Appeal No. A25A1018

In the
Court of Appeals of Georgia

Publix Super Markets, Inc.,
Appellant,
v.

Cobb County,
Appellee.

On Appeal from the Cobb County Superior Court
Cobb County Superior Court Case No. 23101680

BRIEF OF APPELLEE COBB COUNTY

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INTRODUCTION

Publix created a public nuisance in Cobb County by failing to maintain effective controls against diversion of prescription opioids. Seeking a remedy for that wrongdoing, the County Attorney filed suit on behalf of Cobb County in federal court. *Cobb County v. Purdue Pharma L.P.*, 1:18-cv-02865, ECF No. 1 (N.D. Ga. filed June 12, 2018) (the "Opioid Action"). The County Attorney did so with the aid of private attorneys engaged on a contingent fee basis. Five years later, with pretrial proceedings ending in the Opioid Action, Publix filed the present litigation in State court seeking, in essence, to disqualify the private attorneys and to thereby hobble the County's efforts to hold Publix accountable for its wrongdoing.

The Superior Court dismissed Publix's Amended Complaint on the ground that it failed to state any claim for relief. The Court reached the merits after rejecting Cobb County's jurisdictional arguments. If this Court reaches the merits, the decision should be affirmed because the Amended Complaint does indeed fail to state any claim for relief. But this Court should not reach the merits because Publix lacks standing and its claims are barred by sovereign immunity.

JURISDICTIONAL COUNTERSTATEMENT

In its jurisdictional statement, Publix says that although this case involves applying the "new debt" provision in Ga. Const., art. IX, § 5, ¶ I, it does not involve the "construction of some constitutional provision directly in question and doubtful." App. Br. at 12-13, citing *City of Decatur v. DeKalb Cnty*, 284 Ga. 434, 436-37 (2008). Publix asserts that the meaning of art. IX, § V ¶ I is "unambiguous and undisputed." App. Br at 14. But the Superior Court held that the contingent fee agreement at issue here does not create a "new debt," and Publix argues the contrary. Given the Superior Court's ruling, it cannot reasonably be said that "the case requires merely an application of unquestioned and unambiguous constitutional provisions." 284 Ga. at 436-37. Accordingly, this Court lacks appellate jurisdiction to review the Superior Court's determination of that issue.

This Court also lacks appellate jurisdiction over the question of the County's sovereign immunity because it involves the construction of the waiver provision in Ga. Const. art. 1, § 2, ¶ 5(b)(1), which is directly in question and not unambiguous.

As discussed below, subject matter jurisdiction is lacking because Publix lacks standing, and Publix's claims are barred by sovereign immunity.

STATEMENT OF THE CASE

Opioid Action

On June 12, 2018, then-Cobb County Attorney Deborah Dance filed the Opioid Action in federal court. V2-4136, 4415, 4417 & 4420.[1] The complaint identified attorneys from Simmons Hanly Conroy and Crueger Dickenson as "Of Counsel." V2-4415. Cobb County had engaged private law firms to investigate and pursue opioid-related claims. The firms agreed to do so on a 25% contingent fee basis and to bear all the costs of the litigation. The signed engagement agreement provides, "[n]o monies shall be paid to Counsel for any work performed, costs incurred or disbursements made by Counsel in the event no Recovery to County has been obtained." V2-4813. The agreement provides that it can be

[1] The Court can take judicial notice of federal court filings. *See* O.C.G.A. § 24-2-201(f); *NationsBank, N.A. (S.) v. Tucker*, 231 Ga. App. 622, 623 (1998). Cobb County's jurisdictional defenses were raised pursuant to O.C.G.A. § 9-11-12(b)(1), under which the Court considers evidence submitted in support of the motion and is not limited to the allegations of the complaint. *Church v. Bell,* 213 Ga. App. 44, 45 (1994).

terminated by Cobb County at any time. *Id*. It also preserves Cobb County's right to approve any settlement. *Id*. at 4814.

Given the massive scope, cost, likely duration, and risks of the opioid litigation, Cobb County would not have had the resources to pursue its claims against Publix and the other companies who contributed to the opioid crisis in Cobb County without the assistance of experienced mass tort lawyers engaged on a contingent fee basis. V2-4124. The Cobb County Board of Commissioners approved the engagement agreement in an executive session due to the confidential nature of the matter. *Id*. The engagement agreement was subsequently ratified and confirmed in a Resolution entered in the minutes on November 18, 2021. *Id*.; V2-5087.

In 2018, the federal Judicial Panel on Multidistrict Litigation ("JPML") transferred the Opioid Action to a multi-district litigation pending in Ohio (the "MDL"). V2-4424. The Cobb County Attorney remained counsel of record and has remained fully and actively engaged in the action. V2-4125 at ¶ 9.

Publix was not among the original defendants in the Opioid Action; nor was it listed by name in the engagement agreement. The agreement

expressly contemplated, however, that "[d]epending upon the results of initial investigations of the facts and circumstances surrounding the potential claim(s), there may be additional parties sought to be made responsible." V2-4810.

In 2019, based on outside counsel's investigation, and with the approval of the Cobb County Attorney, Publix was added as a defendant. V2-4443; V2-4125-26 at ¶ 10. While the County Attorney remained counsel of record, the pleading was signed by Paul Hanly of Simmons Hanly Conroy. Hanly served as one of three Co-Lead Counsel and as a member of the Plaintiffs' Executive Committee ("PEC") appointed by the MDL Court due to the experience, qualifications, and resources of him and his firm. V2-4125-26 at ¶¶ 10-11.

In 2021, Cobb County's case was chosen as a bellwether to be prepared for trial, V2-4795 at n.2, and its complaint was further amended. *Id.*; V2-4126 at ¶ 11; V2-4484. The Amended Complaint was signed by Jayne Conroy of Simmons Hanly Conroy, who had been named as a Co-Lead Counsel and a member of the PEC after Hanly's death. By that time, H. William Rowling, Jr., was County Attorney, and he

approved the pleading and appeared as counsel of record. V2-4126 at ¶ 11; V2-4484, 4715.

In 2021, a nationwide settlement was reached to resolve all opioid litigation brought by states and local political subdivisions against the nation's three largest pharmaceutical distributors and Johnson & Johnson. On November 18, 2021, the Cobb County Board of Commissioners resolved to participate in that settlement, and their resolution was entered on the minutes. V2-5083-88.[2] In that resolution, the Board resolved that, "all actions heretofore taken by the Board of Commissioners and other appropriate public officers and agents of Cobb County with respect to the matters contemplated under this Resolution are hereby ratified, confirmed and approved." *Id*. The actions "heretofore taken" included the engagement agreement, the addition of Publix as a defendant, and the amendment of the complaint.

In 2021, Publix moved to dismiss the Opioid Action, claiming that (i) Georgia law does not recognize a public nuisance claim of the kind

[2] The Court can take judicial notice of the resolution and minutes because they are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." O.C.G.A. § 24-2-201(b).

alleged by Cobb County and (ii) Cobb County failed to allege any specific wrongdoing by Publix or any actual connection between Publix's actions and Cobb County. The MDL court found "neither argument well-taken" and denied the motion. V2-4795. *See also* V2-4787 (denying reconsideration); *In re Publix Super Markets, Inc.*, No. 24-3486, 1:17-md-02804-DAP Doc #: 5846 & 5846-1 (6th Cir. Jan. 7, 2025) (denying mandamus).

After Publix's motion to dismiss was denied, the parties completed discovery. Discovery confirmed Cobb County's allegations that Publix failed to maintain effective controls against diversion of opioids in Cobb County and substantially contributed to the opioid crisis here. V2-4127. Given the strength of the evidence, Cobb County sought summary judgment on the issue of Publix's liability. The MDL court denied that motion saying, "the evidence produced by Publix is weak, but sufficient to create a genuine issue of material fact." *In re Nat'l Prescription Opiate Litig.*, Case No. 1:17-md-2804, 1:18-op-45817, ECF Doc. No. 88 at 7 of 8 (N.D. Ohio Sept. 20, 2024).

In November 2024, MDL Court advised the JPML that pretrial proceedings had been completed and that remand to the Northern

District of Georgia for trial was appropriate, and the JPML issued a conditional remand order. 18-cv-02865, ECF No. 7 (JPML Nov. 22, 2024). Publix did not object to the remand order, so it became effective. *Cobb County*, 1:18-cv-02865, ECF No. 6 (N.D. Ga.). The parties appeared before the federal Court in Georgia on February 11, 2025, and the Court set a trial date of November 3, 2025. *Id.* No. 31.

On November 22, 2024, the MDL Court issued a clarifying order which stated that it had intended to remand only of the public nuisance claim against Publix. The JPML then vacated the prior remand order, 18-cv-02865, ECF No. 10 (JPML Feb. 19, 2025), and issued a corrected order. *Id.* No. 11. On February 25, 2025, Publix objected to the corrected order, *id.* No. 13, and its objection is currently being briefed by the parties. *Id.* No. 14. At this time, proceedings in the district court are effectively stayed.

Publix's Action

Publix commenced the present suit in 2023, more than a year after the MDL Court denied its motion to dismiss. V2-4758. Cobb County moved to dismiss Publix's original complaint, V2-29; Publix then amended its complaint, V2-5090; and Cobb County then moved to dismiss

the Amended Complaint. V2-4085. The County's motion was based on (i) sovereign immunity, (ii) lack of standing, (iii) waiver, (iv) laches, (v) failure to join indispensable parties (the lawyers), and (vi) failure to state a claim. V2-4093-4120.

Superior Court Decision

The Superior Court granted Cobb County's motion to dismiss, holding that none of Publix's claims stated a claim for relief. V2-6542. Before reaching the merits, the Court held that Cobb County did not have sovereign immunity and that Publix had standing as a taxpayer and member of the community to challenge Cobb County's retention of counsel. The Court did not address Cobb County's other arguments.

Related Case Before this Court

On September 21, 2023, Publix filed a complaint for declaratory and injunctive relief against Rockdale County, in the Superior Court for Rockdale County. *Publix Super Markets, Inc. v. Rockdale County,* 2023-CV-2360 (Rockdale County Superior Ct.). Two of claims asserted by Publix against Rockdale County are in all material respects the same as those asserted against Cobb County here: (i) violation of Georgia public policy and (ii) violation of O.C.G.A. § 41-2-2. Rockdale County filed a motion to strike under OCGA §§ 9-11-11.1 (the Anti-SLAPP Act) and to

dismiss under 9-11-12 (b) (failure to state a claim). On March 19, 2024, the Rockdale Superior Court granted both branches of the motion. The Court held that (i) Rockdale County had standing under the Anti-SLAPP Act, (ii) Publix had no probability of prevailing on the merits of its claims, (iii) Publix lacked standing to challenge Rockdale County's retention of contingent fee counsel, (iv) Georgia law does not prohibit government prosecution of tort litigation through counsel working on a contingent fee basis, (v) Publix's claim under OCGA § 41-2-2 failed to state a claim, and (vi) Publix had no right to a declaratory judgment that its activities are not a public nuisance.

This Court affirmed in part, vacated in part, and remanded with direction. *Publix Super Market, Inc. v. Rockdale County*, A24A1391 (Mar. 10, 2025). The Court held that Publix's claims were nonjusticiable and that its complaint should be dismissed without prejudice. In particular, this Court held that Publix lacked standing as a resident, taxpayer, or community stakeholder because it was not seeking "to vindicate a public right." *Id.,* slip op. at 9.

Although Publix had expressly denied that it was seeking to disqualify counsel,[3] this Court noted that,

> the relief Publix seeks would require a state trial court to, in essence, disqualify attorneys involved in a federal lawsuit, straining beyond reason all notions of comity between these courts. See *Hines v. Rawson*, 40 Ga. 356, 361 (1) (1869) ("The State Courts are exempt from all interference by the Federal tribunals, and the Federal Courts are exempt from all interference by the State tribunals, and each is destitute of all power to restrain either the process or proceedings in the other.") (Brown, C. J., concurring).

Rockdale, slip op. at 9.

As to Publix's claim seeking a declaratory judgment that "its operations in Rockdale County do not constitute a public nuisance," this Court held that the claim was not justiciable because it was "merely an end-run around any future opioid litigation against Publix and [was] thus an impermissible basis for a declaratory action." *Rockdale,* slip. op. at 11.

[3] *Rockdale*, Brief of Appellant at 9.

SUMMARY OF ARGUMENT

Publix lacks standing to seek relief under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 *et seq.*, because it is not in a position of uncertainty or insecurity as to some future action it must take. Rather, Publix seeks a series of declarations that would effectively disqualify the County's outside counsel in the federal opioid action, thereby thwarting the County's ability to try its case later this year.

Furthermore, Publix lacks standing to pursue any of its specific claims because it has alleged no legally cognizable harm arising from any action by Cobb County.

Cobb County has sovereign immunity for all of Publix's claims because all of the alleged improper acts of Cobb County occurred prior to January 1, 2021. Ga. Const. Art. 1, § 2, ¶ 9 (e); Ga. Const. Art. 1, § 2, ¶ 5(b)(1).

The Superior Court was correct that Publix failed to state a claim. Count I of Publix's Amended Complaint alleges that the engagement of outside counsel on a contingent fee basis is a violation of Georgia public policy. There is no support in Georgia law for that claim. Publix's litigation tactic of trying to evade liability for wrongdoing by attacking

its adversary's fee arrangements with outside counsel has been tried repeatedly by other defendants—and it has just as repeatedly been rejected throughout the Nation by every court to consider it, including now by the Superior Court in *Rockdale*.

Count II alleges that Cobb County violated O.C.G.A. § 41-2-2, which provides, "Private citizens may not generally interfere to have a public nuisance abated. A complaint must be filed by the district attorney, solicitor-general, city attorney, or county attorney on behalf of the public." This count is based on the demonstrably false allegation that the complaint was not filed by a county attorney. In fact, the Opioid Action was filed on behalf of Cobb County by the Cobb County Attorney in federal court in Georgia. V2-4414; *see also* 4715. There is nothing in § 41-2-2 that even remotely suggests that a County Attorney cannot bring a public nuisance action with the assistance of outside co-counsel.

Count III alleges that Cobb County violated O.C.G.A. § 36-10-1, which provides, "All contracts entered into by Cobb County governing authority with other persons in behalf of Cobb County shall be in writing and entered on its minutes." This count is meritless. The engagement agreement is in writing and has been entered on the minutes.

Count IV alleges that Cobb County violated Ga. Const. art. 9, § 5, ¶ I(a), which provides, "no … county … shall incur any new debt without the assent of a majority of the qualified voters of such county." Ga. Const. art. 9, § 5, ¶ I(a). This count fails because an agreement to share contingent revenue in the future cannot reasonably be regarded as a "new debt" within the prohibition of Article 9.

ARGUMENT

I. STANDARD OF REVIEW

On appeal of a grant or denial of a motion to dismiss a complaint, the appellate court reviews the trial court's ruling *de novo*. *Sweet City Landfill, LLC v. Lyon*, 352 Ga. App. 824, 825 (2019).

II. DISMISSAL WAS PROPER BECAUSE SUBJECT MATTER JURISDICTION WAS LACKING

While the Superior Court properly held that Publix failed to state a claim, the Court should not have reached the merits because subject matter jurisdiction was lacking. This Court should affirm the dismissal based upon the lack of subject-matter jurisdiction.[4]

[4] Publix's brief implies this Court cannot consider the threshold jurisdictional matters because the County did not cross appeal the portions of the trial court's order that were adverse to the County. (*See* Pub.Br., p. 21). Publix is mistaken. "This Court may affirm a trial court's

A. Publix Failed to Demonstrate Standing

"Standing is a jurisdictional prerequisite to a plaintiff's right to sue." *Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners,* 315 Ga. 39 (2022). Standing is a threshold issue, and a plaintiff "must demonstrate standing separately for each form of relief sought." *Perdue v. Barron*, 367 Ga. App. 157, 160 (2023). Publix failed to do so.

1. Declaratory Relief

Declaratory relief is unavailable under Georgia's Declaratory Judgment Act, O.C.G.A. § 9-4-1 *et seq*. "unless there is an actual, justiciable controversy between the parties." *Burton v. Composite State Bd. Of Medical Examiners,* 245 Ga. App. 587 (2000). The controversy cannot be "hypothetical, abstract, academic or moot." *Id.* As explained by the Supreme Court of Georgia:

> For a controversy to justify the making of a declaration, it must include a right claimed by one party and denied by the other, and not merely a question as to the abstract meaning or validity of a statute. There can be no justiciable controversy

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grant of a motion to dismiss if it is right for any reason, so long as the argument was fairly presented to the court below." *Alred v. Georgia Pub. Def. Council,* 362 Ga. App. 465, 471, 869 S.E.2d 99, 104 (2022). Cobb County presented its standing and sovereign immunity arguments to the court below, V2-4093-4109; Publix responded to those arguments, V2-6299-6314; and the Superior Court decided them. Further, this Court has an independent duty to address subject matter jurisdiction even if it was not raised in the lower court.

> unless there are interested parties asserting adverse claims upon a state of facts which have accrued.

Pilgrim v. First Nat. Bank & c., 235 Ga. 172, 174 (1975). "'Declaratory judgment will not be rendered based on a possible or probable future contingency' because such a ruling would be 'an erroneous advisory opinion.'" *Burton,* 245 Ga. App. at 588 (quoting *Baker v. City of Marietta,* 271 Ga. 210, 214 (1999)).

Moreover, "[t]he purpose of the Declaratory Judgment Act … is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Gwinnett County v. Netflix, Inc.,* 367 Ga. App. 138, 146 (2023). "It is well settled that 'declaratory judgment is not available where a judgment cannot guide and protect the petitioner with regard to some future act.'" *Id.* (citing *Drawdy v. Direct Den. Ins. Co.,* 277 Ga. 107, 109 (2003)). After all, the sole purpose of a declaratory judgment "is to permit one who is walking in the dark to ascertain where he is and where he is going, to turn on the light before he steps rather than after he has stepped in a hole." *Georgia Cas. & Sur. Co. v. Valley Wood, Inc.,* 345 Ga. App. 30, 33 (2018).

"To secure a declaratory judgment, the plaintiff must show facts or circumstances whereby it is in a position of uncertainty or insecurity

because of a dispute and of having to take some future action which is properly incident to its alleged right, and which future action without direction from the court might reasonably jeopardize its interest." *Perdue,* 367 Ga. App. at 163. Thus, "[t]o warrant a declaratory judgment, 'the relief sought by a plaintiff must have some *immediate legal effect on the parties' conduct*, rather than simply burning off an abstract fog of uncertainty.'" *Id.* (quoting *City of Atlanta v. Atlanta Independent School System*, 307 Ga. 877, 880 (2020)).

Plaintiff's Amended Complaint alleged a series of "on-going" violations by Cobb County, V2-5112-13, in an attempt to overcome the hurdle that "[Georgia courts] cannot issue a declaration about things that have already occurred." *Perdue,* 367 Ga. App. at 164. But this did not remedy Publix's lack of standing. "The object of the declaratory judgment is to permit determination of the controversy *before* obligations are repudiated or rights are violated." *Perdue,* 367 Ga. App. at 163. If the violations are currently occurring, then, under Publix's own facts, its rights have already been violated and declaratory judgment is improper.

More importantly, whether Publix will face some future injury is not the proper inquiry. The pertinent questions are: (1) Did Publix show

that it was in a position of uncertainty or insecurity as to some future *action* that *Publix* intended to take?; (2) Was that future action properly incident to a legally-protected right that was *denied* by Cobb County?; and (3) Did Publix show that, if its future action was taken without direction from the court, the action might reasonably jeopardize its interest? The answer to these questions was—and remains—no.

Publix's Amended Complaint included three purported "uncertainties." *First*, Publix claimed it was "uncertain whether any settlement payment that the Plaintiffs' Lawyers have demanded from Publix or which Publix may agree to pay is lawful if a portion of it would be retained by the Plaintiff's Lawyers in violation of Georgia public policy." V2-5103-04. But the claimed uncertainty is belied by the uncontroverted facts, and the possibility of a settlement was, and remains, entirely hypothetical. The mediation in the MDL began in January 2023, V2- 4127, and Publix repeatedly asked the MDL Court to pause discovery so they could continue focusing on settlement efforts V2-4127-28, 4132, without ever expressing any "uncertainty" about the legality of a settlement—until it filed its *Amended* Complaint.[5]

[5] The original complaint does not allege *any* uncertainty. *See* V2-4 *et seq*.

Furthermore, the prospect of Cobb County and Publix reaching a settlement agreement was a mere possibility. "Declaratory judgment will not be rendered based on a possible or probable future contingency' because such a ruling would be 'an erroneous advisory opinion.'" *Burton,* 245 Ga. App. at 588 (quoting *Baker,* 271 Ga. at 214).

Second, Publix claimed it was "uncertain as to its ability, or right to demand, to negotiate resolution of the Opioid Action directly with the County Attorney outside the presence of the Plaintiffs' Lawyers." This claimed uncertainty too is demonstrably false. In the months preceding the filing of its Amended Complaint, and in the days and months following the amendment, Publix's counsel reached out to the County Attorney directly on several occasions. V2-4132, ¶ 33. Thus, Publix's claimed uncertainty did not prevent Publix's counsel from contacting the County Attorney directly. At no time did anyone acting on behalf of Cobb County state or imply that Publix was not permitted to contact the County Attorney directly. V2-4133, ¶ 34. Moreover, any such "uncertainty" would be patently unreasonable considering the County Attorney is counsel of record in the Opioid Action. V2-4125-26, ¶¶ 9&11.

Third, Publix claimed it was "uncertain whether the Plaintiffs' Lawyers with whom it must communicate concerning the Opioid Action [were] lawfully retained and otherwise as to the extent to which they [had] authority to pursue a resolution of the Opioid Action on behalf of the county." V2-5103-04. Like the first "uncertainty," this uncertainty—even if it actually existed—did not involve some future action that *Publix* intended to take.

Even if the above uncertainties were plausible, they still did not justify a declaratory judgment action because Publix did not claim a legally-protected right that was denied by Cobb County. *See Action for a Clean Environment v. State*, 217 Ga. App. 384, 385 (1995).

Of the three uncertainties, the only the second uncertainty alluded to any type of right, *i.e.*, a "right to demand to negotiate" directly with the County Attorney outside the presence of Plaintiffs' Lawyers. But a defendant does not have a legally-protected right to negotiate settlement with anyone, much less a legally-protected right to do so "with the County Attorney directly outside the presence of" Cobb County's other litigation counsel. It is up to Cobb County, and not Publix, to decide whether to engage in settlement negotiations and who will represent it in such

negotiations. Furthermore, even if Publix did have such a right, that right was not denied. Publix's request to meet and discuss settlement privately was accepted, and a meeting between Publix's counsel and the County Attorney was held on July 13, 2023. V2-4133, ¶ 37.[6]

Finally, Publix's request for declaratory relief was not viable because, under Georgia law, "'[a] declaratory judgment will not be rendered to give an advisory opinion in regard to questions arising in a proceeding pending in a court of competent jurisdiction, in which the same questions may be raised and determined.'" *Southeast Service Corp. v. Savannah Teachers Properties, Inc.*, 263 Ga. App. 513 (2003) (quoting *Merrills v. Horace Mann Ins. Co.*, 214 Ga. App. 142, 143 (1994)). "Where the questions to be answered are legal ones determinable in another proceeding then in progress between the same parties, in a court having jurisdiction to determine them, the court will ordinarily refuse to entertain a declaratory judgment proceeding." *Merrills,* 214 Ga. App. at 143 (quoting *Darnell v. Tate*, 206 Ga. 576, 581 (1950)). "[A] declaratory judgment action is not available for a party merely to test the viability of

[6] The other two "uncertainties" alleged by Publix did not implicate any legally-protected right or a denial of such by Cobb County.

its defenses in such a pending action." *Id.* (citing *Chattahoochee Bancorp v. Roberts*, 203 Ga.App. 405 (1992)).

Publix raised the issue of Cobb County's engagement of contingency counsel as an affirmative defense in its Answer in the Opioid Action. V2-5067-68. Publix could have had the issue determined by the MDL court years ago, but it chose not to do so. Allowing Publix to engage in an end run around the MDL court would "strain[] beyond reason all notions of comity between these courts." *Rockdale,* slip. op. at 9.

The Amended Complaint should have been dismissed for lack of standing.

2. Injunctive Relief

Because standing was lacking as to the declaratory relief claim, Publix's injunctive relief claim also failed for lack for standing. *Sexual Offender Registration Review Bd.*, 301 Ga. 391, 396 (2017).

3. Individual Claims

To have standing, a plaintiff must plead allegations sufficient to show: (1) injury in fact; (2) a causal connection between the injury and the alleged wrong; and (3) the likelihood that the injury will be redressed with a favorable decision. *Black Voters Matter Fund v. Kemp*, 313 Ga. 375

(2022). Publix did not make the necessary showings as to any of its four claims.

a. *Count I*

Publix might have had standing to pursue a claim for *disqualification* of Cobb County's private attorneys on the ground that the engagement agreement purportedly violates public policy because it creates a conflict of interest on the part of the attorneys. *Cf. Greater Georgia Amusements, LLC v. State*, 317 Ga. App. 118 (2012) (RICO action); *Amusement Sales, Inc. v. State*, 316 Ga. App. 727 (2012) (same). However, the Amended Complaint does not seek disqualification. In response to Cobb County's argument that Publix's action was, in essence, a disqualification effort masquerading as a declaratory judgment action, Publix denied that it sought disqualification. V2-6329-30. Thus, the injury of which Publix complains in Count I is limited to injury it supposedly suffered as a taxpayer and member of the community.[7] A "public policy" claim based solely on such injuries necessarily fails for

[7] If Publix *were* seeking disqualification, its claim would be barred under *Rockdale*. *See* slip op. at 9.

lack of standing, however, because as this Court expressly held in *Rockdale*, "its object is not to vindicate a public right." Slip op. at 8-9.

Publix lacks taxpayer standing because Cobb County's hiring of lawyers on a contingency fee basis has not and *cannot possibly* harm the public purse. *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs*, 315 Ga. 39, 56 (2022). To the contrary, the relief Publix requests can only harm Cobb County's taxpayers by shifting the enormous financial risk and burden of this litigation from outside counsel to the taxpayers.

Publix lacks standing as a member of the community because it fails to allege a violation of "a duty owed to the public at large." *Sons of Confederate Veterans*. 315 Ga. at 57. Publix argued below that it is harmed as a member of the community because Cobb County has acted illegally, but it failed to explain how Cobb County's alleged violation of public policy by the engagement of contingent fee counsel violates any duty owed to the public at large. The public policy that Publix invokes is a public policy that protects those against whom governmental entities prosecute in quasi-criminal litigation. Pub.Br. at 34, citing *Greater Georgia Amusements,* 317 Ga. App. 118 (RICO forfeiture); *Amusement*

Sales, 316 Ga. App. 727 (same). The only parties within the "zone of interests" of that public policy are litigants *in their capacity as litigants*. *See Amdahl Corp. v. Georgia Dep't of Admin. Servs.*, 260 Ga. 690, 696 (1990) (adopting zone of interests test).

Publix also lacks standing to object that the contingent fee agreement violates public policy based on Bar Rule 1.5(c)(1), which requires that contingency fee agreements be in a signed writing. That rule exists for the protection of clients like Cobb County, not for the protection of wrongdoers against whom clients have claims. Publix's argument, if accepted, would pervert Bar Rule 1.5(c)(1) by converting a rule to protect clients into an instrument to deprive clients of the right to counsel of their choosing.

Here, as in *Rockdale*, the object of Publix's Count I "is not to vindicate a public right." *Id*. at 9. Therefore, that count should have been dismissed for lack of standing.

b. *Count II*

O.C.G.A. § 41-2-2 provides, "Private citizens may not generally interfere to have a public nuisance abated. A complaint must be filed by the … county attorney on behalf of the public." The purposes of the

statute are to protect the interests of Cobb County by preventing private individuals from interfering with Cobb County's ability to control public nuisance actions and to require that such actions be filed by lawyers representing the county. It would be absurd to construe the statute in such a way as to help wrongdoers like Publix, who create and maintain public nuisances, to evade responsibility. Where, as here, the Opioid Action was filed by the Cobb County Attorney on behalf of the county, and there is no private citizen interfering in the action, Publix lacks standing because it has suffered no relevant injury in fact and is not within the zone of interests protected by O.C.G.A. § 41-2-2.

c. *Count III*

The purpose of statutes like O.C.G.A. § 36-10-1, requiring contracts to be in writing and entered in the minutes, is to keep the public's business open to inspection. *See Graham v. Beacham*, 189 Ga. 304, 305 (1939). Since the engagement agreement is a signed writing, the only objection Publix could have as a taxpayer or member of the community would be an interest in transparency. That interest was fully satisfied prior to the commencement of this action, however, because Publix had requested and received pursuant to an Open Records Act request copies

of both the engagement agreement and the record of the March 12, 2018, executive session during which it had been duly approved by the Board. V2-5108-09 at ¶¶ 81-88. Thus, Publix lacks standing because at the time it commenced this action on February 27, 2023, it had suffered no relevant injury in fact.

Furthermore, mootness, like standing, is an issue of jurisdiction. *Cardinale v. State*, 363 Ga. App. 873, 875 (2022). Since the agreement was duly ratified by a Resolution entered in the public minutes on November 18, 2021, V2-5087, Publix's claim to prevent the agreement from being enforced until it was entered—the only remedy that would be available to a taxpayer or member of the community—is moot.

d. *Count IV*

Publix claims standing as a taxpayer to pursue its claim that the contingent fee agreement violates Ga. Const. art. IX, § 5, ¶ I (a) because it allegedly creates a "new debt." As *City Council of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 914 (1899), makes clear, however, the purpose of § 5, ¶ I (a) is to avoid putting taxpayers in a situation where Cobb County must pay an amount that it does already have and that it would therefore have to raise taxes to pay. The contingent fee

arrangement presents no such situation. The engagement agreement expressly provides, (i) "[t]here is no fee for the services provided herein unless a monetary recovery acceptable to County is obtained by Counsel in favor of County, whether by suit, settlement, or otherwise," V2-4812; (ii) "[n]o monies shall be paid to Counsel for any work performed, costs incurred or disbursements made by Counsel in the event no Recovery to County has been obtained," *id.* at 4813; and (iii) "County shall not be required to pay Counsel any more than the sum of the full Recovery," *id.* Since there is no circumstance under which Cobb County could ever have to pay anything over and above the amount of its recovery, and no money would ever have to be paid out of future taxes, Publix has suffered no taxpayer injury and is threatened with none.[8]

[8] Publix appears to have abandoned its meritless claim that the contingent fee agreement somehow restricts future commissions' ability to freely legislate in matters of municipal government in violation of O.C.G.A. § 36-30-3(a). If not, the claims should be dismissed for lack of standing. A citizen-taxpayer has no standing to raise an objection under O.C.G.A. § 36-30-3(a) unless it has special damages not shared by the general public. *City of East Point v. Weathers*, 218 Ga. 133 (1962); *see Juhan v. City of Lawrenceville*, 251 Ga. 369, 369 (1983). The Amended Complaint alleges no such injury.

B. Publix's Claims Are Barred by Sovereign Immunity

Cobb County is entitled to sovereign immunity unless that immunity has been waived. Ga. Const. Art. 1, § 2, ¶ 9 (e). Publix relies on the waiver of sovereign immunity set forth in Ga. Const. Art. 1, § 2, ¶ 5(b)(1). That waiver applies to "past, current, and prospective acts which occur on or after January 1, 2021." It is inapplicable here because all of Cobb County's acts complained of by Publix occurred prior to January 1, 2021.

Publix alleges that the engagement of contingent fee counsel was unlawful, but counsel was engaged in 2018. Publix asserts that the nuisance action was improperly filed, but the action was filed in 2018, and Publix was added as a defendant in 2019.

The Superior Court held that the waiver applies because "the payment of any contingency would necessarily be a future act." The trial court erred.

Waivers of sovereign immunity must be strictly construed against a finding of waiver. *Fulton County School Dist. v. Jenkins*, 347 Ga. App. 448, 451 (2018). Nothing in the language or history of 5(b) suggests that, in waiving sovereign immunity for acts after 2021, the legislature

actually intended to waive sovereign immunity retroactively for all earlier acts—however remote in time prior to 2021—that had any continuing impact after 2021. Such an expansive construction violates the rule of strict construction. It would make no sense to hold that Cobb County is immune for entering into a contract prior to 2021 and for filing an action prior to 2021 but that it can be sued for continuing the action and honoring the contract at some uncertain date in the future.

Furthermore, payment of any contingency would not be a future *act of Cobb County*. Rather, in the event of a settlement or judgment, the payment will be made to counsel, and counsel will remit the proceeds net of fees and expenses—without any "act" by Cobb County.

III. PUBLIX FAILS TO STATE A CLAIM

A. Count I Fails to State a Claim Because Cobb County Has the Right to Engage Contingent Fee Counsel

"[T]he power of the courts to declare a contract void for being in contravention of a sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599 (1903) (internal quotes omitted). Publix's public policy argument was rejected as a matter of Georgia law by the

Superior Court in *Rockdale*, and it has been uniformly rejected in cases throughout the nation. *See, e.g., In re Opioid Litigation*, Index No. 400000/2017, 2018 WL 4827863, at *6 (N.Y. Sup. Ct., Suffolk Cnty. May 15, 2018) (denying opioid defendants' motion to preclude county's prosecution of opioid claims by counsel retained on a contingent fee basis) (citing cases); *State v. Actavis Pharma, Inc.*, 167 A.3d 1277, 170 N.H. 211 (2017) (opioid defendants lacked standing to challenge State's contingent fee contract with counsel and rejecting defendants' due process challenge to such a contract) (citing cases); *City of Chicago v. Purdue Pharma L.P.*, No. 14-CV- 4361, 2015 WL 920719, at *4-*5 (N.D. Ill. Mar. 2, 2015) (denying motion challenging contingent fee arrangement) (citing cases)

Nor has Publix's argument ever been accepted in any case like this one by any court in this State. Publix relies on *Greater Georgia Amusements,* 317 Ga. App. 118, and *Amusement Sales,* 316 Ga. App. 72, but those are RICO forfeiture cases—a critical distinction Publix neglects to mention. The basis for the Court's holdings is that a RICO forfeiture action is a quasi-criminal proceeding in which the defendant is entitled to the safeguards of criminal procedure. *See Amusement Sales,* 316 Ga.

App. at 735-266. *See Cisco v. State*, 285 Ga. 656, 658 (2009) (RICO forfeiture defendants entitled to criminal procedure safeguards).

The courts in *Greater Georgia Amusements* and *Amusement Sales* were well aware that the General Assembly had recently passed a part of Senate Bill 181, which became OCGA § 16-1-12, effective July 1, 2011, which prohibits a lawyer appointed in a RICO forfeiture action from being compensated on a contingency basis. *Greater Georgia Amusements*, 317 Ga. App. at 122 n.2; *Amusement Sales*, 316 Ga. App. at 736 n.4. Thus, they had the benefit of an explicit legislative declaration of the public policy of the State with respect to RICO forfeiture actions. In contrast here, the fact that the legislature has specifically prohibited contingent fee arrangements in RICO forfeiture actions—but not in any other kind of action—strongly suggests that the public policy is limited to RICO forfeiture actions.

Publix also cites *Sears, Roebuck & Co. v. Parsons*, 260 Ga. 824 (1991), but that case involved an agreement between a board of tax assessors and a private auditing firm that provided that the private firm would audit tangible personal property returns and, if an audit results in an increased valuation, the private firm would be compensated on a

contingent fee basis. The Supreme Court held that the agreement was contrary to public policy because it provided the private firm with an incentive to increase valuations. The Court explained,

> [t]he people's entitlement to fair and impartial tax assessments lies at the heart of our system, and, indeed, was a basic principle upon which this country was founded. Fairness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends.

260 Ga. at 824. There is a fundamental distinction between the role of an assessor in providing an opinion on the value of taxable property and the role of an attorney in enforcing a claim in an adversarial proceeding, presided over by a judge, in which the trier of fact will determine liability and damages after discovery and trial. Thus, the reasoning of the case does not extend to contingent fee arrangements with attorneys in civil actions.

Any public policy interest that might arguably favor Publix must be weighed against other important public policy interests. Georgia law recognizes a public policy of "general fairness." *See Hostetler v. Answerthink, Inc.*, 267 Ga. App. 325, 328 (2004). Many government entities, like many individuals and businesses, lack the resources to litigate against large, wealthy, corporate entities like Publix. Contingent

fee arrangements are important to level the playing field. The engagement agreement contemplated litigation against many of the largest corporations in the country. V2-4810. Such companies can afford to hire some of the most expensive lawyers in the world to help them continue to manufacture, distribute, and dispense dangerous narcotics. Publix is one of the ten largest-volume supermarket chains in the country, with annual sales of almost $60 billion.[9] In contrast, the Cobb County Attorney has a four-person in-house litigation team.

By attacking Cobb County's ability to engage counsel, Publix it is not seeking to vindicate the public interest; quite the opposite, it seeks to evade liability for its role in creating and maintaining the opioid crisis by making it prohibitively expensive for Cobb County to seek justice on behalf of the community. As a matter of simple fairness, Cobb County should have no less freedom than Publix when it comes to the engagement of the best available legal counsel.

[9] Cobb County requests the Court to take judicial notice of those two facts based on Publix's statements on its website. https://corporate.publix.com/about-publix/company-overview/facts-figures (accessed 3/27/25).

The only limitation any of the authorities has recognized with respect to contingent fee agreements by government entitles is that the government client must maintain ultimate control over the litigation. That issue need not be reached or decided in this case, however, because Cobb County maintains control: the County Attorney filed the case, V2-4415; the County Attorney is counsel of record, V2-4420, 4715; Cobb County has the right to terminate the engagement at any time, V2-4813; and Cobb County has the right to reject or accept any settlement V2-4824.

Publix argues that the allegations of the Amended Complaint will support an inference that the Cobb County Attorney has not in fact exercised control. Pub.Br. at 38. That argument fails for two independently sufficient reasons.

First, it fails as a matter of fact. Nowhere in the Amended Complaint does Publix allege that the County Attorney failed to exercise control over the conduct of the litigation. In fact, in its effort to overcome Cobb County's sovereign immunity defense in Superior Court, Publix affirmatively advanced the following facts:

- Cobb County Attorney "remained counsel of record and has been fully and actively engaged in the

> prosecution of the action from its inception to the present";
>
> - "At all times, outside counsel have done so pursuant to the oversight, supervision, and ultimate authority and control of Cobb County Attorney";
> - The Cobb County attorney "approved" the 2021 amendment of the opioid complaint; and
> - Cobb County "maintains control" over the opioid action.

V2-6301-02.

In support of its argument, Publix cites the terms of the engagement agreement and ¶ 38 of the Amended Complaint, but that merely states, "the Cobb County Attorney, on information and belief, still outsourced all major decision-making about Cobb County's opioid-related litigation to the conflicted private attorneys." V2-4055. That bald allegation does not support any plausible inference that the County Attorney has failed to exercise sufficient control, where the County Attorney clearly remains as counsel of record in the federal case.

Second, even assuming, *arguendo*, that Georgia public policy requires that the governmental attorneys must have ultimate control of the litigation, that would not mean the governmental lawyers cannot rely heavily on outside counsel's expert advice and rely on outside counsel to

bear the laboring oar in the conduct of the litigation. It would certainly not mean that the County's adversaries in litigation should be allowed to intrude upon the working relationships and decision-making between the County Attorney and outside counsel or to litigate the extent to which the County Attorney actually exercised the control that he or she indisputably maintains.

Publix claims that the contingent fee agreement violates Bar Rule 1.5(c)(1) which requires contingency fee agreements to be in a signed writing. Pub.Br. at 34. That claim is meritless. The contingency fee agreement *is* in a signed writing. V2-4810. Publix suggests that the agreement does not satisfy the bar rule because it does not specifically name Publix. But the agreement expressly provides that "[d]epending on the results of initial investigation … there may be additional parties sought to be made responsible." *Id*. Thus, the agreement clearly, explicitly, and unambiguously covers claims against additional parties such as Publix.

In short, this is not a case in which the alleged violation of a public policy is so clear that it can be said to be "free from doubt." *Equitable Loan & Security Co.*, 117 Ga. at 599. Count I was properly be dismissed.

B. Count II Fails to State a Claim Because the Cobb County Attorney Filed the Opioid Action on Behalf of the Public.

O.C.G.A. § 41-2-2 provides, "Private citizens may not generally interfere to have a public nuisance abated. A complaint must be filed by the … county attorney on behalf of the public." Count II fails to state a claim because Cobb County's complaint *was filed by its County Attorney on behalf of Cobb County*, and there is no allegation that any private citizen is interfering in Cobb County's action to abate the Publix nuisance.

There is nothing in the language or history of the statute, or in any case construing the statute, to suggest that county attorneys are prohibited from engaging private co-counsel to act *alongside* them when they file and thereafter prosecute public nuisance actions on behalf of the Counties they represent. The purpose of the statute is to prevent "private citizens" from "interfere[ing]" with actions to abate public nuisances. There is no danger of that where, as here, Cobb County Attorney engages private co-counsel to represent Cobb County and no private citizens are involved. Publix offers no explanation for why the legislature would want to deny County Attorneys the ability to obtain assistance from highly

qualified private counsel in the abatement of public nuisances—at no cost or risk to the taxpayers.

Count II was properly dismissed.

C. Count III Fails to State a Claim Because the Engagement Agreement Was a Signed Agreement Entered on the Minutes.

In Count III, Publix claims that Cobb County violated O.C.G.A. § 36-10-1, which provides, "All contracts entered into by the county governing authority with other persons in behalf of the county shall be in writing and entered on its minutes." O.C.G.A. § 36-10-1. The statute has been fully complied with. The engagement agreement is reflected in a signed writing, and it was entered in the minutes, and Public had been provided with a copy before this action was commenced. V2-4810; V2-5087; V2-5108-09.

Count III was properly dismissed.

D. Count IV Fails to State a Claim Because a Contingent Fee Obligation Does Not Create a "New Debt."

Publix claims that the contingent fee agreement violates Ga. Const. art. IX, § 5, ¶ I(a) because it allegedly creates a "liability that is 'not to be discharged by money already in the treasury, or by taxes to be levied during the year in which the contract under which the liability arose was

made." Pub.Br. at 47 (quoting *Fairgreen Cap., LLC v. City of Canton*, 335 Ga. App. 719, 720 (2016) (quoting *Greene Cnty. Sch. Dist. v. Circle Y Constr., Inc.*, 291 Ga. 111, 112 (2012))). That quoted definition of "debt" actually comes from the Supreme Court's seminal decision in *City Council of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 914 (1899). Publix chose not to cite *Dawson*, however, probably because *Dawson* makes clear that "[t]he word 'debt' is *not* to be construed in its broad and unrestricted sense of a liability by one person to pay money or other thing of value to another." *Id.* (emphasis added).

Publix's reliance on the *Dawson* definition will not withstand scrutiny. It is based on the false predicate that the contingent fee agreement creates a "liability." For the same reasons that a contingent fee obligation cannot be regarded as creating a "debt," it cannot be regarded as creating a "liability."

Publix fails to address the reasoning of those cases that have rejected their argument on the basis that a contract does not create a "debt" when the parties lawfully and reasonably contemplate that the obligation will be satisfied exclusively out of a future recovery of funds. *See L. Offs. of Cary S. Lapidus v. City of Wasco*, 114 Cal. App. 4th 1361,

1367–68, 8 Cal. Rptr. 3d 680, 685 (2004); *Mun. Admin. Servs., Inc. v. City of Beaumont*, 969 S.W.2d 31, 39 (Tex. App. 1998); *Barnard v. Young*, 43 Idaho 382, 251 P. 1054, 1057 (1926); *McNeill v. City of Waco*, 89 Tex. 83, 87, 33 S.W. 322, 323–24 (1895).

As the definition of "new debt" in *Dawson* makes clear, the purpose of the provision at issue is simply to avoid putting taxpayers in a situation where the municipality must pay an amount that it does not already have in the treasury and that it would therefore have to levy taxes to pay. A contingent fee arrangement does not present any such situation, however, because the nature of a contingent fee arrangement is such that, as the engagement agreement here expressly provides, "[t]here is no fee for the services provided herein unless a monetary recovery," V2-4812, "[n]o monies shall be paid to Counsel for any work performed, costs incurred or disbursements made by Counsel in the event no Recovery to County has been obtained," V2-4813, and "County shall not be required to pay Counsel any more than the sum of the full Recovery." *Id*. Since there is no circumstance under which Cobb County could ever have to pay anything to its attorneys over and above the

amount they recover for Cobb County, and no money would ever have to be paid out of future taxes, no "debt" was created.

Publix argues that the possibility of a recovery in *quantum meruit* in the event that the representation were terminated, together with the reservation of a lien on a future recovery, creates a "new debt." But that possibility does not alter the fact that under the engagement agreement "County shall not be required to pay Counsel any more than the sum of the full Recovery," V2-4813, and that limitation applies to any claim based on *quantum meruit*.

Count IV was properly dismissed.

CONCLUSION

This Court should affirm the dismissal of the Amended Complaint.

Respectfully submitted,

This submission does not exceed the word count limit imposed by Rule 24.

This 31st day of March, 2025.

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CERTIFICATE OF SERVICE

In accordance with Georgia Court of Appeals Rule 6, I hereby certify that on the below date a genuine copy of the foregoing **Brief of Appellee Cobb County** was sent by electronic mail and U.S. Mail, with sufficient postage pre-paid to ensure delivery to:

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