Cite as 2019 Ark. 199

SUPREME COURT OF ARKANSAS

No.: CV-18-616

	Opinion Delivered: June 6, 2019
AUSTIN PRINCE, WILLIE REINHARDT, MARY E. LOWMAN, DEBORAH BROWN, KEVIN STEELAND, PHYLLIS STINSON, THOMAS LOWMAN, AND RICHARD SMITH APPELLANTS	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SECOND DIVISION [NO. 60CV-18-345] HONORABLE CHRISTOPHER CHARLES PIAZZA JUDGE
V.	AFFIRMED.
ARKANSAS STATE HIGHWAY COMMISSION; ARKANSAS DEPARTMENT OF TRANSPORTATION; AND SCOTT E. BENNETT, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARKANSAS DEPARTMENT OF TRANSPORTATION APPELLEES	

ROBIN F. WYNNE, Associate Justice

Appellants Austin Prince, Willie Reinhardt, Mary E. Lowman, Deborah Brown, Kevin Steeland, Phyllis Stinson, Thomas Lowman, and Richard Smith appeal from an order of the Pulaski County Circuit Court granting a motion to dismiss filed by the Arkansas State Highway Commission; the Arkansas Department of Transportation; and Scott E. Bennett, in his official capacity as director of the Arkansas Department of Transportation. We affirm.

The Arkansas State Highway Department determined that a new bridge was needed on Highway 79 to span the White River at Clarendon as part of a realignment and expansion of the highway. Because Highway 79 runs through federal land at that location, the Department was required to obtain an easement from the federal government. To that end, the Department entered into an agreement with the United States Fish and Wildlife Service (USFWS). Under the agreement, the Department would cede fifty acres of property to USFWS in exchange for a 49.69-acre easement over land in the Cache River and White River Wildlife Refuges. The Department also agreed to convey ninety-seven acres of land in Monroe County to USFWS to mitigate for the loss of habitat quantity and quality caused by the realignment and expansion of Highway 79. The agreement further required the Department to demolish three bridges, one of which is the old Clarendon bridge, remove all bridge structures, restore the natural topography, and reestablish native hardwood vegetation. To comply with this provision of the agreement, the Department planned to invite bids and enter into a contract with the winning bidder on the bridge-demolition project, with an estimated cost of $10.8 million.

Appellants filed a motion for preliminary injunction and complaint for declaratory and injunctive relief alleging that the contract between the Department and USFWS is void because it is unconscionable, entered into under duress, and constitutes a windfall to USFWS. They also alleged that there exists a mutual mistake of fact regarding the necessity of removing the old Clarendon bridge. Appellants contended in the complaint that, because the contract is void, the monetary expenditures constitute an illegal exaction,

for which suit is permitted under article 16, § 13 of the Arkansas Constitution. In the complaint, appellants requested a permanent injunction restricting the Department from demolition activities for the old Clarendon bridge as well as reasonable attorney's fees, costs, and expenses.

Appellees moved to dismiss the complaint on the following grounds: (1) the complaint is barred by sovereign immunity; (2) appellants lack standing to challenge the agreements; (3) the complaint fails to state a claim for which relief may be granted; and (4) appellants failed to join an indispensable party (USFWS). Appellees also contested the motion for a preliminary injunction, contending that it was barred by sovereign immunity and failed to satisfy the requirements of Arkansas Rule of Civil Procedure 65 (2017). The circuit court granted the preliminary injunction with the stated goal of giving the parties time to explore settlement. The parties were unable to settle, and the circuit court entered an order granting the motion to dismiss on all four grounds asserted by appellees. This appeal followed.[1]

Appellants appeal from the grant of a motion to dismiss. In reviewing a trial court's decision on a motion to dismiss under Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Goforth v. Smith*, 338 Ark. 65, 991 S.W.2d 579 (1999). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in

[1]Upon motion by appellants, this court stayed demolition of the old Clarendon bridge pending resolution of this appeal.

favor of the complaint, and pleadings are to be liberally construed. *Hames v. Cravens*, 332 Ark. 437, 442, 966 S.W.2d 244, 247 (1998). However, our rules require fact pleading. A complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Brown v. Tucker*, 330 Ark. 435, 438, 954 S.W.2d 262, 264 (1997); Ark. R. Civ. P. 8(a)(1) (2017).

Appellants' sole claim in their complaint is that the agreement between the Department and USFWS constitutes an illegal exaction. Article 16, § 13 of the Arkansas Constitution provides: "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 whatsoever." This court has held that such a suit is not barred by the constitution's sovereign-immunity provision, article 5, § 20, because article 16, § 13, as a more specific provision, controls over the more general prohibition in article 5, § 20.[2] *McGhee v. Ark. State Bd. of Collection Agencies*, 360 Ark. 363, 201 S.W.3d 375 (2005); *Carson v. Weiss*, 333 Ark. 561, 972 S.W.2d 933 (1998); *Streight v. Ragland*, 280 Ark. 206, 209-10 n. 7, 655 S.W.2d 459, 461 n. 7 (1983).

Clearly, citizens are constitutionally permitted to sue the state for an illegal exaction. The question before us in this appeal is whether appellants' complaint states a cause of action for an illegal exaction. We hold that it does not.

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[2]We further note that the decision in *Board of Trustees of University of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616, has no bearing whatsoever on the right to sue provided to citizens in article 16, § 13, as *Andrews* dealt solely with the issue of whether the legislature was permitted to waive the state's constitutional immunity through statute.

An illegal exaction is an exaction that is either not authorized by law or is contrary to law. *Stromwall v. Van Hoose,* 371 Ark. 267, 265 S.W.3d 93 (2007). Two types of illegal-exaction cases can arise under article 16, section 13: "public funds" cases, where the plaintiff contends that public funds generated from tax dollars are being misapplied or illegally spent, and "illegal-tax" cases, where the plaintiff asserts that the tax itself is illegal. *McGhee*, 360 Ark. 363, 201 S.W.3d 375 (2005). This court has stated that citizens have standing to bring a "public funds" case because they have a vested interest in ensuring that the tax money they have contributed to a state or local government treasury is lawfully spent. *Ghegan & Ghegan, Inc. v. Weiss,* 338 Ark. 9, 991 S.W.2d 536 (1999). Accordingly, "a misapplication by a public official of funds arising from taxation constitutes an exaction from the taxpayers and empowers any citizen to maintain a suit to prevent such misapplication of funds." *Farrell v. Oliver,* 146 Ark. 599, 602, 226 S.W. 529, 530 (1921). When the expenditure is authorized by statute, no illegal exaction occurs. *Sullins v. Cent. Ark. Water*, 2015 Ark. 29, 454 S.W.3d 727.

A review of appellants' complaint reveals that it lacks sufficient facts to state a claim for an illegal exaction. Appellants do not allege in the complaint that the Department lacks the authority to enter into the agreement with USFWS. In fact, the Department has express statutory authority to "let all contracts for construction, improvement, and maintenance of roads comprising the state highway system." Ark. Code Ann. § 27-65-107(a)(2) (Supp. 2017). It also has the express authority to "enter into all agreements with the United States government relating to the survey, construction, improvement, and

maintenance of roads under the provisions of any present or future congressional enactment." Ark. Code Ann. § 27-65-107(a)(3)(A). Appellants also do not allege that the Department failed to follow any applicable statute, rule, or regulation with regard to the agreement.

The complaint does not allege any wrongdoing on the part of the state at all. Instead, it alleges that USFWS took advantage of the Department's highway-expansion project to force unreasonable terms on the state and attempts to assert various contract defenses on the state's behalf. This is not sufficient to establish a claim for an illegal exaction. *See Bowerman v. Takeda Pharm. U.S.A.*, 2014 Ark. 388, 442 S.W.3d 839 (holding that a claim that the state's treasury was diminished by reimbursements for a prescription medication alleged to have caused serious health problems was not one for illegal exaction where there was no claim that the state lacked authority to make the reimbursement payments and all allegations of wrongdoing were against the pharmaceutical company).[3]

As appellants do not plead facts sufficient to establish that the Department engaged in a misapplication or illegal expenditure of public funds, their claim is not one for an

[3]In *Nelson v. Berry Petroleum Co.*, 242 Ark. 273, 413 S.W.2d 46 (1967), this court held that the chancery court had jurisdiction to entertain an illegal-exaction suit in which the plaintiff contended that a consortium of asphalt providers had conspired to charge the state amounts in excess of the fair-market value for asphalt, giving the state a lower grade than that contracted. In *Bowerman*, the court distinguished *Nelson* on the basis that, in *Bowerman*, the state provided reimbursement for the exact medication prescribed. 2014 Ark. 388, at 6, 442 S.W.3d 839, 843. Here, as in *Bowerman*, there is no allegation in the complaint that the state has not received what is due to it under the agreement with USFWS.

illegal exaction, and the circuit court did not err in dismissing the complaint. As we have held that the circuit court was correct in finding that the complaint fails to state facts upon which relief could be granted, we decline to consider appellants' remaining points on appeal.

Affirmed.

Special Justice MEREDITH SWITZER joins.

BAKER, J., concurs.

HART, J., dissents.

GOODSON, J., not participating.

KAREN R. BAKER, Justice, concurring. I agree with the majority's disposition; however, I write separately for the reasons stated in my dissents in *Board of Trustees of University of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616 and *Arkansas Oil & Gas Comm'n v. Hurd*, 2018 Ark. 397, 564 S.W.3d 248. While I concur, I must note the majority's footnote—*Andrews* has no bearing on a citizen's right to bring an illegal-exaction claim—is not supported by *Andrews* and its progeny. The majority's footnote states:

> We further note that the decision in *Board of Trustees of University of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616, has no bearing whatsoever on the right to sue provided to citizens in article 16, § 13, as *Andrews* dealt solely with the issue of whether the legislature was permitted to waive the state's constitutional immunity through statute.

Despite the majority's footnote, this simply conflicts with the broad language employed by *Andrews*. Article 5, section 20 of the Arkansas Constitution provides that

"[t]he State of Arkansas shall never be made defendant in any of her courts." As explained by the majority in *Andrews*, "We interpret the constitutional provision, 'The State of Arkansas shall never be made a defendant in any of her courts,' precisely as it reads." 2018 Ark. 12, at 10, 535 S.W.3d at 622. Further, sovereign immunity is jurisdictional immunity from suit, and jurisdiction must be determined entirely from the pleadings. *Andrews*, *supra* (citing *LandsnPulaski, LLC v. Ark. Dep't of Corr.*, 372 Ark. 40, 269 S.W.3d 793 (2007); *Clowers v. Lassiter*, 363 Ark. 241, 213 S.W.3d 6 (2005); *Ark. Tech Univ. v. Link*, 341 Ark. 495, 17 S.W.3d 809 (2000)). In the present case, the majority holds that the appellants' complaint does not sufficiently establish an illegal-exaction case pursuant to 12(b)(6) of the Arkansas Rules of Civil Procedure. However, based on *Andrews*, because the State may never be sued—there is jurisdictional immunity from suit—the appellants' pleadings are inconsequential. Accordingly, because we interpret the constitution "precisely as it reads," the appellees, as agencies of the State, are immune from suit. Of course, this is an absurd result, but as I noted in my dissent in *Andrews*, the manner in which the majority interpreted article 5, section 20 conflicted with various other constitutional provisions. *Id.* at 15–16, 535 S.W.3d at 624–25 (Baker, J., dissenting). Further, I specifically included "illegal-exaction cases" in my bulleted listed as one of the "specific types of actions that the majority's decision calls into question when the suit is filed against the State of Arkansas." *Id.* at 18, 535 S.W.3d at 626–27 (Baker, J., dissenting). *Andrews* did not identify exceptions, exemptions, or the like. Again, the State may never be sued. *Hurd*, 2018 Ark. 397, at 18, 564 S.W.3d at 258 (Baker, J., dissenting). Accordingly, I must concur.

JOSEPHINE LINKER HART, Justice, dissenting. I dissent. When the government is engaged in wasteful and fiscally irresponsible activity, an illegal-exaction lawsuit brought by a taxpayer is often the only thing that can stop it. Here, a group of taxpayers asserts that the Arkansas Department of Transportation (ARDOT) is about to destroy one of our state's historic structures, the old U.S. 79 White River Bridge at Clarendon, Arkansas (the Clarendon Bridge), at a cost of no less than $10.8 million. According to the complaint, ARDOT insists on this course of action, even though the bridge's destruction (1) is unnecessary and will not serve its intended purpose; (2) is expressly illegal for lack of federally required workability assessments, which would show that the destruction of the bridge is unnecessary and will not serve its intended purpose; and (3) will eliminate a substantial and ready-to-implement economic-development plan featuring the Clarendon Bridge that would bring tourism revenue to a region of our state that could use it. The complaint sufficiently states an illegal exaction claim.[1]

This court reviews a circuit court's decision to grant a motion to dismiss under the abuse-of-discretion standard. *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, at 4, 372 S.W.3d 324, 329. In making its determination, this court treats the facts alleged in the complaint as true and views them in the light most favorable to the plaintiff. *J.B. Hunt, LLC v. Thornton*, 2014 Ark. 62, at 5, 432 S.W.3d 8, 11.

[1]I do commend Justice Wynne for clearly reiterating that sovereign immunity is not a viable defense against an illegal-exaction claim. That an agency of our state would even put forth a proposition to the contrary is, to put it lightly, scary.

The Arkansas Constitution permits any citizen to sue to protect "against the enforcement of any illegal exactions whatever." Ark. Const. art. XVI, § 13. Arkansas law has consistently acknowledged that taxpayers are the equitable owners of public funds and that their liability to replenish the funds exhausted by misapplication entitles them to illegal-exaction relief against such misapplication. *Farrell v. Oliver*, 146 Ark. 599, 602, 226 S.W. 529, 530 (1921); *Ward v. Farrell*, 221 Ark. 363, 367, 253 S.W.2d 353, 356 (1952). The purpose of illegal exaction is to "prevent a mis-application of funds." *Macky v. McDonald*, 255 Ark. 978, 982, 504 S.W.2d 726, 731 (1974). Illegal exaction has been specifically applied to federal funds, and "it is clear, that once these funds reach the 'treasury' they are protected by the illegal exaction safeguards." *Id.* at 736. "'Illegal Exaction' under the Arkansas Constitution means both direct and indirect illegal exactions, thus comprehending any attempted invalid spending or expenditure by any government official . . . . With little limitation, almost any misuse or mishandling of public funds may be challenged by a taxpayer action. . . . The remotest effect upon the taxpayer concerning any unlawful act by a tax supported program or institution may be enjoined under Article XVI." *Nelson v. Berry Petroleum Co.*, 242 Ark. 273,277, 413 S.W.2d 46, 49 (1967) (emphasis added).

Federal authority requires that any authorized use of a National Wildlife Refuge System area, such as that contemplated by the 2009 Exchange Deed at issue here, must be predicated upon a valid "compatibility determination." 50 C.F.R. § 26.41. The

requirements of a given compatibility determination are substantial and varied.[2] *Id.* Absent exceptions not applicable in this case, no use will be permitted or re-authorized for a period longer than ten years unless there is a new compatibility determination. 50 C.F.R.

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[2] Every compatibility determination must include, at least, the following information:

> (1) The proposed or existing use;
> (2) The name of the national wildlife refuge;
> (3) The authorities used to establish the national wildlife refuge;
> (4) The purpose(s) of the national wildlife refuge;
> (5) The National Wildlife Refuge System mission;
> (6) The nature and extent of the use including the following:
> (i) What is the use? Is the use a priority public use?;
> (ii) Where would the use be conducted?;
> (iii) When would the use be conducted?;
> (iv) How would the use be conducted?; and
> (v) Why is the use being proposed?.
> (7) An analysis of costs for administering and managing each use;
> (8) The anticipated impacts of the use on the national wildlife refuge's purposes and the National Wildlife Refuge System mission;
> (9) The amount of opportunity for public review and comment provided;
> (10) Whether the use is compatible or not compatible (does it or will it materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge);
> (11) Stipulations necessary to ensure compatibility;
> (12) A logical explanation describing how the proposed use would, or would not, materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge;
> (13) The Refuge Manager's signature and date signed; and
> (14) The Regional Chief's concurrence signature and date signed.
> (15) The mandatory 10- or 15–year re-evaluation date.

50 C.F.R. § 26.41(a).

§ 25.21(h). Moreover, if the conditions under which a use was permitted change significantly, or if there is significant new information regarding the effects of the use, there must be a new compatibility determination, then and there. 50 C.F.R. § 25.21(g). The re-evaluation must be assessed based on the "existing conditions with the use in place, not from the pre-use perspective." 50 C.F.R. § 25.21(h). This requires "a fresh look at the use" and, importantly, "[preparing] a new compatibility determination." 50 C.F.R. § 25.21(i).

The taxpayers' complaint sets forth a number of allegations relevant to our consideration of this issue. First, the Exchange Deed was predicated upon a compatibility determination prepared in 2005, well over ten years prior to the filing of the taxpayers' complaint. The 2005 compatibility determination included a finding that destruction of the Clarendon Bridge was necessary for the project's implementation, so to prevent adverse-floodplain consequences. This finding was based on the results of a hydrological report prepared in connection to the 2005 compatibility determination, which simulated five- and hundred-year flood-flow events along the White River. Importantly, in simulating the flood flow events, the old hydrological report assessed the Clarendon Bridge *together* with a separate roadway that extended 9,000 feet west of the bridge on a fifteen-foot-high berm, which had acted as a dam impeding flood flows in the refuge. There has been no new compatibility determination performed since the 2005 compatibility determination, even though the berm has since been removed.

The entire point of the taxpayers' illegal-exaction claim is that the circumstances have significantly changed since this plan was set in motion. The 2005 compatibility determination has expired. Moreover, the berm has since been removed. The old hydrological report did not model, evaluate, analyze, or otherwise even mention the Clarendon Bridge as it exists today after the berm removal, and it does not suggest that the Clarendon Bridge itself is causing any tangible impact on flood flows along or across the White River floodplain. In other words, according to the taxpayers, we are about to spend $10.8 million to blow up a piece of our state's history that does not need to be blown up, and if the powers that be would simply replace their expired compatibility determination with a new one *as legally required*, they would be forced to acknowledge as much.

What makes this alleged wasteful spending even more frustrating to the taxpayers is the opportunity cost. The City of Clarendon has formally adopted a detailed economic-development plan for the surrounding region, the centerpiece of which is the historic Clarendon Bridge. This plan would see the creation of one of the longest elevated bicycling, pedestrian, and nature-watching platforms in the entire world, right here in the Arkansas Delta. It is also proposed that the Department of Arkansas Heritage and the Arkansas Department of Parks and Tourism will pay for the bridge's maintenance. Truly, there appears to be a legitimate and substantial opportunity here that will be lost when the bridge is destroyed.

ARDOT's refusal to follow the law and obtain a new compatibility determination as required does not make any sense. Likewise, the majority fails to acknowledge this legal

requirement or address its impact on the issue presented. The majority opinion amounts to a premature detonation.

I dissent.

Gill Ragon Owen, P.A., by: *John P. Gill* and *Mitchell S. Dennis*; and *Robert Keller Jackson, PLLC*, by: *Robert K. Jackson*, for appellants.

Leslie Rutledge, Att'y Gen., by: *William C. Bird III* and *Brittany N. Edwards*, Ass't Att'ys Gen., for appellee.