Sovereign Immunity in Arkansas: Absolute or Only a Bar to Monetary Recovery?

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Earlier this year, the Arkansas Supreme Court handed down a case that reduced the ability to sue the State. *See Board of Trustees of the University of Arkansas v. Andrews*.[1] This decision has been controversial; it has already resulted in a rejection of lawsuits against the State,[2] and is being cited as the reason that other would-be lawsuits are not even being filed.[3] As such, it seems poised to "leave[] the state of law on sovereign immunity in complete disarray."[4] In the weeks following the announcement in *Andrews,* some have attempted to interpret the opinion narrowly to apply only in the case involving monetary damages, or apply in limited non-money damage cases. This post examines whether these recent interpretations are consistent with the *Andrews* opinion and otherwise in alignment with the law.

How did we get here?

Ever since 1874, the Arkansas Constitution has declared that "the State of Arkansas shall never be made a defendant in any of her courts."[5] Despite the existence of this durable language, opinions interpreting it have been anything but consistent. For more than half a century the Arkansas Supreme Court interpreted this Section literally, granting the State absolute sovereign immunity.[6] Any attempt by the Arkansas General Assembly to abrogate this immunity was stricken as unconstitutional. However, in 1996 the Arkansas Supreme Court changed course, ushering in a new era of sovereign immunity doctrine under which the State could be sued.[7] This January, the pendulum of Arkansas sovereign immunity jurisprudence swung back in the other direction, as the Court signaled a return to absolute sovereign immunity in *Andrews.*

Narrowing the holding of Andrews

Some, such as Arkansas Solicitor General Lee Rudofsky, have taken the view that *Andrews* only applies to cases where a party seeks monetary damages against the State.[8] Operating under a similar interpretation, Governor Asa Hutchinson has instructed agency directors to seek his permission before asserting sovereign immunity in cases that do not involve money damages. [9] Specifically mentioning lawsuits seeking relief under the Freedom of Information Act, on the subject of non-monetary cases, Governor Hutchinson was quoted as saying "I've asked my agencies: do not assert sovereign immunity without the approval of the governor's office."[10] This approach seems to limit the applicability of the defense of sovereign immunity to: (1) cases involving monetary damages, and (2) cases that do not involve monetary damages but have been vetted by the Governor as being worthy of the assertion of the

sovereign immunity shield. At the time that the Governor announced this policy, the implementation of it could have arguably been limited by a court raising the issue of sovereign immunity on its own, as there is precedent suggesting that the Governor alone does not hold the keys to the sovereign immunity defense.[11] However as of March 1st, the Court announced an opinion that calls that precedent into question, and clearly describes sovereign immunity as an affirmative defense. *Walther v. Flis Enterprises, Inc.,* Case No. CV-17-240 (Ark. 2018). In characterizing sovereign immunity as such, the Court signaled that if it was not raised by the parties then immunity could be waived. This seems to support the Governor's position.

Are these narrow interpretations supported by the *Andrews* opinion? Yes and no. The opinion does not explicitly limit the sovereign immunity defense to cases seeking monetary damages. To the contrary, the opinion broadly states that "[a] suit against the State is barred by the sovereign-immunity doctrine if a judgment for the plaintiff will operate to control the action of the State or subject it to liability."[12] This statement, combined with the unambiguous Constitutional mandate that the State "shall never be made a defendant in any of her courts," seems to stand for the proposition of absolute sovereign immunity. Indeed, after quoting that Section of the Constitution, the Court instructed that it would be interpreted "precisely as it reads."[13]

But on the other hand, the opinion does not explicitly foreclose this narrow interpretation. Toward the end of the opinion, the Court reconciles its holding with Article 2, Section 13—stating that "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive"—by offering up the Arkansas Claims Commission as the champion of righting financial wrongs.[14] The Court does not explain how a person would be entitled to a certain remedy for injuries or wrongs that could not be satisfied by a payout from the Claims Commission, thus arguably leaving that issue open for interpretation.

One thing is for sure—the *Andrews* dissent makes a strong argument that there is no such line between lawsuits seeking monetary and non-monetary damages, noting that "[a]bsent from our constitution is any language limiting sovereign immunity to money judgments."[15] And others have interpreted *Andrews* to mean that you cannot even file suit against the State challenging the scoring of an application submitted to the Medical Marijuana Commission.[16] This would appear to be a classic non-monetary case that merely asks the State to count numbers differently, yet now such a lawsuit may not even reach the front door of the courthouse based on the interpretation that *Andrews* would bar it.

Conclusion

A Constitutional Amendment would bring clarity to the issue and answer this question once and for all. In the meantime, watch for another legal challenge similar to *Andrews* where no money damages are sought. Such a future case will force the Court to clarify its holding in *Andrews*, and will define the reach of Arkansas sovereign immunity. If the same textualist interpretation controls as did in the *Andrews* case, it would seem a tenacious avowal of sovereign immunity. And, depending on how the Governor interprets and applies his newly articulated policy of sovereign immunity, watch for legal challenges there as well. In the meantime, the law on sovereign immunity in Arkansas is in a state of flux, the *Andrews* case having "revived the antiquated doctrine that 'the king can do no wrong.'"[17]

[1] 2018 Ark. 12, 535 S.W.3d 616.

[2] *See e.g. Monsanto Co. v. Ark. State Plant Board et al.,* Case no. 60CV-17-5964 (Pulaski Cnty. Cir., Feb 16, 2018) (Judge Piazza stating that "I really think the [Andrews case] prevents us from hearing this case at this moment.")

[3] http://katv.com/news/local/expert-cant-sue-the-state-if-medical-marijuana-cultivation-application-denied

[4] *Andrews,* 2018 Ark. at 18, 535 S.W.3d at 626 (Baker, J. dissenting).

[5] Art. 5, § 20.

[6] *Ark. State Highway Comm'n v. Nelson Bros.,* 191 Ark. 629, 87 S.W.2d 394, 399 (1935).

[7] *State, Dep't of Fin. & Admin. v. Staton,* 325 Ark. 341, 942 S.W.2d 804 (1996).

[8] https://www.usnews.com/news/best-states/arkansas/articles/2018-01-30/arkansas-lawmaker-raise-concerns-about-immunity-ruling

[9] http://www.arkansasbusiness.com/article/120919/questions-remain-about-arkansas-immunity-ruling-andrew-demillo-analysis?utm_source=enews_022618&utm_medium=email&utm_content=morning-roundup&utm_campaign=newsletter&enews_zone=3873

[10] http://kasu.org/post/gov-hutchinson-outlines-path-passage-arkansas-works-offers-direction-sovereign-immunity

[11] *See Carson v. Weiss,* 333 Ark. 561, 563–64, 972 S.W.2d 933, 934 (1998) (explaining that "we also consider whether sovereign immunity has been waived because it is a jurisdictional issue that may be raised at any time or on our own motion.").

[12] *Andrews*, 2018 Ark. at 5, 535 S.W.3d at 619.

[13] *Id.* at 10, 622.

[14] *Id*. at 12, 623.

[15] *Id.* at 14, 624 (Baker, J. dissenting).

[16] http://katv.com/news/local/expert-cant-sue-the-state-if-medical-marijuana-cultivation-application-denied

[17] *Andrews,* 2018 Ark. at 17, 535 S.W.3d at 626 (Baker, J. dissenting).