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SUPREME COURT OF ARKANSAS

No. CV-17-1020

ARKANSAS DEPARTMENT OF VETERANS AFFAIRS APPELLANT V. DIANE MALLETT AND JOSEPH FABITS APPELLEES	Opinion Delivered: June 21, 2018 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. 60-CV-14-595] HONORABLE WENDELL L. GRIFFEN, JUDGE REVERSED AND DISMISSED.

RHONDA K. WOOD, Associate Justice

Appellant Arkansas Department of Veterans Affairs (ADVA) appeals the circuit court's denial of its motion to dismiss based on sovereign immunity. We reverse and dismiss.

Appellees, Diane Mallett and Joseph Fabits, are two former employees of ADVA. In February 2014, Mallett, Fabits, and several others filed a class-action complaint alleging that ADVA failed to compensate them for working overtime in violation of the Arkansas Minimum Wage Act (AMWA), Ark. Code Ann. §§ 11-4-201 et seq. (Repl. 2012). They allege they frequently worked through their lunch breaks and had to work off-the-clock to complete their job duties; and therefore, they are entitled to overtime wages. ADVA filed its answer in March 2014. The circuit court granted class certification, but we reversed and remanded with instructions to decertify the class in *Arkansas Department of Veterans Affairs v. Mallett*, 2015 Ark. 428, 474 S.W.3d 861.

Almost two years after remand, ADVA filed a motion to dismiss arguing that AMWA's abrogation of sovereign immunity violates article 5, section 20 of the Arkansas Constitution. The circuit court denied the motion to dismiss, and ADVA appealed. We have appellate jurisdiction pursuant to Rule 2(a)(10) of the Arkansas Rules of Appellate Procedure–Civil.

ADVA advanced the same argument in its motion to dismiss the AMWA[1] claim as presented in *Bd. of Trs. of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616. As in *Andrews*, the circuit court denied the motion to dismiss. ADVA now argues *Andrews* controls. We agree. *Andrews* controls. In *Andrews*, we held that the provision of the AMWA that allows the State to be named as a defendant is repugnant to article 5, section 20 of the Arkansas Constitution.[2] While the parties ask us to further analyze *Walther v. FLIS Enterprises, Inc.* 2018 Ark. 64, 540 S.W.3d 264, this is not the case for us to do so. In *Andrews* we struck the provision of the AMWA that provided that this action could be brought against the state. We therefore reverse the circuit court's denial of ADVA's motion

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[1]AMWA provides that "[a]n employee may bring an action for equitable and monetary relief against an employer, including the State of Arkansas or a political subdivision of the state, if the employer pays the employee less than the minimum wages, including overtime wages, to which the employee is entitled under or by virtue of this subchapter." Ark. Code Ann. § 11-4-218(e)(1).

[2]We caution that *Andrews* should not be interpreted too broadly. The holding that the legislature may "never" authorize the state to be sued was in the application of the constitutional provision to a statutory act, AMWA, for monetary relief. Since *Andrews*, this court has not had the occasion to consider other actions against the state such as allegations that state actors are acting outside their constitutional duties, whether acting in a manner that is ultra vires, arbitrary, capricious, in bad faith, or refusing to perform ministerial duties.

to dismiss on sovereign immunity. As we stated in *Andrews*, the avenue for financial redress is through the Claims Commission. *Andrews*, 2018 Ark. 12, at 12, 535 S.W.3d at 623.

Reversed and dismissed.

KEMP, C.J., concurs.

BAKER, GOODSON and HART, JJ., dissent.

JOHN DAN KEMP, Chief Justice, concurring. I agree with the majority's conclusion that we must reverse and dismiss this case pursuant to article 5, section 20 of the Arkansas Constitution. I write separately to state that the people of Arkansas have the ability by constitutional amendment to decide the rights and privileges granted in their fundamental document.

KAREN R. BAKER, Justice, dissenting. I must respectfully dissent for the reasons stated in my dissents in *Bd. of Trustees of Univ. of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616 and *Arkansas Community Correction v. Barnes*, 2018 Ark. 122, 542 S.W.3d 841. Further, I must note the majority's footnote cautioning the application of *Andrews* conflicts with the very language of *Andrews.* The footnote states:

> We caution that *Andrews* should not be interpreted too broadly. The holding that the legislature may "never" authorize the state to be sued was in the application of the constitutional provision to a statutory act, AMWA, for monetary relief. Since *Andrews*, this court has not had the occasion to consider other actions against the state such as allegations that state actors are acting outside their constitutional duties, whether acting in a manner that is ultra vires, arbitrary, capricious, in bad faith, or refusing to perform ministerial duties.

Despite the majority's footnote, this simply conflicts with *Andrews* and illustrates the flaws in *Andrews*. As I explained in my dissent in *Barnes*, "[i]f 'never' does indeed mean never, as the majority held in *Andrews*, and made means cause to become—rather than compelled, as I contended in my dissent in *Andrews* is the correct interpretation—then this must be the law for everyone, all of the time. The majority is not free to pick and choose when it will apply. 'Never' does not mean unless an attorney for the state has failed to raise the issue, as the majority held in *Walther v. Flis Enterprises Inc.*, 2018 Ark. 64, 540 S.W.3d 264, nor can it mean unless authorized by the judicial branch or the executive branch rather than the legislative branch. Likewise, 'never' cannot mean except when not ruled on by the circuit court below. The definition of 'never' is 'at no time' *Merriam–Webster's Collegiate Dictionary* (9th ed.) (1991), or 'not ever; on no occasion; at no time' *American Heritage Dictionary* (4th ed.) (2000). Thus, because the Arkansas Supreme Court is a 'court' established by the Arkansas Constitution, the State of Arkansas cannot be caused to become a defendant in this court, by this court, or in any other Arkansas court under the reasoning employed by the majority in *Andrews*. Such an interpretation clearly conflicts with other provisions of the constitution which is a fact the majority conveniently chose to ignore in *Andrews*." 2018 Ark. 122, at 5-6, 542 S.W.3d at 843-44. Accordingly, the footnote is of no moment never means never.

Further, I must also note that the majority states—"While the parties ask us to further analyze *Walther v. Flis Enterprises, Inc.*, 2018 Ark. 64, 540 S.W.3d 264, this is not the case for us to do so." I disagree. This statement demonstrates the flaws in *Andrews* and its

progeny. In my opinion, the majority must address its recent decision in *Flis* because it directly conflicts with the majority's holding today and with the majority's holding in *Andrews*. In *Flis*, the majority held that sovereign immunity is an affirmative defense—"Although sovereign immunity certainly has jurisdictional qualities, this court historically has treated it like an affirmative defense that must be preserved. *See Ark. Lottery Comm'n v. Alpha Mktg.*, 2012 Ark. 23, at 6, 386 S.W.3d 400, 404 (concluding that the trial court's failure to rule on sovereign immunity prevented appellate review)." Further, as to affirmative defenses, Rule 8(c) of the Arkansas Rules of Civil Procedure states in pertinent part, "In responding to a complaint, counterclaim, cross-claim or third party claim, a party *shall* set forth affirmatively . . . [an] affirmative defense." (Emphasis added.)

As discussed above, in *Flis*, the majority held that sovereign immunity is an affirmative defense, and to reach this result, the majority relied on *Alpha Marketing*, which was overruled by *Andrews*. In short, the majority has managed to tie into a knot the law on sovereign immunity and cannot untangle it. Thus, the majority's understandable reluctance to further analyze its holding in *Flis*. However, here, ADVA filed its answer to Mallett's complaint on March 13, 2014, and actually conceded that the AMWA waived sovereign immunity. ADVA did not assert that Mallett's claims were barred by the doctrine of sovereign immunity until its September 28, 2017 motion to dismiss. In other words, initially, ADVA did not assert sovereign immunity as an affirmative defense; and when it did, it was over three and a half years later. In sum, as discussed above, to further

compound the sovereign-immunity debacle, the majority completely ignores its recent decision in *Flis*.

I dissent.

HART, J., joins.

COURTNEY HUDSON GOODSON, Justice, dissenting. I did not participate in *Board of Trustees of the University of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616. Despite my misgivings about the holding in *Andrews* that legislative waivers of the State's sovereign immunity are incompatible with the Arkansas Constitution, I have adhered to the principles of stare decisis in applying it. *See Chamberlin v. State Farm Mutual Auto Ins. Co.*, 343 Ark. 392, 36 S.W.3d 281 (2001) (stating that the policy of stare decisis is designed to lend predictability and stability to the law). Nonetheless, the court has struggled in finding a majority that understands the application of *Andrews*. Because the decision today exacerbates the confusion caused by *Andrews*, I must respectfully dissent.

The same day *Andrews* was decided, we also handed down *Williams v. McCoy*, 2018 Ark. 17, 535 S.W.3d 266. There, the majority recognized that the State could be sued for illegal acts, although it observed in a footnote that the validity of the illegal-actions exception to sovereign immunity remained an open question in the wake of *Andrews*. In *Walther v. FLIS Enterprises, Inc.*, 2018 Ark. 64, 540 S.W.3d 264, we held that sovereign immunity is not a matter of subject-matter jurisdiction and is to be treated as an affirmative defense. The plaintiff in *FLIS* sought judicial relief from a tax assessment pursuant to Arkansas Code Annotated § 26-18-406 (Supp. 2017). Because the parties did not raise the

issue of sovereign immunity in the circuit court, we determined that it would be improper to address the issue further. Most recently, we held that a state agency is entitled to the dismissal of claims being brought under the Arkansas Whistle-Blower Act, Arkansas Code Annotated, §§ 21-1-601 et seq. (Repl. 2016). *Ark. Cmty. Corr. v. Barnes*, 2018 Ark. 122, 542 S.W.3d 841. In *Barnes*, the agency asserted sovereign immunity in its answer and later filed a motion for judgment on the pleadings seeking dismissal on that basis. *Barnes* was consistent with *FLIS* because sovereign immunity was pleaded as an affirmative defense.

Today's decision essentially ignores the teachings of *FLIS* in that it abandons the holding that sovereign immunity is to be treated as an affirmative defense. Arkansas Rule of Civil Procedure 8(c) requires that a party *shall* set forth, in its response to a complaint, counterclaim, cross-claim, or third-party claim, "any other matter constituting an avoidance or affirmative defense." The Arkansas Department of Veterans Affairs (ADVA) did not set forth sovereign immunity as an affirmative defense in its answer; rather, it affirmatively stated that the appellees' claims under the Arkansas Minimum Wage Act (AMWA), Arkansas Code Annotated §§ 11-4-201 et seq. (Repl. 2012), were not barred by sovereign immunity. Sovereign immunity is not a Rule 12(h) defense that is waived by the failure to assert it in the original responsive pleading, and notably, ADVA did not amend its answer pursuant to Rule 15. Although ADVA filed a motion to dismiss, its motion was not filed

in response to the complaint.[3] In reality, ADVA filed a motion for judgment on the pleadings. *See* Ark. R. Civ. P.–Civ. 12(c) ("[A]fter the pleadings are closed . . . any party may move for judgment on the pleadings."). Thus, ADVA moved for judgment on the pleadings, and those pleadings directly contradict ADVA's asserted basis for dismissal.

The majority here concludes that *Andrews* controls, and ADVA is entitled to dismissal. The facts in *Andrews* are distinguishable from those in the present case. In *Andrews*, the plaintiff filed an AMWA complaint against a state college. The college responded and "pleaded sovereign immunity as an affirmative defense." *Andrews*, 2018 Ark. 12, at 2. ADVA made no such assertion here. I fear that today's decision vitiates the mandatory pleading requirements set forth in Rule 8 and will open the door for any defendant to assert any affirmative defense at any time during the course of litigation. With today's holding, a defendant could choose to state in its answer that it would not assert a statute-of-limitations defense, which is specifically included in Rule 8(c), and then three years later seek dismissal on that very basis. This outcome does not lend predictability or stability to the law and will undoubtedly create more confusion for the bench and bar.

ADVA also argues that in its answer it specifically reserved its right to assert additional defenses in a motion to dismiss and that it may therefore raise the defense of sovereign immunity at any time. In support of its argument, ADVA cites *Wallace v. Hale*,

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[3]We have treated affirmative defenses raised in a motion to dismiss as being proper when the motion was filed in response to a complaint. *See, e.g.*, *Amos v. Amos*, 282 Ark. 532, 669 S.W.2d 200 (1984); *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996).

341 Ark. 898, 20 S.W.3d 392 (2000). However, in *Wallace*, the defendants listed the specific defenses they intended to reserve. Here, ADVA's answer makes only a general statement that it reserves the right to amend the answer or assert additional defenses. Moreover, ADVA did not amend its answer, which affirmatively states that ADVA is not pleading sovereign immunity as to the AMWA claim.

Unfortunately, today's decision further muddies already murky waters. ADVA's motion to dismiss was not the proper vehicle for asserting the affirmative defense of sovereign immunity when the motion was filed more than three years after it had filed its answer that expressly declined to assert sovereign immunity as a defense. Under these circumstances, the circuit court's order should be affirmed.

JOSEPHINE LINKER HART, Justice dissenting. The court failed to conduct a proper constitutional analysis in *Board of Trustees v. Andrews*, 2018 Ark. 12, ___ S.W.3d ___, and as a result, *Andrews* was wrongly decided. The Arkansas Constitution is a complex legal document that, to be properly interpreted, requires harmonizing a large number of related provisions. *Wright v. Ward*, 170 Ark. 464, 467, 280 S.W. 369, 370–71 (1926); *see also Ark. Dep't of Comm. Corr. v. Barnes*, 2018 Ark. 122, 542 S.W.3d 841 (Hart, J., dissenting); *City of Jacksonville v. Smith*, 2018 Ark. 875, 40 S.W.3d 661 (Hart J., dissenting); *Bd. of Trs. v. Andrews*, 2018 Ark. 12, ___ S.W.3d ___ (Baker, J., dissenting). No *majority* opinion from this court has ever undertaken this type of analysis.

Despite the overbroad holding in *Andrews*, it does not annul the right of a citizen to seek redress in the courts of this state if a public official has engaged in an ultra vires act.

This right is not affected by article 5, section 20 and cannot be canceled by a decision of this court.

I submit that hiring a person and refusing to pay that person in accordance with the laws of this state is an ultra vires act. Article 2, section 8 of the Arkansas Constitution guarantees that no person shall be denied his property without due process of law. A person's lawfully earned wages are without question property. Accordingly, the circuit court did not err in refusing to dismiss this case pursuant to article 5, section 20.

I dissent.

Leslie Rutledge, Att'y Gen., by: *Patricia Van Ausdell*, Ass't Att'y Gen., and *Monty Vaughan Baugh*, Deputy Att'y Gen., for appellant.

Holleman & Associates, P.A., by: *John Holleman*, *Timothy A. Steadman*, and *Jerry Garner*, for appellees.