is precluded from receiving attorney's fees as a matter of law. Arkansas follows the American Rule, which states that each party to a suit bears the cost of their litigation absent a statute to the contrary. *Fox v. AAA U-Rent It*, 341 Ark. 483, 17 S.W.3d 481 (2000). The only statutory basis for attorney's fees in illegal exaction cases is Ark. Code Ann. § 26-35-902. That statute only provides for an award of fees against a "county, city, or town" in illegal-tax cases where taxpayers receive a refund of taxes illegally collected from them. In *Bahil v. Scribner*, this Court rejected an argument that a refund to a county treasurer "is, in essence, a refund to the taxpayers themselves" and affirmed the denial of taxpayers' motion for costs and attorney's fees. 265 Ark. 834, 841, 581 S.W.2d 334, 338 (1979). The Court held that "the statute clearly applies only to suits brought against counties, cities, or towns" and was therefore inapplicable in a suit against county tax collectors. *Id.*

The statute is likewise inapplicable here in an illegal exaction suit against the Director of the Department of Finance and Administration, the State Auditor, and the State Treasurer. *See id.* Moreover, even if Ark. Code Ann. § 26-35-902 did encompass the State, which it does not, this Court has repeatedly held that attorney's fees are not recoverable in public funds illegal exaction cases like

Wilson's case. *See, e.g.*, *Hamilton*, 323 Ark. at 495-96, 915 S.W.2d at 272-73; *City of Hot Springs*, 288 Ark. at 290, 705 S.W.2d at 418.

Wilson erroneously cites *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991), in support of his argument that Ark. Code Ann. § 26-35-902 permits an award of attorney's fees against the State. Appellee's Br. at Arg. 9. *Pledger*, however, is inapposite here. First, *Pledger* involved an illegal tax rather than a public funds illegal exaction claim. 306 Ark. at 47-48; 811 S.W.2d at 288. Second, the taxpayers' recovery of attorney's fees in *Pledger* was based on the common fund doctrine, not *Lake View*'s economic benefit theory or Ark. Code Ann. § 26-35-902. *Id*. at 57; 811 S.W.2d at 293-94. Third, and most importantly, *nowhere* in Pledger is sovereign immunity discussed. The State did not raise it as an objection to attorney's fees, and the Court did not address the issue *sua sponte*. To be sure, five years later, this Court overruled its conclusion in *Pledger* on sovereign immunity grounds, which this Court reaffirmed in *Board of Trustees of the University of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616.[2] The *Andrews*

[2] *See State Dep't of Fin. & Admin. v. Staton*, 325 Ark. 341, 344, 942 S.W.2d 804, 806 (1996) (holding that the Court in *Pledger* did not properly consider the question of sovereign immunity before awarding fees), *overruled on other grounds by Bd. of Trs. of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616.

Court reaffirmed "that suits subjecting the State to financial liability are barred by sovereign immunity[.]" *Id.* at 12, 535 S.W.3d at 623. Thus, *Pledger* lends no support to Wilson's argument.

Because an award of attorney's fees is generally only permissible where expressly provided by statute, simple logic dictates that if Wilson truly believed that Ark. Code Ann. § 26-35-902 provided a statutory basis for the circuit court to award him attorney's fees in this case, then he would have cited it to the circuit court rather than try to obtain an award from the *highly unique* and rare exception of substantial economic benefit used in *Lake View*. *See Lake View*, 300 Ark. at 497, 10 S.W.3d at 902 (stating "this is a unique case with a unique set of circumstances"). He did not. Arkansas Code Annotated § 26-35-902 is the sole statutory basis for the award of attorney's fees in illegal exaction cases, and it does not encompass an award against the State in a public funds case. No other fee statute applies to Wilson's case. Therefore, the American Rule applies, and Wilson is not entitled to recovery of attorney's fees in this case. This Court should reverse the circuit court's award of attorney's fees to Wilson.

III. Wilson is not entitled to attorney's fees under *Lake View*'s economic benefit theory.

Wilson's final argument is that he created a substantial economic benefit for the State, and therefore he is entitled to attorney's fees under *Lake View*.

Appellee's Br. at Arg. 10-13; Add. 39. Conspicuously missing from the "economic benefit" section of Wilson's brief, however, is *any* rebuttal of Appellants' two key arguments barring his recovery under this theory.

First, and most noticeably, Wilson makes *no* attempt to reconcile his case with that of *Cotten v. Fooks*, 346 Ark. 130, 55 S.W.3d 290 (2001). As Appellants explained in their principal brief, *Cotten* is highly instructive in this case. Appellant's Br. at Arg. 12-13. In *Cotten*, decided just one year after *Lake View*, this Court reaffirmed that taxpayers are not entitled to attorney's fees in public funds illegal exaction claims, even if, as Cotten argued, the taxpayers gain some form of benefit by the termination of the government's illegal actions. 346 Ark. at 134-35, 55 S.W.3d at 293.

In *Cotten*, the City of Haskell was allowing private citizens to use city equipment for personal use. *Id*. at 132, 55 S.W.3d at 291. Cotten challenged this practice as an illegal exaction and sought to enjoin the practice. *Id*. Prior to a hearing, but *after* Cotten filed his Complaint and the city answered, the mayor of Haskell implemented a new policy prohibiting any private use of city property. *Id*. Although the case was dismissed as moot, Cotten argued he was entitled to attorney's fees because the city only changed the policy as a direct result of his lawsuit. *Id*.

In its decision, this Court explained that attorney's fees are not permitted in illegal exaction cases where no refund is sought:

> Arkansas follows the American Rule that attorney's fees are not chargeable as costs in litigation unless permitted by statute. *See Love v. Smackover Sch. Dist.*, 329 Ark. 4, 946 S.W.2d 676 (1997); *City of Hot Springs v. Creviston*, 288 Ark. 286, 705 S.W.2d 415 (1986). Our Tax Code does allow recovery of attorney's fees in illegal-exaction cases when a refund or return of taxpayer moneys is ordered by the court. *See* Ark. Code Ann. § 26–35–902(a) (Repl. 1997). Yet, there is no similar provision for a suit in which strictly injunctive relief is sought, and ***this court has specifically held on several occasions that attorney's fees are not allowed in illegal-exaction cases where no refund is sought.*** *See Hamilton v. Villines*, 323 Ark. 492, 915 S.W.2d 271 (1996) (citing *Munson v. Abbott*, 269 Ark. 441, 602 S.W.2d 649 (1980)); *City of Hot Springs v. Creviston, supra.* Indeed, in *Hamilton v. Villines, supra*, we alerted the General Assembly to the fact that it might wish to extend the language in § 26–35–902(a). As of this writing, it has not done so.

Id. at 134-35, 55 S.W.3d at 293 (emphasis added). *Cotten* was decided only *one year* after *Lake View.* And while the majority opinion does not mention *Lake View* in its analysis, Justice Glaze's concurrence indicates the issue of whether or not to extend *Lake View*'s economic benefit theory to situations like *Cotten* was discussed during oral argument and evidently rejected. *Id*. at 136, 55 S.W.3d at 294 (Glaze, J., concurring). Wilson cannot seriously contend that this Court should overturn decades of precedent holding that attorney's fees are not allowed in illegal exaction cases seeking only non-monetary relief simply because this is his third successful illegal exaction suit, and he did not seek fees the prior two times. *See*

Appellee's Br. at Arg. 12. To be clear, Wilson's past suits have absolutely no bearing on an award in this case, and the circuit court erred in awarding fees in part due to Wilson's past litigation efforts. *See* Ab. 15.

Wilson likewise ignores Appellants' contention that no economic benefit exists here because the money in question does, and always has, belonged to the State. Instead, Wilson blindly avers that "the State most certainly has benefitted because it will be receiving a *payment* in excess of at least $600,000." Appellee's Br. at Arg. 11 (emphasis added). The State is not receiving a *payment*. The entire $969,799.60 in the circuit court registry came from public funds the State lawfully collected. This is undisputed. The fact that the State disbursed that money to CAPDD pursuant to legislative appropriations later declared unconstitutional does not change this fact. Indeed, in *Cotten* the city defendants admitted their practice was unconstitutional, and this Court still held that Cotten—despite being the one to end the illegal practice—was not entitled to any award of fees. *Id*. at 136, 55 S.W.3d at 294 (Glaze, J., concurring).

The facts on this issue are clear. Like the plaintiff in *Cotten*, Wilson sought only declaratory and injunctive relief. Add. 22. He did not seek a refund of any illegally-collected money, but rather sued to prevent the State from spending *its* money in a certain way. Wilson—*exactly like Cotten*—sued to end an unconstitutional practice. His efforts resulted in the termination of that practice, but

it did not result in a *new* pool of available money like the result of the plaintiff's litigation efforts in *Lake View*. Wilson's only basis for a fee award is *Lake View*'s economic benefit exception. Ab. 1, 14-15; Add. 39. Because Wilson only prevented the State from spending money it rightfully possessed and did not create a new source of revenue for the State, he is not entitled to *Lake View*'s economic benefit exception even if the Court were to reject Appellants' sovereign immunity argument. *See Lake View*, 340 Ark. at 495, 10 S.W. 3d at 892 (holding appellants created a substantial economic benefit for the State when their efforts generated a *new* pool of money totaling $130 million).

In his concurring opinion in *Cotten*, Justice Glaze explained what would be necessary for attorney's fees to be available:

> It is my continued opinion that an act of the General Assembly (or constitutional provision) must be enacted in order for attorney's fees to be authorized or awarded in cases like the one before us. We said as much in *Hamilton v. Villines*, 323 Ark. 492, 915 S.W.2d 271 (1996) (the General Assembly may wish to extend the language of Ark. Code Ann. § 26-35-902 (Supp. 1995)).

Cotten, 346 Ark. at 137, 55 S.W. 3d at 294 (Glaze, J., concurring). The General Assembly has not responded to this Court's suggestion to amend the fee statute, and Ark. Code Ann. § 26-35-902 remains unchanged since 1993. Justice Glaze closed in *Cotten* by stating, "Cotten will have to be content with the unremunerated satisfaction that he was responsible for ending the city's illegal use of its

equipment." *Id*., 55 S.W. 3d at 295. In this case, Wilson must do the same. Accordingly, this Court should reverse the circuit court's fee award.

CONCLUSION

For these reasons and those stated in Appellants' opening brief, this Court should reverse the circuit court's award of attorney's fees and remand with instructions to the Pulaski County Circuit Clerk to release the $969,799.60 in State GIF funds in its possession to the State treasury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2018, I electronically filed the foregoing via the eFlex electronic filing system, which shall send notification of the filing to any participants. I also certify that I will serve a paper copy of the brief within five calendar days upon the following:

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Case Name: *Larry Walther, Director, Arkansas Department of Finance and Administration, et al v. Mike Wilson*

Docket Number: CV-18-601

Title of Brief: Appellants' Reply Brief

Certificate of Compliance

I have submitted and served on opposing counsel unredacted and, if required, redacted PDF documents that comply with the Rules of the Supreme Court and Court of Appeals. The PDF documents are identical to the corresponding parts of the paper documents from which they were created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

Identification of original paper documents that are not in PDF format and are not included in the PDF documents: None

/s/ *Brittany Edwards*
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