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SUPREME COURT OF ARKANSAS

No.: CV-17-653

	Opinion Delivered: May 30, 2019
DENNIS MILLIGAN, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF ARKANSAS APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SECOND DIVISION [NO. 60CV-15-4618]
V.	HONORABLE CHRISTOPHER CHARLES PIAZZA, JUDGE
DAVID SINGER APPELLEE	REVERSED AND DISMISSED.

ROBIN F. WYNNE, Associate Justice

Dennis Milligan, as Arkansas Treasurer of State, has filed an interlocutory appeal from an order of the Pulaski County Circuit Court denying his motion to dismiss a claim under the Arkansas Whistle-Blower Act (AWBA) as barred by the state's sovereign immunity. This court's jurisdiction arises under Rule 2(a)(10) of the Arkansas Rule of Appellate Procedure–Civil (2017). Because the complaint is barred by the state's sovereign immunity, we reverse the order denying the motion to dismiss and dismiss the complaint.

David Singer, who had worked as the assistant for legislative affairs and communications in the treasurer's office prior to his termination, filed a defamation suit against Jim Harris, Milligan's chief of staff in 2015. Singer subsequently filed a

supplemental complaint that added Milligan as a defendant in his individual and official capacities, added new claims, and sought monetary damages. Because the supplemental complaint raised issues of federal law, Milligan successfully moved to have the case removed to federal court.

While the case in federal court was pending, Singer filed another complaint in the Pulaski County Circuit Court seeking relief for defamatory statements and alleging a violation of the AWBA. The complaint named Milligan and Harris individually and in their official capacities. The complaint alleged that Harris had made defamatory statements about Singer with Milligan's approval, and that Singer was terminated after he reported concerns about misuse of public funds and violations of campaign laws. Milligan answered the complaint and alleged that the complaint was barred by sovereign immunity.

In June 2017, Singer filed a second amended complaint alleging a violation of the AWBA. The only defendant named in the complaint was Milligan in his official capacity. In the complaint, Singer sought lost wages, front pay or reinstatement, lost earnings, attorney's fees, and costs. Milligan filed a motion to dismiss the second amended complaint. In the motion, Milligan alleged that the complaint was barred by sovereign immunity and that it failed to state a claim for relief and was subject to dismissal under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure. The trial court entered an order finding that the complaint was not barred by sovereign immunity and denying the motion to dismiss. This interlocutory appeal followed.

Article 5, § 20 of the Arkansas Constitution provides that the "State of Arkansas shall never be made defendant in any of her courts." Whether a party is immune from suit is purely a question of law and is reviewed de novo. *City of Little Rock v. Yang*, 2017 Ark. 18, 509 S.W.3d 632.

This court previously considered a motion to dismiss on grounds of sovereign immunity in a suit under the AWBA in *Arkansas Community Correction v. Barnes*, 2018 Ark. 122, 542 S.W.3d 841. In that case, Barnes had filed a suit alleging a violation of the AWBA. Arkansas Community Correction moved to dismiss, alleging that the complaint was barred by sovereign immunity. The motion to dismiss was denied. On appeal, this court reversed the order denying the motion to dismiss and dismissed the complaint, holding that the purported legislative waiver of the state's sovereign immunity in the AWBA is unconstitutional, pursuant to the holding in *Board of Trustees v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616.

Singer asserts in his responsive brief that Milligan waived jurisdiction by admitting the trial court had jurisdiction over the subject matter and the parties in his answer to the initial complaint. However, Milligan asserted that the claim was barred by sovereign immunity in his motion to dismiss, which was his initial pleading after the second amended complaint was filed. His averments as to jurisdiction in his previous answers are of no moment and, in any event, he raised the issue of sovereign immunity in those pleadings as well. Singer also argues that the governor waived sovereign immunity for the executive branch by signing the AWBA into law. The governor does not enact legislation.

That is the function of the legislature, which we have expressly held cannot waive the state's immunity. The governor's signature does not act as evidence of agreement with the legislation; it is instead a fulfillment of the duties of office under our system of checks and balances. Singer's argument lacks merit.

Singer contends that *Andrews* and *Barnes* were wrongly decided because the provision in article 2, § 13 stating that "every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property, or character" takes precedence over article 5, § 20. In *Bryant v. Arkansas State Highway Commission*, 233 Ark. 41, 342 S.W.2d 415 (1961), this court considered an argument that article 5, § 20 must give way to article 2, § 13 and squarely rejected it:

> The framers of the constitution certainly knew that instances of hardship would result from the prohibition of suits against the State, but they nevertheless elected to write that immunity into the constitution. The language is too plain to be misunderstood, and it is our duty to give effect to it. The appellants' argument, carried to its logical end, would completely destroy the State's immunity from suit, for it could be argued in every case that to exempt the State from a coercive proceeding would be to deny the plaintiff a certain remedy for an injury he had supposedly suffered.

233 Ark. at 44, 342 S.W.2d at 417

In recognition of the state's constitutional sovereign immunity, the legislature created the Arkansas State Claims Commission to provide a method by which claims against the state may be addressed while preserving the state's sovereign immunity. *See Ark. Pub. Def. Comm'n v. Greene Cty. Cir. Ct.*, 343 Ark. 49, 32 S.W.3d 470 (2000). Singer admits that he can make a claim before the Commission, but he contends that this remedy is

inadequate because the Commission has no authority to enjoin a party from engaging in acts that are ultra vires, in bad faith, or arbitrary. But Singer is seeking damages against Milligan, not injunctive relief, rendering his argument inapplicable here.

Finally, Singer contends that sovereign immunity does not apply because the State of Arkansas is not a named defendant. Singer sought damages against Milligan under the AWBA in a complaint that named Milligan solely in his official capacity. A suit against a state official in his or her official capacity is not a suit against that person; rather, it is a suit against that official's office. *Short v. Westark Cmty. Coll.*, 347 Ark. 497, 65 S.W.3d 440 (2002). As an award of damages in this case would subject the state to liability, the sovereign immunity granted to the state in the Arkansas Constitution applies.

Pursuant to our decision in *Barnes*, the legislature's attempt to waive that immunity in the AWBA is unconstitutional. Further, none of Singer's arguments against the application of the holding in *Andrews*, and by extension *Barnes*, have merit. Accordingly, we reverse the order denying Milligan's motion to dismiss and dismiss the complaint. Because the complaint is barred by sovereign immunity, it is unnecessary to consider Milligan's alternate contention that the complaint fails to state a claim for relief.

Reversed and dismissed.

BAKER and HART, JJ., dissent.

KAREN R. BAKER, Justice, dissenting. I dissent for the reasons stated in my dissent in *Arkansas Community Correction v. Barnes*, 2018 Ark. 122, 542 S.W.3d 841.

JOSEPHINE LINKER HART, Justice, dissenting. I dissent. The United States Supreme Court looks to several factors when determining whether to afford a prior decision *stare decisis*. Among those factors are the quality of the decision's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. *Janus v. Am. Fed'n of State, Cty. & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478–79, 201 L. Ed. 2d 924 (2018). Literally all[1] of these factors weigh against affording stare decisis to

[1]While the focus of this dissent is on "the quality of the [*Andrews*] decision's reasoning," make no mistake that the other enumerated factors weigh against *stare decisis* as well. As I observed in *Arkansas Oil & Gas Comm'n v. Hurd*:

> The untenability of our current sovereign immunity jurisprudence, demonstrated by cases like the one currently before us, is lost neither on the parties to this case nor on the rest of the Arkansas legal community. The fallout from *Board of Trustees of the University of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616 has manifested in all forms of state court litigation related to government affairs, with litigants from both the public and private spheres clamoring to either weaponize or escape from *Andrews* and its undefined limitations, and our law is suffering because of it. This court must "wipe the slate" on sovereign immunity, in lieu of continuing this tired and awkward endeavor to develop our jurisprudence within *Andrews* and its progeny. *See, e.g.*, *Walther v. FLIS Enters., Inc.*, 2018 Ark. 64, 540 S.W.3d 264 (sovereign immunity is an affirmative defense that must be raised in a responsive pleading) and *Arkansas Dep't of Veterans Affairs v. Mallett*, 2018 Ark. 217, 549 S.W.3d 351 (without overruling *FLIS*, failure to raise sovereign immunity as affirmative defense in responsive pleading simply does not matter).
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> We cannot keep doing this. The *Andrews* decision was improvident for its profound lack of any actual constitutional analysis. *See Arkansas Community Correction v. Barnes*, 2018 Ark. 122, 542 S.W.3d 841 (Hart, J., dissenting).

Andrews[2] (and its progeny most relevant here, *Barnes*[3]), the sovereign immunity decision that the majority suggests controls the outcome of this case.[4]

This court handed down *Andrews* on January 18, 2018, and the majority held as follows:

> [W]e acknowledge that the General Assembly enacted the AMWA and allowed "an action for equitable and monetary relief against [the State]." Ark. Code Ann. § 11–4–218(e). Nevertheless, we conclude that the legislative waiver of sovereign immunity in section 11–4–218(e) is repugnant to article 5, section 20 of the Arkansas Constitution. In reaching this conclusion, we interpret the constitutional provision, "The State of Arkansas shall never be made a defendant in any of her courts," precisely as it reads.

Andrews, 2018 Ark. 12, at 10, 535 S.W.3d 616, 623. Pursuant to this rationale, the majority dismissed the plaintiff-appellee's claim against his State employer for unpaid wages

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> The notion that the drafters of our constitution intended to allow our state government to assert sovereign immunity against the citizens of Arkansas in cases like *Andrews* and *Barnes*, where the government is accused of acting illegally and unconstitutionally, is simply wrong. Furthermore, the failure by the majority in *Andrews* to define the majority opinion's limitations, especially when the dissent so desperately endeavored to point out the majority opinion's dangerous implications, has made this situation far worse. It is time for this court to simply acknowledge as much, so we can move forward.

2018 Ark. 397, at 13–14, 564 S.W.3d 248, 256 (Hart, J., concurring).

[2]*Bd. of Trustees of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616.

[3]*Ark. Cmty. Corr. v. Barnes*, 2018 Ark. 122, 542 S.W.3d 841.

[4]*See also Pearson v. Callahan*, 555 U.S. 223, 235, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009) ("Where a decision has been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts, these factors weigh in favor of reconsideration.") (internal citations omitted).

brought pursuant to the Arkansas Minimum Wage Act (AMWA). *Id.* Effectively, a majority of this court held that the State of Arkansas does not have to pay its employees minimum wage, or at least that no court can make the State pay its employees their wages when it has declined to do so. *Id.* As one circuit judge put it shortly thereafter, this was a "sea change" that significantly abridged the then-acknowledged exceptions to sovereign immunity—according to *Andrews*, citizens can no longer recover any legal damages from the State, even if the State has passed a *law* that specifically says so. *Id.* Instead, the majority opined, these damaged individuals can try their luck with the Arkansas Claims Commission, a politically created forum where the merits and value of any claim are within the discretion of appointed commissioners, and not subject to the constitutional guarantees of a jury trial or a legal remedy. *Id.* at 12, 535 S.W.3d at 623.

However, in neither *Andrews* nor any case handed down by this court since has the majority set forth an actual constitutional analysis of the issue in question. A constitutional analysis would, at the very least, analyze the constitution—all of it, together. *See, e.g.*, *Ward v. Priest*, 350 Ark. 345, 382, 86 S.W.3d 884, 898 (2002) ("It is a rule of universal application that the Constitution must be considered as a whole, and that, to get the meaning of any part of it, we must read it in the light of other provisions relating to the same subject."). This analysis would show that the protection afforded to the State of Arkansas through article 5, section 20 of the Arkansas Constitution––"[th]e State of Arkansas shall never be made defendant in any of her courts"––is not enforceable against the "Declaration of Rights" guaranteed to the citizens by article 2 of the very same

Arkansas Constitution. For example, article 2, section 13 provides 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; he ought to obtain justice freely, and without purchase; completely, and without denial; promptly and without delay; *conformably to the laws*." (Emphasis added.)[5] Additionally, article 2, section 7 provides that "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law. . . . This amendment to the Constitution of Arkansas shall be self-executing and require no enabling act[.]" Most importantly, article 2, section 29 excepts these rights away from interference through the powers of State government—"we declare that everything in *this article* is excepted out of the general powers of the government." (Emphasis added.)[6]

Additionally, the *Andrews* majority's excuse for disregarding article 2 was entirely baseless. The majority specifically ignored any of the plaintiff-appellee's asserted arguments

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[5]Here is, or was, the constitutional prescription that, together with article 2, section 29 (*see ante*, fn. 6), allowed for the legislative waiver exception to sovereign immunity, the very idea of which the *Andrews* majority suggested was "repugnant" to the same constitution I am quoting from. 2018 Ark. 12, at 10, 535 S.W.3d at 623. "Laws" like the AMWA and the AWBA, which protect against "injuries or wrongs [one] may receive in his person, property, or character," are no less constitutional than the law that created the Arkansas Claims Commission; in fact, those among the former are *more so* because they respect article 2, section 7's jury-trial guarantee, whereas the latter does not.

[6]Again, no provision similar to article 2, section 29 existed in the 1868 Arkansas Constitution. The *Andrews* majority hung its hat on the distinction between the 1868 version of article 5, section 45 and the 1874 version of article 5, section 20, the former of which expressly provided that the legislature could decide when to waive the State's sovereign immunity. *Andrews*, 2018 Ark. 12, at 10–11, 535 S.W.3dat 622. Acknowledging the new article 5, section 20 while simultaneously ignoring the new article 2, section 29 defied the intent of our founders.

relating to article 2, offering as explanation that the plaintiff-appellee failed to obtain a ruling on any such argument below, without more. 2018 Ark. 12, at 12, 535 S.W.3d at 623. The majority was incorrect. While this court generally requires an *appellant* to raise an issue to the trial court and to obtain a ruling on that issue before this court will address that issue on appeal, this court can affirm a trial court's decision in favor of the *appellee* for any legitimate reason, regardless of whether the specific reason was raised or ruled upon below. *See, e.g.*, *Alexander v. Chapman*, 299 Ark. 126, 130, 771 S.W.2d 744, 746–47 (1989) ("It also makes no difference that the trial court's decision to overrule the appellant's objection was not based on the law of the case doctrine. We will affirm the court's ruling if it is correct for any reason. The appellee was not bound to present to the trial court every conceivable reason for overruling the appellant's objection.") (internal citations omitted).

The majority maintained a similar tactic in *Barnes* by throwing out the plaintiff-appellee's claim brought pursuant to the Arkansas Whistle-Blowers Act (AWBA), the same claim and legal authority through which Singer seeks relief in this case. *See Barnes*, *supra*. The *Barnes* majority simply stated the facts, cited *Andrews*, and moved on. *Id.* The majority did not make any effort to square its continued interpretation of article 5, section 20 with the rights guaranteed by article 2 of the very same Arkansas Constitution. *Id.*

In the present case, we have another AWBA claim, and the majority says *Andrews* and *Barnes* control. To its credit, this time the majority cites *Bryant v. Arkansas State Highway Commission*, 233 Ark. 41, 341 S.E.2d 415 (1961), which it offers for the proposition that one's right to a legal remedy guaranteed by article 2, section 13 is

subservient to the State protection contained in art. 5, § 20. However, the majority's reliance upon *Bryant*, an opinion this court issued just short of six decades ago, is misplaced.

As an initial matter, this court faced a situation in *Bryant* that was wildly different from this case. There, the plaintiff-appellants, owners of a hotel, were attempting to persuade the courts to issue a writ of mandamus that would compel the state highway commission to file a condemnation lawsuit against the owners themselves, to the end that a forum would be created where the owners might recover for alleged property damages resulting from the closure of nearby thoroughfare exits—a far cry from the AWBA claim at issue here. *Bryant*, 233 Ark. at 42–43, 342 S.W.2d at 416. Additionally, in denying the owners' alleged claim, the *Bryant* court's consideration of article 2 was confined to section 13; the *Bryant* court did not in any way address how any of the other provisions in article 2 would affect its analysis. *Bryant*, *supra*.

Moreover, to the extent *Bryant* ever stood for the constitutional interpretation the majority suggests it does, that interpretation was necessarily rejected eighteen years later in *Grimmett v. Digby*, 267 Ark. 192, 589 S.W.2d 579 (1979), *overruled on other grounds by Craven v. Fulton Sanitation Serv., Inc.*, 361 Ark. 390, 206 S.W.3d 842 (2005)). In *Grimmett*, an insurance company sought to recover for sums paid to its insured after a state-trooper vehicle had allegedly caused a traffic accident and that resulted in damages to the insured. *Id.* This court was presented with the argument that the General Assembly's creation of the Arkansas Claims Commission, along with the existing state protection afforded by

article 5, section 20 of the Arkansas Constitution, meant that the Arkansas Claims Commission had exclusive jurisdiction over claims against state employees.[7] *Id.* at 193, 589 S.W.2d at 580. Utilizing our workers'-compensation laws as an illustrative example, this court offered a detailed explanation as to why embracing such an argument would contradict our constitution, an explanation that I quote at some length here:

> In making this contention, the petitioner fails to take into consideration other provisions of the Arkansas Constitution such as Art. 2 s 7 and Art. 2 s 13.
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> Article 2, § 7 provides:
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> > "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; . . ."
>
> Article 2, § 13 provides:
>
> > "Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and

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[7]I am mindful that part of the *Grimmett* court's analysis involved a prior decision in which this court held that a suit against a state trooper involved in a highway traffic accident does not in and of itself amount to a suit against the State. *See Grimmett v. Digby*, 267 Ark. 192, 193, 589 S.W.2d 579, 580 (1979) ("We pointed out in *Kelly v. Wood, Circuit Judge*, 265 Ark. 337, 578 S.W.2d 566 (1979), that an automobile negligence action for personal injuries brought against a state trooper for a violation of duty imposed upon him by law in common with all other people using the highways does not amount to an action against the State within the prohibition of Arkansas Constitution Art. V s 20."). A close review of *Grimmett* shows that the petitioners were nonetheless arguing that the plaintiff was barred from bringing the lawsuit against the state trooper in State court. *Id.* ("Petitioner readily recognizes our decision in *Kelly v. Wood, Judge*, . . . but points out that other states with a provision similar to Art. V § 20 . . . have upheld tort-claim acts such as the Arkansas Claims Commission Act . . . and have construed such acts as giving exclusive jurisdiction of all personal injury actions against state employees to such commissions or adjudicatory agencies.").

> without denial, promptly and without delay, conformably to the laws."

In *St. L., I. M. & S. Ry. v. Williams*, 49 Ark. 492, 5 S.W. 883 (1887), based upon the foregoing constitutional provisions, we held:

> "Everyone is entitled, under the Constitution, to have his rights enforced, his wrongs redressed, and his liabilities determined in the courts, whenever it becomes necessary to compel their enforcement, redress or adjustment, and, when he is liable for damages, as the appellant is in this case, to have the damages he shall pay assessed by a jury. The Legislature has no power to substitute boards of arbitration for the courts, without the consent of parties, and make their awards obligatory and the exercise of the right to seek the aid of the courts to obtain relief from a wrong, or impose upon any one a penalty for exercising such right. To make the action of such a board obligatory or impose such a penalty would be a denial of the right, or a purchase of justice, and a violation of the Constitution."

The foregoing construction given to Art. 2 s 7 and Art. 2 s 13 made it *necessary* for the people of this State to amend the Constitution (Amendment # 26) before a valid Workmen's Compensation law could be enacted. *Such provisions would also prevent the General Assembly from giving the Claims Commission exclusive jurisdiction of tort claims against state employees or officers for their unlawful acts.*

Id. at 193–93, 589 S.W.2d at 580–81 (emphases added).

In my view, article 5, § 20 cannot be construed to deny any of the rights guaranteed by article 2 without a constitutional amendment so permitting. A clear reading of *Andrews* shows that the majority opinion cannot possibly comport with our founding people's instruction to their State government set forth in article 2, section 29: "We declare that everything in this article is excepted out of the general powers of the government; and shall forever remain inviolate[.]" The majority continues to refuse to address this issue.

I dissent.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Byron Freeland*, *Kathlyn Graves*, and *Graham Talley*, for appellant.

Sutter & Gillham, P.L.L.C., by: *Luther Oneal Sutter* and *Lucien Gillham*, for appellee.