Cite as 2019 Ark. 105

SUPREME COURT OF ARKANSAS

No. CV-18-601

LARRY WALTHER, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; ANDREA LEA, STATE AUDITOR; DENNIS MILLIGAN, STATE TREASURER; AND CENTRAL ARKANSAS PLANNING AND DEVELOPMENT DISTRICT APPELLANTS V. MIKE WILSON APPELLEE	Opinion Delivered: April 18, 2019 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. 60CV-16-862] HON. CHRISTOPHER CHARLES PIAZZA, JUDGE REVERSED AND REMANDED.

KAREN R. BAKER, Associate Justice

Appellants Larry Walther, Director of the Arkansas Department of Finance and Administration (DFA); Andrea Lea, State Auditor; Dennis Milligan, State Treasurer (collectively, the State); and the Central Arkansas Planning and Development District (the CAPDD) appeal from the Pulaski County Circuit Court's award of attorney's fees to appellee Mike Wilson in his illegal-exaction lawsuit that successfully challenged the constitutionality of certain legislative acts. This appeal stems from the circuit court's order awarding attorney's fees to Wilson in the amount of $323,266.53. The award was based on an illegal-exaction suit initiated by Wilson in 2015 alleging that certain legislative acts of 2015 appropriating funds from the Arkansas General Improvement Fund (GIF) to eight

regional planning and development districts were unconstitutional. In *Wilson v. Walther*, 2017 Ark. 270, at 1, 527 S.W.3d 709, 711 (*Wilson I*), we agreed with Wilson and held that the acts were unconstitutional as written because they failed to state their district purpose in the bills. We reversed and remanded the matter and affirmed on cross-appeal.

On remand, Wilson sought a permanent injunction against the State enjoining disbursements under the authority of the acts in question, refund of funds and costs and fees. The sole issue on appeal relates to the circuit court's award of attorney's fees. The circuit court held a hearing and awarded $323,266.53 in attorney's fees (one-third of the remaining $969,799.60 GIF funds involved). The State timely appealed and presents three arguments regarding the one point on appeal: (1) the circuit court erred in finding Wilson's request for attorney's fees was not barred by sovereign immunity; (2) Wilson's recovery of attorney's fees is precluded as a matter of law; and (3) the circuit court's judgment in Wilson's favor did not result in the kind of substantial benefit that would warrant an exception from the normal attorney's-fee rules.

At issue is the circuit court's order from March 29, 2018, which stated in pertinent part:

> Central Arkansas Planning and Development District, Inc. presently holds from the last legislative GIF appropriation funds remaining and unspent in the amount of $969,799.60.
>
> . . . .
>
> By this lawsuit Plaintiff has conferred a benefit to taxpayers in the amount of the GIF funds appropriated but unspent. Plaintiff is, therefore, entitled to an award of attorney's fee of one-third (1/3) of the remaining GIF funds, or $323,266.53.

> Central Arkansas Planning and Development District, Inc. shall pay the amount of this fee award into the Court's registry within thirty (30) days of the date of the entry of this order.
>
> Central Arkansas Planning and Development District, Inc. shall remit payment of the balance of the remaining GIF funds ($646,533.07) to the State Treasurer within thirty (30) days of the date of entry of this order.

On review, "our general rule relating to attorney's fees is well established and is that attorney's fees are not allowed except when expressly provided for by statute. *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). An award of attorney's fees will not be set aside absent an abuse of discretion. *See Harris v. City of Fort Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006)." *Hanners v. Giant Oil Co. of Ark.*, 373 Ark. 418, 425, 284 S.W.3d 468, 474 (2008). Further, in awarding attorney's fees, we have explained that

> [a]lthough there is no fixed formula in determining the computation of attorney's fees, the courts should be guided by recognized factors in making their decision, including the experience and ability of the attorney, the time and labor required to perform the legal service properly, the amount involved in the case and the results obtained, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar legal services, whether the fee is fixed or contingent, the time limitations imposed upon the client or by the circumstances, and the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. *State Farm Fire & Casualty Co. v. Stockton*, 295 Ark. 560, 750 S.W.2d 945 (1988); *Southall v. Farm Bureau Mut. Ins. Co. of Arkansas, Inc.*, 283 Ark. 335, 676 S.W.2d 228 (1984); *New Hampshire Ins. Co. v. Quilantan*, 269 Ark. 359, 601 S.W.2d 836 (1980).
>
> We have also previously noted that due to the trial judge's intimate acquaintance with the record and the quality of service rendered, we usually recognize the superior perspective of the trial judge in assessing the applicable factors. Accordingly, an award of attorney's fees will not be set aside absent an abuse of discretion by the trial court. *State Farm Fire & Casualty Co. v. Stockton*, *supra*.

Chrisco, 304 Ark. at 229–30, 800 S.W.2d at 718–19.

With these standards in mind, we turn to the State's point on appeal. The State first contends that Wilson is not entitled to an award of attorney's fees because it directly exposes the State to financial liability and is therefore barred by sovereign immunity. The State further asserts there is no statutory authority for attorney's fees. Additionally, the State contends that the circuit court erred in applying *Lake View School District. No. 25 of Phillips County v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000), because in that case, the State agreed to pay attorney's fees, and here, the State has asserted that sovereign immunity bars recovery of attorney's fees since the beginning of the litigation. Wilson responds that he is not claiming a statutory basis for attorney's fees but was instead relying on *Lake View* in which this court held that a substantial benefit to the State had accrued because of Lake View's efforts and that attorney's fees should be awarded on this basis.

We begin with the State's argument that sovereign-immunity bars an attorney's fee award. Based on the record before us, the State's argument is misplaced because the State relinquished the funds; therefore, sovereign immunity is not an issue in this case. The record demonstrates that on September 13, 2015, the State disbursed $2,987,500 of appropriated funds from the GIF to the CAPDD. On February 12, 2016, Wilson filed suit challenging the constitutionality of the acts that appropriated these funds from the GIF. Throughout the litigation, the CAPDD continued to retain the funds. On October 5, 2017, we announced our opinion in *Wilson I*, 2017 Ark. 270, 527 S.W.3d 709, and held that the acts at issue were unconstitutional. At that time, the CAPDD continued to hold the funds. On April 30, 2018, pursuant to the circuit court's order, the entirety of the

$969,799.60 in GIF funds was deposited into the registry of the circuit court to remain there during the pendency of this appeal. Accordingly, at no point since the State relinquished the funds to the CAPDD on September 13, 2015, has the State had an interest in the funds. Despite the origination of the funds, once the funds were handed over to the CAPDD, the funds were no longer in State coffers or under State control. Simply put, when the $979,799.60 was transferred from the State coffers to a private entity, the State no longer exercised sovereignty over the funds. This "transfer" equates to an abandonment. Therefore, sovereign immunity is not applicable to this case.

Having determined that sovereign immunity is not at issue, we turn to our law regarding attorney's fees. Arkansas follows the American Rule that attorney's fees are not chargeable as costs in litigation except where the fees are expressly provided for by statute. *Lake View*, *supra*; *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). We have, however, recognized two exceptions to that rule: (1) the "common fund" doctrine and (2) the "substantial benefit" rule. *Millsap*, *supra*. "An exception has been created to that rule where a plaintiff has created or augmented a common fund or where assets have been salvaged for the benefit of others as well as himself. *Powell v. Henry*, 267 Ark. 484, 592 S.W.2d 107 (1980); *Trustees v. Greenough*, *supra*. Note, *The Counsel Fee in Stockholder's Derivative Suits*, 39 Columbia L. Rev. 784 (1939). In such a situation, to allow the others to obtain the full benefit from the plaintiff's efforts without requiring contribution or charging the common fund for attorney fees would be to enrich the others unjustly at the expense of the plaintiff.

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 87 S.Ct. 1404, 18 L. Ed. 2d 475 (1966)." *Millsap*, 288 Ark. at 442, 706 S.W.2d at 379–80.

Pursuant to the "substantial benefit" rule, the plaintiff may be awarded attorney's fees if the plaintiff's actions result in a substantial benefit to the class or to a business corporation, even when the benefit is not pecuniary and no fund has been created. *Lake View*, *supra*; *Millsap*, *supra*. In *Millsap*, this court affirmed an award of attorney's fees when the plaintiff's derivative action preserved a large sum of corporate assets, which benefited the corporation. In *Lake View*, we also concluded that "a substantial economic benefit has accrued not only to the poorer school districts as a direct result of Lake View's efforts but to the state as a whole. With the gradual elimination of disparities in funding and opportunities for students and with the passage of Amendment 74, education in the State has unquestionably benefitted." *Id.* at 495. In reaching that conclusion, we relied on evidence that there was an increase of over $100 million in public-school funding due to Lake View's efforts. *Id.* at 495–96. We further noted, however, as follows:

> We emphasize that this is a unique case with a unique set of circumstances. 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.

Id. at 497, 10 S.W.3d at 902.

Here, like *Lake View*, sovereign immunity is not applicable, and a substantial benefit has been conferred to the benefit of the taxpayers. As we explained in W*ilson I*, "[T]he issues before us involve significant statewide public interest because they concern *millions* of dollars of taxpayer money." 2017 Ark. 270, at 9, 527 S.W.3d at 715(emphasis added).

Having determined that attorney's fees are permitted in this case, we turn to the State's argument that we should remand this matter to the circuit court with instructions to employ the factors set forth in *Chrisco*, 304 Ark. 227, 800 S.W.2d 717. We agree. Based on the record before us, the circuit court did not make any findings with respect to what a reasonable attorney's fee would be in this case and awarded the one-third in fees that Wilson had requested. Accordingly, we remand to the circuit court for it to consider the *Chrisco* factors in determining whether the amount of fees requested by Wilson is reasonable under the circumstances.

Reversed and remanded.

KEMP, C.J., and WOOD and WOMACK, JJ., dissent.

JOHN DAN KEMP, Chief Justice, dissenting. I disagree with the majority's decision to affirm the circuit court's award of $323,266.53 in attorney's fees. Most significant, the majority's holding directly conflicts with this court's designation of the funds in the previous appeal. *Wilson v. Walther*, 2017 Ark. 270, 527 S.W.3d 709. There, this court

concluded that "the funds at issue were derived from taxes and implicate the state treasury." *Wilson v. Walther*, 2017 Ark. 270, at 7, 527 S.W.3d at 714. The majority now reverses course, concluding that the funds are owned and retained by CAPDD, not the State, because the State abandoned the money and therefore has no interest in the funds. If the State has no interest in these funds, as the majority now concludes, the question of who has the right to the almost $1,000,000 in the CAPDD fund remains unanswered. Therefore, I respectfully dissent.

I. *Facts*

The following are the most relevant facts to the case at bar. Appellee Mike Wilson brought an action seeking declarative and injunctive relief as a public-funds, illegal exaction pursuant to article 16, section 13 of the Arkansas Constitution. *Wilson*, 2017 Ark. 270, 527 S.W.3d 709. Following this court's reversal and remand in *Wilson*, Wilson filed a motion for declaratory judgment, permanent injunction, restitution, costs, and attorney's fees. In his motion, Wilson requested "attorney's fees of 1/3 of the common economic benefit pool accruing to state taxpayers due to [Wilson's] efforts, or such other reasonable attorney's fees as this court may determine according to law." Wilson asserted that "[a]s a result of [his] efforts and those of his counsel, the taxpayers have benefitted in this third action in the amount of $2,547,804 from which 1/3 attorney's fees should be awarded, and remaining funds reimbursed to DFA as restitution." The State responded that Wilson's request for attorney's fees must be denied and contended, *inter alia*, that

sovereign immunity barred his claim. The Central Arkansas Planning and Development District, Inc. (CAPDD), replied and adopted the State's arguments.[1]

After conducting a hearing on the matter, the circuit court entered its order and ruled,

> 1. The Arkansas Supreme Court's opinion and mandate constitute the law of the case upon remand.
>
> 2. Central Arkansas Planning and Development District, Inc. presently holds from the last legislative GIF appropriation funds remaining and unspent in the amount of $969,799.60.
>
> 3. The State Defendants—Arkansas Department of Finance and Administration Director Larry Walther, State Auditor Andrea Lea, and State Treasurer Dennis Milligan—have argued the defense of sovereign immunity. Sovereign immunity, however, does not apply to unconstitutional, illegal, or ultra vires acts of the State. Because the Arkansas Supreme Court concluded that the GIF appropriation statute was unconstitutional, [Wilson]'s claims against the State Defendants are not barred by the doctrine of sovereign immunity.
>
> 4. By this lawsuit [Wilson] has conferred a benefit to taxpayers in the amount of the GIF funds appropriated but unspent. [Wilson] is, therefore, entitled to an award of attorney's fee of one-third (1/3) of the remaining GIF funds, or $323,266.53. Central Arkansas Planning and Development District, Inc. shall pay the amount of

[1]The majority holds that sovereign immunity does not apply because "the State relinquished the [$969,799.60 in general improvement] funds" to CAPDD, a private entity organized under the laws of Arkansas. The majority opines that "[t]his 'transfer' equates to an abandonment," that the State lost an interest in those funds, and that sovereign immunity is inapplicable to the case at bar. I disagree. CAPDD serves as a gatekeeper of state funds, and this court concluded in *Wilson*, 2017 Ark. 270, 527 S.W.3d 709, that the funds at issue were "derived from taxes and implicate the state treasury" when we conferred standing on Wilson. *Id.* at 7, 527 S.W.3d at 714. Further, I note that the circuit court in this case ruled that sovereign immunity did not apply because of alleged unconstitutional acts of the State. The circuit court did not base its sovereign-immunity ruling on the status of CAPDD.

this fee award into the court's registry within thirty (30) days of the date of the entry of this order.

5. Central Arkansas Planning and Development District, Inc. shall remit payment of the balance of the remaining GIF funds ($646,533.07) to the State Treasurer within thirty (30) days of the date of entry of this order.

The circuit court ordered CAPDD to deposit the sum of $969,799.60 into the registry of the court.

On appeal, the State challenges the circuit court's award of attorney's fees and argues that the doctrine of sovereign immunity bars an award of attorney's fees because those fees directly expose the State to financial liability. The State contends that *Lake View School District No. 25 v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000), does not apply because it has not waived sovereign immunity in this case.

II. *Applicable Law*

A. Doctrine of Sovereign Immunity

Article five, section 20 of the Arkansas Constitution provides that "[t]he State of Arkansas shall never be made a defendant in any of her courts." In determining whether the doctrine of sovereign immunity applies, this court must decide whether a judgment for the plaintiff will either operate to control the action of the State or subject it to liability. *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346. If so, the suit is one against the State and is barred. *Id.*, 496 S.W.3d 346.

We have recognized certain occasions in which the State may be a defendant—for example, when the State is the moving party seeking specific relief; when the state agency is

acting illegally, unconstitutionally, or a state-agency officer refuses to do a purely ministerial action required by statute; and when the State fails to assert the defense of sovereign immunity. *See, e.g.*, *Ark. State Police Ret. Sys. v. Sligh*, 2017 Ark. 109, at 8–9, 516 S.W.3d 241, 246.

B. *Lake View*

The State asserts that, pursuant to *Lake View*, it is immune from a suit of attorney's fees. In *Lake View*, this court stated,

> The State is correct that Article 5, § 20, provides that the State shall never be a defendant in any of her courts. Moreover, this court has said that tapping the State's treasury for payment of damages will render the State a defendant. *See, e.g.*, *Newton v. Etoch*, 332 Ark. 325, 965 S.W.2d 96 (1998). Here, it is the State's treasury that would pay either on a pro rata basis from revenues allocated to those school districts that benefitted from the Lake View litigation or from the State coffers. Thus, the State's treasury would ultimately be liable for legal fees. We hold that the sovereign-immunity doctrine applies to this case.

Lake View, 340 Ark. at 496, 10 S.W.3d at 901.

Notwithstanding this court's holding that sovereign immunity applied, we ultimately concluded that the State had "waived its sovereign-immunity defense to payment of those fees." *Id.* at 496, 10 S.W.3d at 901. This court reasoned that

> when the State of Arkansas signed off in two published notices to the class members advocating that attorneys' fees be paid and continued to push for payment of attorneys' fees even after the chancery court refused to sign the Agreed Order, it waived its sovereign immunity defense to payment of those fees.

Id. at 496, 10 S.W.3d at 901. Only after holding that the State had waived sovereign immunity did this court allow an award of attorney's fees under a substantial-economic-benefit theory because "a substantial economic benefit ha[d] accrued not only to the poorer

school districts as a direct result of Lake View's efforts but to the state as a whole." *Id.* at 495, 10 S.W.3d at 900.

III. *Analysis*

In the present case, the circuit court ruled that Wilson was entitled to an award of attorney's fees. Specifically, the circuit court ruled that (1) Wilson's claims against Walther were not barred by the doctrine of sovereign immunity because this court "concluded that the GIF appropriation statute was unconstitutional" in *Wilson*, 2017 Ark. 270, 527 S.W.3d 709, and (2) Wilson had "conferred a benefit to taxpayers in the amount of the GIF funds appropriated but unspent." I disagree with the circuit court's rulings.

This case demonstrates a sharp distinction between (1) sovereign immunity from an action seeking declaratory and injunctive relief and (2) sovereign immunity from an action seeking monetary recovery. This court recognized in *Lake View* that the State's treasury would be forced to pay attorney's fees from revenues allocated to those school districts that benefited from the litigation or from the State coffers. *Lake View*, 340 Ark. at 496, 10 S.W.3d at 901. Further, as previously acknowledged, Wilson had standing precisely because "the funds at issue in this case are derived from taxes and implicate the state treasury." *Wilson*, 2017 Ark. 270, at 7, 527 S.W.3d at 714. Here, the State has never waived its sovereign-immunity defense, and Wilson's suit subjects the State's treasury to financial liability for legal fees. Thus, sovereign immunity should apply and preclude an award of attorney's fees. I would hold that the circuit court abused its discretion in awarding Wilson $323,266.53 in attorney's fees.

Lastly, I emphasize that in *Board of Trustees of University of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616, this court stated that

> suits subjecting the State to financial liability are barred by sovereign immunity and that plaintiffs like Andrews with these causes of actions have a "proper avenue for redress against State action, which is to file a claim with the Arkansas Claims Commission." *Univ. of Ark. for Med. Scis. v. Adams*, 354 Ark. 21, 25, 117 S.W.3d 588, 591 (2003); *see also* Ark. Const. Art. 2, § 13 (stating that "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character").

Andrews, 2018 Ark. 12, at 12, 535 S.W.3d at 623. Pursuant to *Andrews*, a proper avenue for redress is to file a claim with the Arkansas Claims Commission.

IV. *Conclusion*

Based on the applicable law, I would reverse the circuit court's award of attorney's fees and remand for the circuit court to enter an order directing that both the award of $323,266.53 in attorney's fees and the remaining GIF balance be paid to the State Treasurer.

Finally, while I see no legal basis for an award of attorney's fees in this instance, I nevertheless acknowledge and commend counsel's efforts during the course of this litigation to expose any alleged wrongdoing that otherwise might not have been known to the people of Arkansas.

WOOD, J., joins.

SHAWN A. WOMACK, Justice, dissenting. I disagree with the majority's conclusion that Mr. Wilson is entitled to attorney's fees given that the agreement between Mr. Wilson and his attorney for a contingency fee is void on its face.

"A contingent fee agreement *shall* be in writing and *shall* state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." Arkansas Rule of Professional Conduct 1.5(c) (emphasis added). The language of the rule is both clear and mandatory. An agreement for the type of fee sought here by Mr. Wilson must be in writing and it must state how the amount is to be determined.

Mr. Wilson acknowledged during oral argument that no written agreement existed between him and his attorney for the contingency fee to which he argues he is entitled. Under our rules, a verbal agreement for a contingency fee is invalid. While this court has previously granted an exception to Rule 1.5(c), that exception was based on unique facts that do not exist here. *See Hotel Associates, Inc. v. Rieves, Rubens and Mayton*, 2014 Ark. 254, 435 S.W.3d 488. In that case, the parties questioned the validity of an oral contingency fee agreement as it applied between themselves. Here, Mr. Wilson seeks to impose an oral contingency fee agreement between him and his attorney upon a third party, the State of Arkansas. This is not allowed.

Because Mr. Wilson's verbal agreement is facially void and cannot be enforced by this court, I respectfully dissent from the majority's determination that attorney's fees are permitted in this case.

Leslie Rutledge, Att'y Gen., by: *Jennifer L. Merritt*, Sr. Ass't Att'y Gen.; and *Brittany N. Edwards*, Ass't Att'y Gen., for appellant.

Mike Wilson; and *Ogles Law Firm, P.A.*, by: *John Ogles*, for appellee.