

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL DIVISION

SHELLY BUONAUTTO, et. al

PLAINTIFFS

V.

CASE NO. 60CV-18-7758

KEITH GIBSON, et. al

DEFENDANTS

**PLAINTIFFS' MOTION AND INCORPORATED BRIEF IN SUPPORT OF
ENFORCEMENT OF COURT'S ORDER, CIVIL CONTEMPT AND FOR FUNDS
TO BE DEPOSITED IN REGISTRY OF THE COURT FOR REVIEW BY SPECIAL
MASTER**

After over two years of hard-fought litigation, trial, and an appeal to the Arkansas Supreme Court, Plaintiffs succeeded on their claims to protect and preserve taxpayer dollars collected pursuant to Amendment 91 of the Arkansas Constitution from the improper expenditure by Defendants. The right and ability of Arkansas Citizens to bring illegal exaction cases, like this, pursuant to Article 16, §13 of the Arkansas Constitution were intended by the drafters of the Arkansas Constitution to protect taxpayers in the event that other safeguards failed. Indeed, it was drafted as an “ultimate guarantee of recourse to the courts.” *See* Walter Nunn, *The Constitutional Convention of 1874*, 27 *The Arkansas Historical Quarterly*, 177–204 (1968).

On December 9, 2020, this Court, pursuant to its authority under Article 16, §13 of the Arkansas Constitution, entered an Amended Order and Judgment against Defendants finding that the use of Amendment 91 funds in Projects CA0602 and CA0608, to widen and improve portions of Interstate 30 and Interstate 630, comprising more than 4-lanes, was an illegal exaction. The Defendants did not object

to the entry of Judgment. Significantly, that order also allowed Defendants to submit a petition in opposition to the remedy of reimbursement. *See* December 9, 2020 Amended Order and Judgment ¶4.

At no time did any Defendant file a motion in opposition to the remedy of reimbursement. Instead, the parties worked together and consented to the Judgment signed filed on February 1, 2021. The Court’s final Judgment, in no uncertain terms, unequivocally states “Judgment is, therefore, entered in favor of the Plaintiffs, and the amount of \$121,109,391.84 **shall be reimbursed** to the Amendment 91 Fund.” *See* February 1, 2021 Judgment ¶7. No Defendant filed a notice of appeal from this Judgment. The reimbursement contemplated by the Judgment was to be accomplished with sixty (60) days from the entry of Judgment. To date, no proof that the reimbursement has actually occurred has been provided. Instead, the Defendant have chosen to pursue a course of conduct aimed at side stepping the Court’s order.

On March 30, 2021, Defendants filed their opposition to Plaintiffs’ Motion for Attorney fees arguing, among other things, that this lawsuit created no substantial benefit to the State attaching the affidavit of ARDOT employee Jared Wiley as support. Surprisingly, Mr. Wiley’s affidavit stated that this litigation did not create a “pool of money” and that “Amendment 91 funds that were going to be used on Projects CA0602 and CA0608 will be used to fund other projects, and projects CA0602 and CA0608 will be funded from different revenue sources.” *See Exhibit 1 – Affidavit of Jared D. Wiley.* Curiously, neither Mr. Wiley’s affidavit nor Defendants’ motion in opposition to Plaintiffs’ Motion for Attorney Fees mention the Court-ordered

reimbursement of \$121,109,391.84 to the Amendment 91 Fund or any details regarding how or when such reimbursement might be made.

On April 2, 2021, Defendants' counsel provided Plaintiffs' counsel with a document listing eight (8) highway construction projects summarizing the alleged sources for the Court-Ordered reimbursement to the Amendment 91 fund. *See Exhibit 2 – Reimbursement of Amendment 91 Funds summary provided by Defendants.*

Reimbursement of Amendment 91 Funds		
Amendment 91 funds remaining to reimburse CA0602	\$	83,745,901.56
Amendment 91 funds remaining to reimburse CA0608	\$	37,363,490.28
Total remaining to reimburse Amendment 91 Funds	\$	121,109,391.84
Project	Project Name	Amount
CA0605	Vandenberg Blvd. - Hwy. 5 (Widening) (S)	\$ 28,601,975.26
CA0101	Co. Rd. 375 - Hwy. 147 (Widening) (S)	\$ 5,734,068.11
CA0906	Maxie Camp Rd. - Hwy. 206 (Widening) (S)	\$ 7,205,605.07
CA0907	Hwy. 112 - I-49 (S)	\$ 5,366,874.59
CA0702	Hampton - Hwy. 274 (Widening) (S)	\$ 17,427,754.03
CA0703	Hwy. 274 - North (Widening) (S)	\$ 10,483,372.13
BB0804	Mill Creek - Hwy. 331 (I-40) (S)	\$ 45,244,394.00
BB0803	Hwy. 64 - Mill Creek (I-40) (S)	\$ 1,045,348.65
Total funds to reimburse Amendment 91 Funds	\$	121,109,391.84
(1) The amount of state funds expended on the 8 projects listed will now be funded with Amendment 91 funds. These state funds will be used to reimburse Amendment 91 funds expended on CA0602 and CA0608.		

According to the summary sheet, Defendants intended to use state funds from these eight (8) highway construction projects to reimburse the Amendment 91. *Id.*

On April 5, 2021, Plaintiffs took the deposition of Jared D. Wiley. Mr. Wiley testified that the construction of the eight (8) projects that Defendants had selected to divert state funds to reimburse the Amendment 91 fund had already been completed several years ago. *See Exhibit 3 – Deposition of Jared D. Wiley 26:13 – 28:10.* In fact, Mr. Wiley not only testified that the eight (8) projects identified had been completed, but all the funds for those projects, *including the alleged funds Defendants intend to use to reimburse the Amendment 91 fund*, are no longer in possession of Defendants as they have been previously paid out to third parties.

Q: Just like you don't have the \$28,601,975.26 in a bank account for Project CA0605, right?

A: Well, we've expended that money.

Q: Yeah. But it's not in any ARDOT bank account, right?

A: Right.

Q: Wasn't at the time this was prepared, was it?

A: In a bank account?

Q: Sure.

A: For -- no. It's expended.

Q: Sure. It's been paid out to third parties, right?

The same thing for all these projects listed, right?

A: That's correct.

Deposition of Jared D. Wiley 34:18 – 35:5

As such, it appears that Defendants' "plan" to reimburse the Amendment 91 Fund is to use funds that (1) it no longer has and (2) spent and paid out to third parties years ago. Unless Defendants have found a way for money to be in two places at once, their plan for "reimbursement" is not actually a plan for reimbursement at all. This is

expressly contradictory to statements by ARDOT regarding reimbursement of the amendment 91 fund. *See footnote 1 to Exhibit 2.*

Indeed, when asked point blank if Defendants intend to reimburse the Amendment 91 fund, Mr. Wiley equivocated and could not affirmatively state yes.

Q: Let me ask you a different way. Are you planning on putting 121 million dollars in the Amendment 91 fund?

A: We're planning on complying with the order.

Q: That's not my question. The question is, do you plan on putting 121 million dollars in the Amendment 91 fund?

A: If we did do that -- and we need to talk to the CFO. But if we did do that, we'd immediately pull it back out and make the other account right, because we're taking money from one pocket and putting it in the other, and reverse.¹

Q: That's a decision ARDOT is making.

A: That's making it right. Yeah.

Q: Because the eight projects you have here listed, those are all completed, right?

A: Yes.

Q: That's money that's already been paid out.

A: Yes, as has this money.

Q: Sure. So this isn't the only way to accomplish reimbursing the account. It's just one of the ways that ARDOT has come up with, right?

A: I guess there could be a lot of ways, you know, to accomplish it.

Deposition of Jared D. Wiley 33:12 – 34:10

Although Mr. Wiley admits there are a number of ways to accomplish reimbursement to Amendment 91, his testimony confirms that Defendants have made a deliberate and calculated decision to choose a method that does not actually reimburse the Amendment 91 Fund and is not in compliance with this Court's Judgment that Defendants consented to.

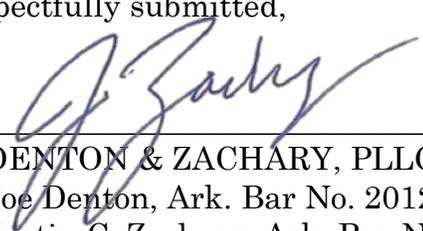
¹ Unfortunately for Defendants, pulling money out of the Amendment 91 Fund to "make another account right," would also constitute an illegal exaction because the funds would not be being used for improving or construction four-lane roadways

Civil contempt protects the rights of private parties by compelling compliance with orders of the court made for the benefit of those parties. Civil contempt is designed to coerce compliance with the court's order, and the civil contemnor may free himself or herself by complying with the order. *See id.* at 139, 752 S.W.2d at 276. This is the source of the familiar saying that civil contemnors “carry the keys of their prison in their own pockets.” *Id.* at 140, 752 S.W.2d at 277 (quoting *Penfield Co. v. S.E.C.*, 330 U.S. 585, 593, 67 S.Ct. 918, 91 L.Ed. 1117 (1947)) (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir.1902)). *Omni Holding & Dev. Corp. v. 3D.S.A., Inc.*, 356 Ark. 440, 448, 156 S.W.3d 228, 234–35 (2004). The Court has broad contempt power “to effect civil remedies, the result of which is to make the innocent party whole from the consequences of contemptuous conduct.” *Butler v. Comer*, 57 Ark. App. 117, 942 S.W.2d 278 (1997).

It has become apparent that Defendants have no intentions of actually reimbursing the Amendment 91 fund and complying with this Court’s order. Since Defendants have refused to reimburse the Amendment 91 Fund, the Court should order that the funds be temporarily deposited in the treasury of the Court and Defendants be required to show a full accounting of the sources of the reimbursement to be reviewed by a special master. The special master should be selected by the Court and paid by the Defendants. Upon review of the special master, the funds can then be deposited into the Amendment 91 Fund. This process will ensure Defendants’ compliance with the Court’s order while protecting taxpayers “ultimate guarantee of recourse to the courts” pursuant to Article 16, §13 of the Arkansas Constitution.

WHEREFORE, Plaintiffs request that that their motion be granted, that Defendants be found in contempt, that an order be entered demanding the payment of \$121,109,391.84 be deposited in the registry for the Court until a court-appointed special master can review the source of the reimbursement, and for all other just and proper relief.

Respectfully submitted,

By: 

DENTON & ZACHARY, PLLC
Joe Denton, Ark. Bar No. 2012167
Justin C. Zachary, Ark. Bar No. 2010162
Andrew P. Norwood, Ark. Bar No. 2017107
2100 Riverdale Road, Suite 200A
Little Rock, Arkansas 72202
Tel: (501) 358-4999
Fax: (501) 358-4737
Email: joe@dentonandzachary.com
justin@dentonandzachary.com
andrew@dentonandzachary.com

CERTIFICATE OF SERVICE

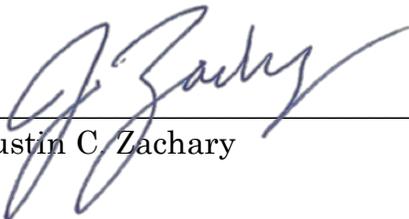
I, Justin C. Zachary, certify that on this 6th day of April, 2021, I electronically filed the foregoing with the Circuit Court Clerk using the Arkansas Judiciary's eFlex electronic filing system, which shall provide electronic notification to the following:

Vincent P. France
Assistant Attorney General
Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, Arkansas 72201
Phone: (501) 682-1314
Fax: (501) 682-2591
Email: Vincent.france@arkansasag.gov

*Attorney for Andrea Lea, Auditor of the State of Arkansas;
Dennis Milligan, Treasurer of the State of Arkansas;
Asa Hutchinson, Governor of the State of Arkansas; and
Larry Walther, Director of the Arkansas Department of Finance and
Administration*

Rita S. Looney
Mark Umeda
Arkansas Department of Transportation
10324 Interstate 30
Little Rock, Arkansas 72209
Phone: (501) 569-2112
Fax: (501) 569-2164
Email: Rita.Looney@ardot.gov
Mark.Umeda@ardot.gov

*Attorneys for the Arkansas State Highway Commission,
Arkansas Department of Transportation, and its director Scott Bennett.*



Justin C. Zachary