Opinion issued December 22, 2015

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00321-CV

TEXAS DEPARTMENT OF INSURANCE,
DIVISION OF WORKERS' COMPENSATION, Appellant

V.

LINDA GREEN, Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Case No. 2010-25688

MEMORANDUM OPINION

The Texas Department of Insurance, Division of Workers' Compensation appeals the trial court's denial of its plea to the jurisdiction in Linda Green's workers' compensation lawsuit. Green's lawsuit sought (1) a judicial review of the

Division's Administrative decision denying Green relief under the "injurious practices" defense and (2) a declaratory judgment that the "injurious practices" defense is not available under current Texas law. The Division argues that the trial court lacks jurisdiction over the declaratory judgment action against it. We agree and accordingly reverse the trial court's denial of the plea to the jurisdiction and dismiss the declaratory judgment action against the Division.

Background

Green received workers' compensation benefits for a workplace injury to her spine and ankle. Several years later, after a contested case hearing, the Division issued a decision and order finding that part of Green's injury would no longer be compensable, based at least partially on the "injurious practices" defense. That defense allowed the Division to "reduce or suspend the compensation" of an employee if the injured worker "persist[s] in insanitary or injurious practices which tend to either imperil or retard his recovery, or shall refuse to submit to such medical or surgical treatment, chiropractor service or other remedial treatment recognized by the State, as is reasonably essential to promote his recovery." TEX. REV. CIV. STAT. ANN. art. 8307 § 4 (West Supp. 1987).

Green sued Zurich American Insurance Company, the workers' compensation insurer, seeking (1) a judicial review of the Division's administrative decision and (2) a declaratory judgment that the "'injurious practices' [defense] is

not a proper defense" under the new version of the workers' compensation statute.[1] The Division intervened in the lawsuit for the "sole purpose" of objecting to Green's declaratory judgment claim against Zurich. *See* TEX. LAB. CODE § 410.254 (West 2015) (authorizing Division's intervention into proceedings seeking judicial review). In its first plea to the jurisdiction, the Division argued that Green's request for declaratory relief was improper because it was an improper attempt to bypass relief available under Section 410 of the Texas Labor Code, which governs proceedings before the Division to determine the liability of an insurance carrier for compensation for an injury or death, and thus "is an impermissible attempt to control state action." The trial court denied that first plea to the jurisdiction. Green then amended her pleading to seek declaratory relief against the Division, as well as attorney's fees and costs. The Division, in response, asserted the "affirmative defense of sovereign immunity to the extent that any portion of Plaintiff's claim is barred thereby."

Over two years later, the Division filed a second plea to the jurisdiction, arguing that sovereign immunity barred Green's declaratory-judgment action

[1] The old version of the Texas Workers' Compensation statute recognized the "injurious practices" defense. *See* TEX. REV. CIV. STAT. ANN. art. 8307 § 4. In 1989, Texas revamped its Workers' Compensation system. TEXAS DEP'T INSURANCE, ABOUT WORKERS' COMPENSATION, https://www.tdi.state.tx.us/wc/dwc/ (last visited Dec. 7, 2015). The Division agrees that the new version of the Workers' Compensation statute does not have an explicit "injurious practices" defense but argues that it contains a similar defense. *See* TEX. LAB. CODE ANN. § 406.032 ("insurance carrier is not liable for compensation if the injury . . . was caused by the employee's wilful attempt to injure himself . . . .").

against the Division, that declaratory judgment is redundant to judicial review of the administrative decision, and that declaratory judgment is an impermissible attempt to control state action. After the Division filed this second plea to the jurisdiction, and one day before the hearing on the plea, Green amended her pleading and joined the head of the Division, Commissioner Ryan Brannan, in his official capacity as a defendant to the lawsuit. Green asserted that a declaratory judgment action was proper because the Division's application of the injurious practices defense was an "ultra vires act[] in direct dereliction" of its responsibility to "properly apply, interpret and enforce the Texas Workers' Compensation Act."

Following the hearing, the trial court denied the Division's plea. The Division appeals the trial court's denial of its plea to the jurisdiction. The Commissioner is not a party to the appeal. [2]

Jurisdiction over Declaratory Judgment Claim against the Division

The Division argues that the trial court lacks jurisdiction over the declaratory judgment action against it for four reasons: (1) "the doctrine of sovereign immunity protects [the Division] from suit"; (2) "the relief sought by [Green] is available under the Texas Labor Code . . . making [Green's declaratory judgment]

[2] An official acts ultra vires when the officer acts "without legal authority." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Because the Division's Commissioner is not a party to this appeal and the parties do not ask us to determine whether the Commissioner acted without any legal authority, we do not address whether Green's lawsuit properly alleges that "the officer acted without legal authority" and thus, acted ultra vires or merely "exercise[d] [his] discretion" and is thus, protected by immunity. *Id.*

claim redundant of the relief available under the Labor Code"; (3) "Green is impermissibly trying to control state action through her [declaratory judgment claim]"; and (4) Green's "claims are not ripe for adjudication and seek an impermissible advisory opinion."

A. Standard of review

A plea to the jurisdiction challenges the trial court's subject-matter jurisdiction over a case. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *Pineda v. City of Houston*, 175 S.W.3d 276, 279 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Subject-matter jurisdiction is required for a court to have authority to decide a case and is never presumed. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993). The plaintiff has the burden to allege facts affirmatively demonstrating that the trial court has subject-matter jurisdiction. *Id.* at 446; *Richardson v. First Nat'l Life Ins. Co.*, 419 S.W.2d 836, 839 (Tex. 1967).

The existence of subject-matter jurisdiction is a question of law. *State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). Therefore, we review de novo the trial court's ruling on a plea to the jurisdiction. *Mayhew*, 964 S.W.2d at 928.

B. Sovereign immunity

The Division argues that "Green's lawsuit is inappropriate and must be dismissed because a state agency is immune from [declaratory judgment] claims when a party seeks a declaration of its rights under a statute or law as Green does in this case . . . . Further, Green's claims for declaratory relief against [the Division] are barred because . . . ultra vires suits for declaratory relief may only be brought against state officials in their official capacities and not against the state itself or its agencies."

"[S]tate agencies . . . are immune from suits under the UDJA [Uniform Declaratory Judgment Act] unless the Legislature has waived immunity for the particular claims at issue." *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 620 (Tex. 2011); *see Satterfield & Pontikes Constr., Inc. v. Tex. S. Univ.*, No. 01-14-00596-CV, 2015 WL 4760209, at *3 (Tex. App.—Houston [1st Dist.] Aug. 13, 2015, pet. filed) ("[A]bsent a legislative waiver, governmental immunity bars suits seeking declaratory and injunctive relief against governmental entities"). The UDJA is not a general waiver of sovereign immunity. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370 (Tex. 2009). The UDJA provides a narrow waiver of immunity for claims challenging the validity or constitutionality of ordinances or statutes. *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015); *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex.

2011); *Heinrich*, 284 S.W.3d at 373 n.6 (Tex. 2009). However, the UDJA does "not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law." *Sefzik*, 355 S.W.3d at 621 (citing *Heinrich*, 284 S.W.3d at 372–73).

Separately, a claimant may bring a suit against a state official in his official capacity under the ultra vires exception. *Heinrich*, 284 S.W.3d at 372–73. "[T]he premise underlying the ultra vires exception is that the State is not responsible for unlawful acts of officials." *Patel*, 469 S.W.3d at 76. If a lawsuit is filed against both the government entity and the "appropriate officials in their official capacity," the court must dismiss the claims against the government entity for lack of jurisdiction but allow any other claims to go forward. *Heinrich*, 284 S.W.3d at 377.

These principles were applied in *Harvel v. Texas Department of Insurance—Division of Worker's Compensation*, in which a worker appealed the Division's order denying him workers' compensation benefits and sought declaratory judgment that certain actions were within the scope of his employment. No. 13–14–00095–CV, 2015 WL 3637823, at *1 (Tex. App.—Corpus Christi June 11, 2015, pet. filed). The Corpus Christi court held that by seeking a determination of what actions were within his scope of employment, the worker sought "a declaration of [his] rights under a statute . . . . " *Id.* at *3. Thus, applying *Heinrich*,

the court found that sovereign immunity barred the worker's suit against the Division for declaratory relief. *Id.*

Green sought a declaratory judgment against both the Division and the Division's Commissioner in his official capacity. Under *Sefzik* and *Heinrich*, "as a technical matter" the trial court has no jurisdiction over the claims against the Division because it retains sovereign immunity as a government agency. *See Harvel*, 2015 WL 3637823, at *3 (holding that UDJA does not generally waive Division's sovereign immunity).

Green responds to the Division's arguments by arguing that the Division waived sovereign immunity because "when the State is a necessary party to a statutory cause of action, such [as in a declaratory judgment] action for interpretation of a statute, sovereign immunity is expressly waived because, were the State not joined, the right to a declaration would have no practical effect." She further argues that the Texas Supreme Court's decision in *Texas Lottery Commission v. First State Bank of DeQueen* "require[s]" her to name the Division as a party because lawsuits against a government agency "to construe statutes are expressly allowed." 325 S.W.3d 628 (Tex. 2010). But *DeQueen* does not authorize all lawsuits seeking an *interpretation* of a statute; it holds that jurisdiction exists over a declaratory judgment action that challenges the *validity* of a statute. *Id.* at 633–34.

Green's petition requests declaratory relief "that the injurious practice defense no longer applies." Closely related to this assertion, Green contends that in the absence of that doctrine, (1) the Act "does not permit the reduction or termination of medical benefits" or the termination of impairment income benefits and (2) the decision and order made in the Division's contested case hearing are "final and binding." All of these claims concern the interpretation of the Act, not its validity.

Thus, *DeQueen* does not establish jurisdiction over Green's request for declaratory relief interpreting the statute. *DeQueen* makes a distinction between an ultra vires claim "to require a state official to comply with statutory or constitutional provisions" and a "suit challenging the validity of an ordinance or statute." *Id.* at 633. The case does "not support the proposition that governmental immunity is waived whenever a party seeks an interpretation of a statute or ordinance." *City of McKinney v. Hank's Rest. Group, L.P.*, 412 S.W.3d 102, 112 (Tex. App.—Dallas 2013, no pet.). On the contrary, Texas law waives immunity "against claims that a statute or ordinance is invalid" but not "against claims seeking a declaration of the claimant's statutory rights or an interpretation of an ordinance . . . [or] a claim that government actors have violated the law." *Id.*; *see Trinity Settlement Servs., LLC v. Tex. State Sec. Bd.*, 417 S.W.3d 494, 503 (Tex. App.—Austin 2013, pet. denied) (holding that sovereign immunity barred suit

seeking declaration of party's rights under Texas Securities Act). *Heinrich*'s approach to sovereign immunity bars Green's claims against the Division for a "declaration of [] rights" under a statute. *Harvel*, 2015 WL 3637823, at *3.

Green's next argument, that the Supreme Court rejected the Division's arguments in *Patel v. Texas Department of Licensing & Regulation*, is misplaced. 469 S.W.3d at 76–77. The Texas Supreme Court did not hold, like Green contends, that "state agency immunity is waived when statutes are challenged as not being properly applied and enforced." Instead, the Court held that, because the plaintiffs there challenged "the validity" and constitutionality of the statutes and regulations at issue, "rather than complaining that officials illegally acted or failed to act," sovereign immunity did not apply. *Id.* Green does not challenge the constitutionality or validity of any regulations but, instead, complains that the Division "illegally acted" in applying the injurious practices defense. Thus, *Patel* does not apply to Green's lawsuit.

Green also relies on three Austin Court of Appeals cases to assert that the trial court has jurisdiction over the declaratory judgment claim against the Division. *Tex. Dep't of Ins., Div. of Workers' Comp. v. Lumbermens Mut. Cas. Co.*, 212 S.W.3d 870 (Tex. App.—Austin 2006, pet. denied); *Tex. Workers' Comp. Ins. Fund v. Tex. Workers' Comp. Comm'n*, 124 S.W.3d 813 (Tex. App.—Austin 2003, pet. denied); *Nat'l Am. Ins. Co. v. Tex. Prop. & Cas. Ins. Guar. Ass'n for*

Paula Ins. Co., No. 03–09–00680–CV, 2013 WL 4817637 (Tex. App.—Austin Aug. 28, 2013, no pet.) (mem. op.).

In *Lumbermens*, the plaintiffs sought a declaratory judgment that certain advisories issued by the Division exceeded the Division's authority. *Id.* at 875. In holding that the trial court had jurisdiction over the declaratory judgment, the Austin court held that a trial court has jurisdiction to issue a declaratory judgment "to interpret the scope of an agency's statutory authority" when the plaintiff asserts that the agency's action was an ultra vires act. *Id.*

Lumbermens was decided three years before *Heinrich*. The reasoning of *Heinrich* controls, and insofar as it is in conflict with this section of *Lumbermens*, overrules it. A government agency has sovereign immunity when the plaintiff complains of an allegedly ultra vires act. The plaintiff complaining of an ultra vires act must sue the government official in his official capacity, not the governmental entity. *Heinrich*, 284 S.W.3d at 377. Because a suit against the Commissioner in his official capacity may proceed, we reject Green's claim that her suit against the Division is "clearly necessary to . . . correct unlawful violations of the Act in workers compensation disputes concerning legal rights." Moreover, Green still has her suit pending against Zurich.

Green argues that *Texas Workers' Compensation Insurance Fund v. Texas Workers' Compensation Commission* allowed a declaratory judgment action

against the Workers' Compensation Commission (the predecessor to the Division) to proceed. 124 S.W.3d at 825. This case does not support Green's position for two reasons. First, because the Austin court agreed with the Commission in that case and affirmed the Commission's administrative decision, it never reached the issue of whether the declaratory judgment action was "redundant to judicial-review remedies expressly provided for under the labor code." *Id.* at 815. Second, even if this case did support Green's position, it was decided before *Heinrich* and thus, like *Lumbermens*, was overruled insofar as *Heinrich* contradicts it.

The third case, *National American Insurance Company v. Texas Property and Casualty Insurance Guaranty Association for Paula Insurance Company*, dealt with a controversy over which of two workers' compensation insurers must pay for a worker's injury. 2013 WL 4817637, at *1. The Texas Guaranty Association,[3] which had taken over payments for the first insurer when it became insolvent, sought a declaratory judgment against the second workers' compensation insurer "that it is not liable to reimburse [the insurer] for any amounts that [the insurer] paid in workers' compensation benefits for the two workers." *Id.* at *2. The Guaranty Association named the Division as a party "having or claiming an interest in the action." *Id.*

[3] The Texas Guaranty Association continues insurance policy coverage if an insurance company becomes insolvent. TEXAS LIFE & HEALTH INSURANCE GUARANTY ASSOCIATION, http://www.txlifega.org/ (last visited Nov. 3, 2015).

National American Insurance Company is distinguishable for two reasons. First, unlike Green, the Guaranty Association in that case did not allege an ultra vires claim, thus *Heinrich* and its holding on sovereign immunity were not implicated. Second, the Guaranty Association did not seek a declaratory judgment against the Division—it only named the Division as an entity having an interest in the lawsuit, not as a party to the lawsuit. In this case, Green seeks a declaratory judgment against the Division and specifically named the Division as a party. Thus, *National American Insurance Company* is not controlling.

Finally, Green argues that the Division "actually intervened as a party in this lawsuit" and, as we construe Green's argument, thereby waived its immunity. When a government agency intervenes in a lawsuit to assert "affirmative claims for relief," it waives immunity for claims "germane to, connected with and properly defensive to claims" the agency asserted when it intervened. *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006). When a government agency joins the lawsuit but does not seek "its own affirmative claims for monetary relief," it does not waive immunity. *See City of Dallas v. Jill Herz, P.C.*, 363 S.W.3d 896, 900–01 (Tex. App.—Dallas 2012, no pet.) (holding that City's intervention did not waive immunity because City did not assert affirmative claims for monetary relief); *In re K.G.S.*, No. 14-12-00673-CV, 2014 WL 801127, at *6 (Tex. App.—Houston [14th Dist.] Feb. 27, 2014, no pet.) (mem. op.) (holding that agency's

intervention in suit did not waive sovereign immunity because agency did not request monetary relief).

The Division's "sole purpose" in intervening in this lawsuit was to "assert that the [trial court] does not have jurisdiction to sign Green's proposed final judgment because Green improperly sought to resolve her suit for judicial review of a Division decision by seeking declaratory relief . . . ." The record does not show, nor does Green argue, that the Division is pursuing affirmative claims for monetary relief. Thus, the Division's intervention in this lawsuit does not waive its sovereign immunity to Green's claims against it.

Because we hold that the Division is protected by sovereign immunity, we do not reach its other arguments regarding the propriety of a declaratory judgment in this case. Accordingly, we sustain the Division's sole issue that the trial court lacked jurisdiction over Green's claim against it for declaratory relief.

Conclusion

We reverse the trial court's denial of the Division's plea to the jurisdiction and dismiss Green's declaratory judgment action against the Division for lack of subject-matter jurisdiction.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.