

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

AN APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
HON. CHRIS PIAZZA, PRESIDING

BRIEF OF THE APPELLEE

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NO REDACTION REQUIRED

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II.

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III.

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ARGUMENT

INTRODUCTION

This appeal comes to this Court from an order of the Circuit Court entered after this Court remanded the case in *Wilson v. Walther, et.al*, 2017 Ark. 270, 527 S.W. 3d 709. In that decision this Court correctly called this case an illegal exaction case and a “public funds case.” This Court found that the taxpayers of this state are “entitled to repayment of GIF funds still in CAPDD’s possession if the challenged acts are declared unconstitutional,” which they were. Having declared the Act at issue facially unconstitutional, this Court remanded the case to the Circuit Court.

On October 30, 2017 Wilson filed a motion with the Supreme Court seeking to tax the costs of the appeal against the current Appellants. See Docket Number CV-17-90. Appellant objected by asserting sovereign immunity barred the taxation of costs. See Response filed November 2, 2017 in Docket Number CV-17-90. On November 30, 2017 this Court rejected Appellants’ sovereign immunity argument and awarded Wilson his costs on appeal. See Formal Order in CV-17-90.

Then Appellants filed in this Court a motion for reconsideration, again asserting sovereign immunity against the payment of costs, and on Jan. 25, 2018 this Court again denied Appellants’ immunity claim *for a second time*. (Case No. CV-17-90) Both orders of this Court awarding appeal costs to Wilson constitute the law of this case. Both previous orders effectively bar the claims of sovereign immunity in

this unique illegal exaction case, consistent with prior case law.

On March 29, 2018 the Circuit Court entered its Order on Remand. (Add. 43)

The Circuit Court's findings can be summarized as follows:

- the Supreme Court's opinion is the law of the case.
- CAPDD holds \$969,799.60 in GIF appropriated funds.
- sovereign immunity does not apply to unconstitutional, illegal or *ultra vires* acts of the State.
- [Wilson] has conferred a benefit to taxpayers in the amount of unspent funds and is entitled to an attorneys' fee of one-third (1/3) of the remaining GIF funds.

(Add. 43-44)

Now, after remand, Appellants seek to avoid the Circuit Court's determination and equitable assessment of attorney's fees as the cost of collection and preservation of taxpayers' public funds over the course of this lengthy, complicated litigation. Notably, the costs and attorney's fees of all other parties to this action are paid only from public funds, *except for the prevailing party* - Wilson - and the class of taxpayers he represents. The Circuit Court on remand, taking into account all the facts, history and circumstances of this case and previous related cases, made its own informed determination of an equitable award, which should not be overturned.

Appellants filed their Notice of Appeal on April 17, 2018 (Add. 45) and

thereafter the \$969,799.60 was ordered to be deposited into the registry of the Court.

(Add. 48)

Appellants advance, essentially, three reasons why an award of attorneys' fees is not proper. First, they argue the State's sovereign immunity bars any award in this case. Next, they argue that Ark. Code Ann. §26-35-902, which authorizes the award of attorneys' fees in illegal exaction lawsuits, does not apply to judgments against the State. Finally, they argue this case is unlike other cases where successful litigants obtained a "common fund" or a "public fund." Wilson contends the State's contentions have no merit and that the decision of the Circuit Court should be affirmed.

SCOPE OF REVIEW FOR ALL THREE POINTS ON APPEAL:

This Court reviews questions of law de novo. *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 371 Ark. 217, 220, 264 S.W.3d 465, 467 (2007). This Court reviews findings of fact under a clearly erroneous standard of review. *Ligon v. Stewart*, 369 Ark. 380, 255 S.W.3d 435 (2007). A finding is clearly erroneous when the appellate court is left with a definite and firm conviction that a mistake has been committed. See *Covenant Presbytery v. First Baptist Church*, 2016 Ark. 138, 489 S.W.3d 153.

It is the duty of the court to construe the constitution as written. *Cannon v. May*, 183 Ark. 107, 35 S.W.2d 70 (1931). This Court must construe a constitutional

provision in such a way that an express purpose or implied result will be given effect. *Rockefeller v. Hogue*, 244 Ark. 1029, 429 S.W.2d 85 (1968). It is also the duty of this court to construe constitutional sections so that the instrument as a whole is harmonious if it is possible to do so. *Huggins v. Wacaster*, 223 Ark. 390, 266 S.W.2d 58 (1954); *Chesshir v. Copeland*, 182 Ark. 425, 32 S.W.2d 301 (1930).

I. WILSON IS NOT BARRED FROM RECOVERING ATTORNEYS' FEES AND COSTS BY SOVEREIGN IMMUNITY.

Appellants argue sovereign immunity is an absolute bar to any award of costs or attorneys' fees. In doing so they combine constitutional arguments with Ark. Code Ann. §26-35-902 and the *Lake View* case. This Court has already twice rejected Appellants' contentions in the prior appeal.

On October 30, 2017 Wilson filed a motion with the Supreme Court seeking to tax the costs of the appeal against the current Appellants. See Docket Number CV-17-90. Appellants objected by asserting sovereign immunity barred the taxation of costs. See Response filed November 2, 2017 in Docket Number CV-17-90. On November 30, 2017 this Court rejected Appellants' sovereign immunity argument and awarded Wilson his costs on appeal. See Formal Order in CV-17-90.

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90) Both orders of this Court awarding appeal costs to Wilson constitute the law of this case. Both previous orders effectively bar the claims of sovereign immunity in this unique illegal exaction case, consistent with prior case law.

It should also be noted the argument advanced on appeal by Appellants differs from the arguments made in the Circuit Court. In its Response in Opposition to Wilson's request for various forms of relief, the State appellants argued, in effect, no "state" funds existed at the time of the remand which could be returned to the State coffers.. (See ¶3 of the Response at Add. 27) Appellants continued with that same argument during oral arguments before the Circuit Court. (See Ab. 10-11) The position taken below is not only a different position than the one taken on appeal, it is wholly inconsistent.

Having lost twice before this Court on their claim of sovereign immunity against court costs on appeal in this very action, Appellants again assert Wilson's attorney's fees award subjects the State to liability, while ignoring their own stated position that Appellants have no interest in the funds remaining unexpended.

Counsel for Appellants contended on remand to the Circuit Court:

"I think the Court could reach a very reasonable conclusion that there aren't any unexpended or unallocated funds left to be returned to the State at all." (Ab. 5)

Further, Appellants have waived any claim of immunity on remand by stating

"... there are no unobligated funds remaining to be returned to the State."

(Add. 27)

There is an interplay between two provisions of our State constitution in this case. This interplay was discussed in *Carson v. Weiss*, 333 Ark. 561, 972 S.W. 2d 933 (1998) as follows:

The clause reads as follows:

Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.

Ark. Const. art. 16, § 13.

This court has observed the inherent conflict in our constitution between our illegal-exaction clause and our sovereign-immunity provision, art. 5, § 20. *Streight v. Ragland*, 280 Ark. 206, 209-10 n. 7, 655 S.W.2d 459, 461 n. 7 (1983). Our sovereign immunity provision provides that the State shall not be a defendant in her own courts, and this court in *Streight* noted that this provision was general in nature. *Id.* We stated that in the face of this conflict, we would employ the well-known rule of construction holding that the more specific provision controls the general. We concluded that the more specific provision was the one that grants the taxpayer standing, the illegal-exaction clause. *Id.*

Therefore, the issue in this case is not whether Article 5, §20 bars an award of costs and attorneys' fees. It is whether Article 16, §13 allows them. Sovereign immunity simply does not apply to this case.

In *Arkansas Dep't of Cmty. Corr. v. City of Pine Bluff*, 2013 Ark. 36, ___ S.W.3d ___ this court recognized three ways in which a claim of sovereign immunity may be surmounted: (1) where the State is the moving party seeking

specific relief, (2) where an act of the legislature has created a specific waiver of sovereign immunity, and (3) where the state agency is acting illegally or if a state-agency officer refuses to do a purely ministerial action required by statute. Additionally, a state agency may be enjoined if it can be shown (1) that the pending action of the agency is *ultra vires* or without the authority of the agency, or (2) that the agency is about to act in bad faith, arbitrarily, capriciously, and in a wantonly injurious manner. See *Arkansas Tech Univ. v. Link*, 341 Ark. 495, 17 S.W. 3d 809 (2000); *Arkansas State Game & Fish Comm'n v. Eubank*, 256 Ark. 930, 512 S.W.2d 540 (1974). The Circuit Court found that the acts of the State in this case were unconstitutional, illegal **and** *ultra vires* so that sovereign immunity was not available as a defense. The Appellants do not argue the Circuit Court was wrong on those findings and, in fact, accept the prior ruling of this Court that the challenged acts were, indeed, unconstitutional.

The Circuit Court clearly did not err in finding that sovereign immunity did not bar Wilson's request for an award of his costs and a reasonable attorneys' fee.

II. ARK. CODE ANN. §26-35-902 DOES NOT BAR WILSON FROM RECOVERING REASONABLE ATTORNEYS' FEES IN THIS CASE

The Appellants claim that Ark. Code Ann. §26-35-902 bars Wilson from

being awarded a reasonable attorneys' fee. That statute does nothing of the sort. It provides:

(a) It is the public policy of this state that circuit courts may, in meritorious litigation brought under Arkansas Constitution, Article 16, § 13, in which the circuit court orders any county, city, or town to refund or return to taxpayers moneys illegally exacted by the county, city, or town, apportion a reasonable part of the recovery of the class members to attorneys of record and order the return or refund of the balance to the members of the class represented.

The statute does not mention - at all - illegal exaction cases against the State so the plain language of the statute certainly does not operate as a bar to any award of attorneys' fees.

Appellants suggest the omission of any reference to an illegal exaction action against the State is fatal to any claim this statute may authorize an award of attorneys' fees. When this Court looks at Article 16, §13 it will find no reference to the State, yet this Court has said the State is, indeed, subject to illegal exaction claims. *Carson v. Weiss*, supra.; *McGhee v. Arkansas State Board of Collection Agencies*, 201 S.W. 3d 375 (2005). There would be nothing improper about this Court interpreting Ark. Code Ann. §25-35-902 in the exact same fashion as Article 16, §13 - actions against the State are contemplated and fall within the purview of both the statute **and** the Constitution.

In addition to the *Lakeview* case where attorneys' fees were awarded

despite a claim of sovereign immunity by the State, there is also the case of *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W. 2d 286 (1991). In that case the attorneys for the plaintiffs obtained a ruling requiring the Department of Finance and Administration to fully fund an Income Tax Refund Account at the level of \$8,000,000. The Circuit Court awarded them an attorneys' fee to be paid from that fund. This Court affirmed and wrote:

An order of the Chancellor, obtained through the efforts of the attorneys for the appellees, required the Income Tax Refund Account to be maintained at an amount not less than \$8,000,000. Presumably this account would have been depleted or returned to the state treasury if not needed for other refunds if the order had not been entered. The attorneys for the class obtained the order which kept the fund at a minimum of \$8,000,000 and thus we hold that the common fund was preserved by the attorneys for the class, and thus an award from that fund was proper.

Wilson did not rely on Ark. Code Ann. §26-35-902 to support his claim for attorneys' fee and the Circuit Court did not either. (Add. 22, 38, 43) Rather, the issue of the applicability of that statute was placed into issue solely by the Appellants. (Add. 28-30, 35-36) This court may not consider arguments on appeal when a party has failed to obtain a ruling from the circuit court. See *Seidenstricker Farms v. Doss*, 374 Ark. 123, 286 S.W.3d 142 (2008).

Even if this Court does not agree this issue is not properly preserved for consideration on appeal, there is no merit to Appellants' contention that Ark.

Code Ann. §26-35-902 bars Wilson from recovering attorneys' fee in an illegal exaction case against the State.

III. THE FINAL RESULT IN THIS CASE CREATED AND PRESERVED A FUND FOR THE BENEFIT OF THE TAXPAYERS, THEREBY ENTITLING WILSON TO A REASONABLE ATTORNEYS' FEE AND COLLECTION OF COSTS FROM THAT FUND.

In *Lake View Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000) the Court began by noting that Arkansas follows the American Rule that attorneys' fees are not chargeable as costs in litigation unless permitted by statute. See, e.g., *Love v. Smackover Sch. Dist.*, 329 Ark. 4, 946 S.W.2d 676 (1997); *Millsap v. Lane*, 288 Ark. 439, 706 S.W.2d 378 (1986); *City of Hot Springs v. Creviston*, 288 Ark. 286, 705 S.W.2d 415 (1986). There are exceptions to that general rule, such as when substantial benefits are afforded, even when no actual fund is created. *Lake View*, supra. On the issue of whether the attorneys were entitled to a fee award, the *Lake View* majority opinion wrote:

By upholding an eventual award of attorneys' fees today, as we do, we are not sanctioning attorneys' fees in all public interest litigation or endorsing a new exception to the American Rule. Nor are we advancing a particular method for paying those attorneys' fees, such as a contingent fee based on the economic benefit or the lodestar method. We further emphasize that we are wedded to no figure for attorneys' fees. All of that is for the chancery court to decide. We are simply holding that in this

case, an economic benefit did accrue to the State of Arkansas due to Lake View's efforts and attorneys' fees should be awarded. Accordingly, we reverse the chancery court's decision denying attorneys' fees and remand for a determination of reasonable fees, after the compliance trial is completed. We leave it to the chancery court to determine what are reasonable fees, after taking into consideration all of the circumstances of this case. See *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). ***Because the State has benefitted, we hold that the State should pay the fees awarded.*** (Emphasis added.)

Here, the State most certainly has benefitted because it will be receiving a payment of in excess of at least \$600,000.

Special Justice Dalby concurred in the majority opinion in *Lake View* and wrote:

The common-fund exception permits the granting of attorneys' fees and other costs of litigation when a plaintiff is successful in creating, increasing, or preserving a fund which benefits an ascertainable class. The court, in exercising its equity jurisdiction may grant fees and costs by directing payment from the fund. Newberg on Class Action, Sec. 13.52 (3rd ed. 1992)

On the attorneys' fee issue, the *Lake View* decision was a six to one decision, with only Justice Glaze dissenting. That is strong evidence to suggest that where a party successfully brings an action which creates a benefit to the class of persons represented - in this case all of the taxpayers of Arkansas - attorneys' fees ought to be awarded.

In the face of numerous decisions of this Court to the contrary, Appellants argue the Circuit Court on remand abused its discretion to

determine costs and attorney's fees where this successful taxpayer's action has created or preserved public funds and benefitted all state taxpayers.

“Traditionally, Arkansas has followed the “American Rule,” meaning that attorney's fees are not chargeable as costs in litigation unless specifically permitted by rule or statute. The “common fund” doctrine, a frequent exception to the American Rule, has been adopted by the Arkansas Supreme Court and has also been espoused by the United States Supreme Court. The common fund exception provides that, where a lawyer recovers a common judgment “for the benefit of persons other than himself or his client ... that lawyer is entitled to a reasonable attorney's fee from the fund as a whole. Accordingly, Arkansas law permits the apportionment of a “reasonable part of the recovery” to class attorneys in illegal-exaction cases. Naturally, the duty of determining what constitutes a reasonable portion of the recovery belongs to the court.”

Foster, “Attorney's Fees in Class Action Suits Against Government Entities” 57 Ark. L. Review 627 (2004)

Appellants cannot seriously deny, and the Circuit Court noted, that Wilson's concerted efforts over many years (Wilson I) 2006 in which he neither sought nor received attorney's fees and (Wilson II) 2007 in which he neither sought nor received attorney's fees - have resulted in substantial benefit to public taxpayers. *Wilson v. Weiss*, 368 Ark. 300, 245 S.W.3d 144 (2006), *Wilson v. Weiss*, 370 Ark. 205, 258 S.W. 3d 351 (2007).

In the current litigation, brought about as a result of legislators' unlawful attempts to make an “end run” around the force of our Constitution and the rules of Wilson I and Wilson II (by inserting a money-laundering machine in

the form of a subservient Planning and Development District to do their individual, personal private bidding) now the Appellants continue to attempt to place costly obstacles in the path of taxpayers seeking public accountability by forcing taxpayers to stop such plunders at their individual personal cost and expense.

In addition to their compensatory function, class actions deter misconduct by harnessing private attorneys general to assist in the enforcement of important public policies. As discussed in the previous section, where harms are small and dispersed, the defendants can avoid liability because no individual has sufficient incentive to sue. By avoiding liability, the defendants place the social costs of their actions on others. In enabling small-claims suits, class actions expose the defendants to the risk of liability and thereby deter them from engaging in wrongdoing in the first place. The class action's compensatory mechanism thereby serves a deterrent function. In so doing, class actions provide an important private supplement to public enforcement of social norms.

...

This point is illustrated in three steps: public enforcers are unable along to deter all wrongdoing; private litigation generally, and class actions specifically, assists in this effort; private enforcement but often a superior deterrent mechanism is not only an important complement to public enforcement. As noted above, class actions deter by making defendants pay for, and thus internalize the costs of, their actions. But for this cost internalization and deterrence to occur, a class action must be a reality. Fee shifting generally, and the common-fund fee award specifically, is the mechanism that makes class actions a reality as they provide means for compensating those whose work vindicates the rights of a class of claimants. Fees provide the incentive that enable private attorneys to pursue small-claims cases for groups of individuals. Stepping into the public enforcement void, these privately funded attorneys become "private attorneys general."

...

In certain circumstances, private class actions may be better situated than public enforcement to deter wrongdoing. Private enforcement may offer at least three advantages.

First, private enforcement may be more efficient than public enforcement. Second, private enforcers may be less conflicted than captured public agencies. Third, private enforcers may be less politically constrained than public enforcers.

Newberg on Class Actions, 5th Edition 2011 pp 21-23. §1.8

CONCLUSION

This Court should resist the invitation of Appellants to remand this case again to Circuit Court with instructions “to determine the proper amount” to which Wilson is entitled, “a much smaller and reasonable award.” See Appellants’ brief pp 13-14. The considered decision of the Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Ogles, hereby state that I have served a true and correct copy of the above an foregoing Brief of the Appellee, upon the Honorable Judge Piazza, Jennifer L. Merritt and Brittany N. Edwards via the electronic filing notification and by paper copy to The Honorable Chris Piazza, 201 West Markham, Little Rock, Arkansas 72201.

/s/ John Ogles
John Ogles