COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

SHYNIECE-KANISHA: MITCHELL[1], Appellant, v. TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, Appellee.	§	No. 08-21-00164-CV Appeal from the County Court at Law No. 3 of El Paso County, Texas (TC# 2021DCV1706)

O P I N I O N

This is an appeal from a trial court's grant of a plea to the jurisdiction that resulted in the dismissal of Appellant Shyniece-Kanisha: Mitchell's suit against Appellee, the Texas Department of Family and Protective Services (the Department). Agreeing with the trial court that it lacked subject matter jurisdiction, we affirm the judgment below.

I. BACKGROUND

A. Factual Background

Mitchell is a respondent in a pending Suit Affecting the Parent-Child Relationship

[1] In her pleadings and signature block, Appellant Mitchell includes a colon between her hyphenated given name and her last name, so we replicate it in our opinion as well.

(SAPCR) filed by the Department on April 14, 2021. A full adversarial hearing was held in June 2021, and the court in that proceeding named the Department as the temporary managing conservator of Mitchell's children. According to the Department, the SAPCR is still pending.

Mitchell claims that she and the Department entered a written contract containing a binding arbitration agreement on April 13, 2021. The backstory on the contract from our record is as follows: Mitchell sent an unsolicited contract form to the Department. The document stated that a binding contract would be formed between Mitchell and the Department through the Department's "tacit acquiescence" if it failed to respond within 72 hours of receiving the document. The purported contract required the Department to (1) dismiss the SAPCR, (2) return Mitchell's children to her, (3) remove Mitchell from the "Central Registry", and (4) pay her $10,000 per day for each day the above three requirements were not met. The purported contract added that the Department's failure to carry out these requirements within 72 hours would breach the contract and that the Department would have no time to cure this beach. And as relevant here, the purported contract contained an arbitration provision which stated that any disputes between the parties would be resolved by arbitration.

This appeal arises from Mitchell's suit to confirm an arbitration award. She claims that on April 16, 2021, and in accord with the purported contract we describe above, she filed an arbitration claim with "Online Contract Arbitration," a firm which designated a named arbitrator. The final arbitration order states that notices of "Demand For Emergency Arbitration" were sent to the Department. The arbitrator issued an award on April 26, 2021, after a meeting between Mitchell and the arbitrator. The Department was not present during this meeting. The final arbitration award favored Mitchell and ordered the Department to fulfill the contract requirements and pay her compensatory damages of $880,000 and $10,000 per day "until all stipulations in the

contract" are fulfilled.

B. Procedural History

Mitchell then filed a petition with the El Paso County Court at Law Number Three to confirm the final arbitration award that she had received from Online Contract Arbitration. Mitchell's petition invoked "the Federal Arbitration Act, 9 U.S.C. 1-16" and claimed that the trial court had jurisdiction "pursuant to 28 U.S.C. § 1332(a)(2)." The Department filed an answer and plea to the jurisdiction. The plea urged that sovereign immunity defeats a trial court's subject matter jurisdiction in an action against a state entity unless the state consents to being sued. The Department argued that neither 28 U.S.C. § 1332, nor the Federal Arbitration Act (FAA) abrogated the Department's sovereign immunity because: (1) section 1332 only governs jurisdiction for federal district courts; and (2) the FAA does not apply to child custody cases because the act is limited "to confirmation of arbitration awards relating to maritime transactions or contracts affecting interstate commerce." The trial court granted the plea to the jurisdiction and dismissed the case.

II. ISSUES ON APPEAL

Mitchell raises two issues, contending first that the trial court erred in dismissing her suit because vacating the arbitrator's decision is the only relief that the court can grant under the FAA. Second, Mitchell claims that the trial court erred in deciding the case outside the federal rules that govern FAA matters. In response, the Department claims that the trial court did not have subject matter jurisdiction because Mitchell has never identified a valid basis for waiver of the Department's sovereign immunity. We agree that the only matter before this Court is whether the trial court properly granted the Department's plea to the jurisdiction which turns on whether Mitchell can overcome the Department's sovereign immunity. We limit our discussion to that

issue.

III. DISCUSSION

A. Sovereign Immunity

"Sovereign immunity protects the State, its agencies, and its officials from lawsuits for damages." *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 (Tex. 2006). In Texas, sovereign immunity implicates a trial court's subject matter jurisdiction whenever the state or governmental unit has been sued unless the State consents to being sued. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). A court's subject matter jurisdiction "is essential to a court's power to decide a case." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000).

The State's "immunity from suits arising from a breach of contract is waived only by the legislature's consent." *In re City of Galveston*, 622 S.W.3d 851, 855 (Tex. 2021). The legislature can waive the State's sovereign immunity by statute or legislative resolution. *Nazari v. State*, 561 S.W.3d 495, 500 (Tex. 2018). And if the legislature chooses to waive sovereign immunity, then it must do so by "clear and unambiguous language." *Id.*; *see also* TEX.GOV'T CODE ANN. § 311.034 ("[A] statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.").

B. Pleas to the Jurisdiction and Standard of Review

The State may assert sovereign immunity from suit in a plea to the jurisdiction. *Miranda*, 133 S.W.3d at 224-26. In a plea to the jurisdiction, a defendant may challenge either the plaintiff's pleadings or the existence of jurisdictional facts claiming that they do not support subject matter jurisdiction. *Id*. at 226-27; *Zimmerman v. City of Austin*, 620 S.W.3d 473, 479-80 (Tex.App.--El Paso 2021, no pet.). When a plea to the jurisdiction challenges only the pleadings,

the trial court must construe the pleadings liberally in favor of the plaintiff—accepting the allegations as true—and look to the plaintiff's intent in its pleadings. *Texas Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002); *Miranda*, 133 S.W.3d at 226-27.

Yet, at the pleading stage, a plaintiff carries the burden of alleging sufficient facts to "demonstrate that the trial court has subject matter jurisdiction over its claims." *City of El Paso v. Viel*, 523 S.W.3d 876, 883 (Tex.App.--El Paso 2017, no pet.); *see also Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (the plaintiff has the burden of pleading facts which affirmatively show that the trial court has jurisdiction). If the pleadings do not allege facts sufficient to affirmatively demonstrate jurisdiction, but the pleading defects are curable by amendment, the issue is one of pleading sufficiency, and the plaintiff should be allowed to amend. *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839-40 (Tex. 2007). But if the pleadings affirmatively negate the existence of the trial court's jurisdiction by revealing an incurable defect, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Id.* at 840; *Tabrizi v. City of Austin*, 551 S.W.3d 290, 303 (Tex.App.--El Paso 2018, no pet.).

"Whether a court has subject matter jurisdiction is a question of law." *Miranda*, 133 S.W.3d at 226. "Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo*." *Id.*

C. Application

The Department, as a state agency, has sovereign immunity that protects it from being sued. *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist.*, 212 S.W.3d at 323; *Brice v. Texas Dep't of Fam. and Protective Services*, No. 14-20-00506-CV, 2022 WL 1310876, at *2 (Tex.App.--Houston [14th Dist.] May 3, 2022, no pet. h.) (mem. op.). Mitchell thus carries the burden to

show that the State has waived the Department's sovereign immunity through a statute or legislative resolution containing clear and unambiguous language of such a waiver. *See Nazari*, 561 S.W.3d at 500. Appellant cites no such Texas statute, nor do we find any.

Chapter 2260 provides a resolution procedure for certain contract claims against the State. TEX.GOV'T CODE ANN. § 2260.001 et seq. But that statute governs only contracts for goods or services which would not apply here, and in any event, the Chapter 2260 provisions expressly do "not waive sovereign immunity to suit or liability." *Id.* §§ 2260.001, .006. Moreover, a suit seeking to confirm an arbitrator's award against a state actor still requires the court (and not the arbitrator) to decide whether immunity is waived. In *Clear Creek Indep. Sch. Dist. v. Cotton Comm. USA, Inc.*, our sister court of appeals confirmed an arbitration award against a local school district, but only because a provision of the Local Government Code validly waived immunity for the contract that gave rise to the dispute. 529 S.W.3d 569, 576 (Tex.App.--Houston [14th Dist.] 2017, pet. denied) (construing immunity waiver provision in TEX.LOC.GOV'T CODE § 271.152).[2] The same court noted, however, that if the local governmental unit's immunity had not been statutorily waived, "the trial court would lack jurisdiction either to adjudicate Cotton Commercial's breach of contract claim or to enforce any arbitration award rendered against CCISD on that claim." *Id.* at 576. In our case, Mitchell raises no Texas statutory provisions that waive the Department's immunity. Nor are any of the other non-statutory bases for waiver of immunity raised by the pleadings below.[3]

[2] The Department is not a local government actor and section 271.152 would not apply to it.

[3] The Texas Supreme Court recognized a limited waiver of immunity in contract matters when the State first sues for monetary relief and the defending party raises a defensive counterclaim as an offset. *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 378 (Tex. 2006). State officers are also subject to ultra vires claims to compel them to comply with non-discretionary duties. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 371-73 (Tex. 2009). Nothing in the pleadings even remotely raises either of those recognized exceptions to sovereign immunity.

Instead, Mitchell argues that she brought this case under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and that the trial court had jurisdiction pursuant to 28 U.S.C. § 1332. Neither of those provisions operate to waive the Department's sovereign immunity. The latter, 28 U.S.C § 1332, defines the jurisdiction of a *federal* district court to hear suits when there is diversity of citizenship and a minimum amount in controversy. Nowhere does 28 U.S.C. § 1332 purport to waive a state's sovereign immunity. And even had Mitchell sought to bring this claim in a federal court using 28 U.S.C § 1332 as a jurisdictional basis, she would have run headlong into the Eleventh Amendment which protects a nonconsenting state from suit in a federal court by its own citizens. *See, e.g.*, *Hans v. Louisiana*, 134 U.S. 1, 10, 20-21 (1890); *Turnage v. Britton*, 29 F.4th 232, 239 (5th Cir. 2022) (and cases cited therein).

Nor does the FAA, on which Mitchell principally relies, alter the equation. First, the purpose of the FAA is to make arbitration agreements "as enforceable as other contracts, but not more so." *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 192 (Tex. 2007) (orig. proceeding) (citations and internal quotation marks omitted). So Mitchell would still need to find a basis for the waiver of the Department's immunity for contract claims outside the text of the FAA. Second, Mitchell's pleadings do not present a plausible claim that the FAA would apply in any event. Subject to its own exclusions, the FAA governs maritime transactions and contracts involving interstate commerce. *See* 9 U.S.C. §§ 1, 2. Mitchell, however, seeks to apply it to a SAPCR between a citizen of Texas and a department of the state of Texas. As a result, Mitchell presents no viable argument for the FAA's application. *See In re Provine*, 312 S.W.3d 824, 828 (Tex.App.--Houston [1st Dist.] 2009, orig. proceeding) (rejecting application of FAA, noting that arbitration agreement in partially mediated settlement agreement in domestic relations suit did not involve interstate commerce); *In re M.W.M., Jr.*, 523 S.W.3d 203, 207 n.3 (Tex.App.--Dallas 2017,

orig. proceeding) ("However, the arbitration clause in this case is not within the FAA's broad reach, as the agreement containing it concerns wholly intra-state divorce, custody matters."); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) ("We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees."). And unless Mitchell can make a plausible case for the application of the FAA, we need not reach the thornier question of whether Congress intended to waive a state's sovereign immunity in the FAA. *See Town of Highland Park v. Iron Crow Const., Inc.*, 168 S.W.3d 313, 317-18 (Tex.App.--Dallas 2005, no pet.) (declining to address argument that the FAA preempts sovereign immunity because nothing in the record revealed "that interstate commerce was involved" and the "matter is not within the purview of the Federal Arbitration Act."). Finally, the inapplicability of the FAA fully answers Mitchell's issues on appeal that claim the trial court erred in failing to follow provisions of the FAA or other federal rules governing the FAA in its dismissal of this case.

In sum, Mitchell has not pleaded any statutory or common law basis (either Federal or State) that waived the Department's sovereign immunity in this case. She thus did not carry her burden of affirmatively demonstrating that the trial court had subject matter jurisdiction. Moreover, her suit to end-run a SAPCR reveals an incurable defect that belies any basis to allow some opportunity to amend.[4] We overrule Mitchell's two issues on appeal.

IV. CONCLUSION

For the reasons above, we affirm the trial court's judgment granting the plea to the jurisdiction and dismissing Mitchell's claims.

[4] Because the Department premised its plea to the jurisdiction on the pleadings and did not challenge as an evidentiary matter whether there was a valid arbitration agreement, we assume—but only for the sake of the argument—that the parties entered into an arbitration agreement. But to be clear, we do not hold, nor even suggest, that the way this agreement was purported to be formed would ever create a valid binding agreement with the Department.

JEFF ALLEY, Justice

June 14, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.