Opinion issued August 25, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00856-CV

BELA PATEL, M.D., F.C.C.P., RICHARD W. SMALLING, M.D., PH.D., RACKSHUNDA MAJID, PH.D., AND FRANCISCO FUENTES, M.D., Appellants

V.

TOMAS G. RIOS, M.D., Appellee

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Case No. 2015-23764

MEMORANDUM OPINION

This is the second appeal in the suit brought by Dr. Tomas G. Rios against Drs. Bela Patel, Richard Smalling, Rackshunda Majid, and Francisco Fuentes (collectively, the "Doctors")—faculty doctors employed by the University of Texas

Health Science Center at Houston ("UTHealth")—over the decision not to reappoint Rios to continue his medical training at UTHealth. The ruling that is the subject of this appeal is the trial court's denial of the Doctors' plea to the jurisdiction and motion for summary judgment challenging the trial court's subject-matter jurisdiction over Rios's claims for violations of statutes governing the practice of medicine in Texas and retaliation based on constitutionally protected speech. The Doctors contend the trial court does not have subject-matter jurisdiction over these claims because (1) Rios lacks standing and (2) the Doctors are immune from suit.

We reverse and render a judgment of dismissal.

Background

Rios entered the cardiovascular fellowship program at UTHealth for a one-year term beginning in July 2013. His relationship with the faculty physicians supervising his training deteriorated not long after. First, in a December 2013 performance review, Fuentes, the program director, shared with Rios that faculty were concerned about his patient care and professionalism. Fuentes showed Rios "evaluations from several attendings which indicated that [Rios] showed a lack of interest and a lack of knowledge." Two months after this performance review, in February 2014, Rios complained to UTHealth's compliance office about "issues relating to patient endangerment" and the need to improve the quality of treatment. He also reported concern that his actions were being "unfairly scrutinized." Rios

requested that his complaint "remain[] confidential unless absolutely necessary." Two months after Rios made his complaint, in April 2014, Fuentes, citing several additional faculty and staff criticisms, notified Rios by letter that he would not be reappointed to the fellowship program to continue his medical training for a second term because he lacked the "clinical competencies necessary to function effectively."

Rios sued UTHealth along with Fuentes and three other faculty doctors—Patel, Smalling, and Majid—alleging that together they had taken "steps to discredit [his] reputation and harm [his] future as a medical doctor." Rios alleged that UTHealth breached his residency contract and that UTHealth and the Doctors defamed him. In addition, Rios pleaded that the Doctors tortiously interfered with his residency contract and future business relationships and retaliated against him for his compliance-office complaint, which he alleged was speech protected by the federal and state constitutions, by making "false statements" about him. According to Rios, the Doctors' false statements forced him out of the fellowship program and delayed his license to practice medicine from the Texas Medical Board ("TMB").

The Attorney General answered for all defendants and moved to dismiss all but the tort claims against UTHealth. The motion argued that the contract claim

against UTHealth, a state agency,[1] was barred by sovereign immunity and that the tort claims against the Doctors, employees of UTHealth, must be dismissed under the election-of-remedies provision in the Texas Tort Claims Act ("TTCA"). *See* TEX. CIV. PRAC. & REM. CODE § 101.106(e) ("If a suit is filed under [the TTCA] against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit."). In response, Rios abandoned the tort claims against UTHealth in his first amended petition, leaving the Doctors as the only tort defendants, and argued the TTCA no longer required dismissal of the tort claims against them.

The trial court dismissed Rios's contract claim against UTHealth but denied dismissal of his tort claims against the Doctors, resulting in the Doctors' first appeal in this suit. On the Doctors' appeal, the Texas Supreme Court reversed the trial court's ruling as to Rios's tort claims,[2] holding the TTCA mandated the dismissal of those claims. *See Univ. of Tex. Health Sci. Ctr. at Hous. v. Rios*, 542 S.W.3d 530, 534–39 (Tex. 2017). The Court remanded the case to the trial court for further proceedings on Rios's sole remaining claim for retaliation against the Doctors.

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[1] UT Health is part of the University of Texas System. TEX. EDUC. CODE § 65.02(a)(9). State universities are considered state agencies for purposes of sovereign immunity. *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976).

[2] Rios did not appeal the dismissal of his contract claim against UTHealth.

On remand, Rios filed a second amended petition. The second amended petition retained the remanded claim alleging retaliation for Rios's exercise of free speech, which Rios labeled as a cause of action for "Violations of 42 U.S.C. 1983." More specifically, the second amended petition alleged that the Doctors, "in their individual capacities," had unlawfully retaliated against Rios's exercise of his right "to report a wrongdoing" under the First Amendment of the United States Constitution and Article I, Section 8 of the Texas Constitution "by making false statements that eventually led to his reappointment in the residency program being retracted." Rios also alleged the Doctors retaliated against him by publishing false and misleading statements in his fellowship program file, which UTHealth transmitted to the TMB in response to Rios's application for licensure. Rios asserted that the Doctors should be liable to him for damages because of these alleged civil rights violations.

Rios's second amended petition also included a new cause of action against the Doctors for "Violations of Texas Statutes." Under this cause of action, Rios alleged that the Doctors' "false and misleading statements" about him violated certain statutory provisions regulating the practice of medicine in Texas—namely, Section 164.052 of the Texas Medical Practice Act and Section 190.8(2)(C) and (P) of the Administrative Code. *See* TEX. OCC. CODE §§ 151.001–171.024 ("Medical Practice Act" or "the Act"); *id.* § 164.052(a)(1) ("A physician or an applicant for a

license to practice medicine commits a prohibited practice if that person . . . submits to the [TMB] a false or misleading statement, document, or certificate in an application for a license[.]"); 22 TEX. ADMIN. CODE § 190.8(2)(C), (P) (defining "unprofessional and dishonorable conduct" to include "providing false information to the [TMB]" and "behaving in a disruptive manner toward licensees"). He alleged that these statutory violations caused him to incur expenses in refuting the Doctors' "false and misleading statements" and delayed his medical license. Rios pleaded that the Doctors "should be liable" for these violations, and he sought a judgment (1) requiring the Doctors to "retract any false information provided to the [TMB]" and (2) for damages and "[a]ll other relief" to which he was entitled.

The Doctors filed a combined plea to the jurisdiction and motion for summary judgment, seeking dismissal of both of Rios's remaining claims for lack of subject-matter jurisdiction on several grounds. The Doctors argued that Rios lacked standing to bring his claims under the Medical Practice Act and Administrative Code because those statutes do not create a private right of action. The Doctors also argued that Rios lacked standing to seek injunctive relief against them in their individual capacities and to request damages for violation of the Texas Constitution's free-speech guarantee. Finally, the Doctors argued that Rios failed, as a matter of law, to establish a waiver of immunity because his retaliation claims were not based

on protected speech and, even if they were, the doctrines of qualified immunity and official immunity barred the claims.

The trial court denied the Doctors' motion challenging subject-matter jurisdiction. But in its order, the trial court:

- affirmed the dismissal of the contract claim against UTHealth and the tort claims against the Doctors based on sovereign immunity;
- concluded that, "facially," the statute and administrative provisions relied on by Rios "do not create a private cause of action";
- concluded that Rios's cause of action for "Violations of Texas Statutes" also lacked "the specificity required to precisely discern the cause(s) of action asserted";
- concluded that Rios's cause of action for "Violations of 42 U.S.C. 1983" by the Doctors "lack[ed] the specificity required to precisely discern the alleged application of federal law espoused by [Rios] in state court"; and
- ordered Rios to "amend his petition, to correct its substantive, legal deficiencies, and conform [his] claims to the elected remedies, within [30] days[.]"

Before the 30-day deadline for Rios's amended pleading expired, the Doctors filed a timely notice of interlocutory appeal, which had the effect of staying the trial and "all other proceedings in the trial court" pending the resolution of the appeal.[3] Rios did not amend his pleadings before the stay became effective.

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[3] The Doctors appealed under section 51.014(a)(5) of the Civil Practice and Remedies Code, which permits an interlocutory appeal of an order that "denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5). Under subsection (b) of section 51.014, such an appeal

Standard of Review

A governmental defendant's immunity from suit deprives the trial court of subject-matter jurisdiction. *City of Hous. v. Williams*, 353 S.W.3d 128, 133 (Tex. 2011). Whether a trial court has subject-matter jurisdiction is an issue we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

Governmental defendants challenging subject-matter jurisdiction do so through a plea to the jurisdiction. *Id.* at 225–26. When a plea challenges the pleadings, we determine if the plaintiff has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Id.* at 226. We construe the pleadings liberally in favor of the plaintiff and look to his intent. *Id.* If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend his pleading. *Id.* at 226–27. But if the pleadings affirmatively negate the existence of jurisdiction, the plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Id.* at 227.

This is not the end of our analysis, however: "if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence

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triggers a stay of the trial and "all other proceedings in the trial court." *Id.* § 51.014(b).

submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do." *Id.* "If there is no question of fact as to the jurisdictional issue, the trial court must rule on the plea to the jurisdiction as a matter of law." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009). But if the jurisdictional evidence creates a fact question, then the trial court cannot grant the plea to the jurisdiction, and the issue must be resolved by the fact finder. *Id*. This standard mirrors our review of summary judgments, and we therefore take as true all evidence favorable to the plaintiff, indulging every reasonable inference and resolving any doubts in his favor. *Id.*

Rios's Lack of Standing on Claim Alleging Violations of Texas Statutes

In part of their first issue, the Doctors argue the trial court erred by failing to dismiss Rios's claim under the Medical Practice Act and Administrative Code because those statutes do not confer a private right of action and, therefore, Rios lacks standing to assert the claim. We agree Rios's statutory claim must be dismissed for lack of standing.

A. Applicable Law

Standing is a component of subject-matter jurisdiction. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *see also Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005) ("Without standing, a court lacks subject matter jurisdiction to hear the case."). "The general test for standing in

Texas requires that there '(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.'" *Tex. Ass'n of Bus.*, 852 S.W.2d at 446 (quoting *Bd. of Water Eng'rs v. City of San Antonio*, 283 S.W.2d 722, 724 (Tex. 1955)). Standing also requires some interest peculiar to the plaintiff individually and not as a member of the public. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984); *Cernosek Enters., Inc. v. City of Mont Belvieu*, 338 S.W.3d 655, 663 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

These general standing rules apply unless standing has been statutorily conferred on the plaintiff. *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001); *Cernosek Enters.*, 338 S.W.3d at 663. When a private cause of action is alleged to derive from a statutory provision, the duty of the courts is to ascertain legislative intent. *Brown v. De La Cruz*, 156 S.W.3d 560, 563 (Tex. 2004); *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 77 S.W.3d 253, 260 (Tex. 2002). In such a case, the statute itself serves as the basis for the analysis. *Cernosek Enters.*, 338 S.W.3d at 663; *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 851 (Tex. App.—Fort Worth 2005, no pet.). The legislature can indicate its intent to create a private right of action either by including an express provision in the statutory text or through implication. *Brown*, 156 S.W.3d at 563. But the courts will not imply that a statutory provision confers a private right of action unless legislative intent is clear from the language used. *See id.* at 567 (approving of "rule of strict construction" that

provides "causes of action may be implied only when a legislative intent to do so appears in the statute as written").

A. Analysis

Rios concedes the statutory provisions on which his claim rests—Section 164.052 of the Medical Practice Act and Section 190.8(2)(C) and (P) of the Administrative Code—do not expressly confer a private right of action; instead, he contends the provisions do so by implication because they do not expressly prohibit such actions. Consequently, we must determine whether a legislative intent to confer a private right of action in favor of Rios against the Doctors can be implied from the statutory language. *See Brown*, 156 S.W.3d at 563; *Cernosek Enters.*, 338 S.W.3d at 663. We conclude it cannot.

Rios asserts a claim under Section 164.052 of the Medical Practice Act based on the Doctors' submission of allegedly "false" and "misleading statements and documents" about him, which he claims kept him from being reappointed for a second term in the fellowship program and delayed the TMB's issuance of his license to practice medicine. *See* TEX. OCC. CODE § 164.052. Rios further alleges that the Doctors violated Section 190.8(2)(C) and (P) of the Administrative Code "by providing false information to the [TMB], and behaving in a disruptive manner toward [him]." *See* 22 TEX. ADMIN. CODE § 190.8(2)(C), (P).

We begin with an overview of the statutes at issue. The Medical Practice Act provides an enforcement scheme for regulating the practice of medicine in Texas. *See* TEX. OCC. CODE §§ 151.001–171.024. The TMB is the state agency statutorily conferred with enforcement powers. 22 TEX. ADMIN. CODE § 161.1 ("The [TMB], referred to as the 'board' or the 'Medical Board', is an agency of the executive branch . . . statutorily empowered to regulate the practice of medicine in Texas."); *see also* TEX. OCC. CODE § 152.001(a) (TMB has "the power to regulate the practice of medicine"). The Act instructs that the TMB "should remain the primary means of licensing, regulating, and disciplining physicians." TEX. OCC. CODE § 151.003(2). Consistent with that instruction, the Act empowers the TMB to oversee all aspects of medical licensing, including the initial examination and application for a license, the renewal and registration of a license, the investigation of complaints against a physician, and the suspension or revocation of a license. *See id.* §§ 151.001–171.024. As part of its authority, the TMB may take disciplinary action against physicians who engage in statutorily prohibited acts. *See, e.g.*, *id.* §§ 164.001 (disciplinary authority of TMB), .051(a) ("The board . . . may take disciplinary action against a person if the person: (1) commits an act prohibited under Section 164.052[.]"). The prohibited acts, enumerated in Section 164.052, include submitting "to the [TMB] a false or misleading statement, document, or certificate

in an application for a license[,]" something Rios claims the Doctors did here.[4] *Id.* § 164.052(a)(1).

The regulations promulgated in Chapter 190 of the Administrative Code—entitled "Disciplinary Guidelines"—concern the TMB's powers and procedures to sanction physicians it finds to have violated the Medical Practice Act. *See* 22 TEX. ADMIN. CODE §§ 190.1–.15. Chapter 190 states its purpose and authority:

> (a) Purpose. This chapter is promulgated to:
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> (1) promote consistency in the exercise of sound discretion by board members in licensure and disciplinary matters;
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> (2) provide guidance for board members for the resolution of potentially contested matters; and
>
> (3) provide guidance as to the types of conduct that constitute violations of the Medical Practice Act . . . or board rules.
>
> (b) Authority. Pursuant to §§ 164.001–164.103, the Board may adopt rules relating to its disciplinary authority to take action against a licensee.

Id. § 190.1. The specific section Rios alleges his claim under—Section 190.8—provides guidance on the "acts, practices, and conduct" that violate the Medical

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[4] Section 164.052 of the Medical Practice Act has been amended twice since Rios filed his second amended petition asserting his statutory claim for the first time. *See* Act of May 25, 2019, 86th Leg., R.S., ch. 1231, § 16, sec. 164.052(a), 2019 Tex. Gen. Laws 3526, 3532–33; Act of May 19, 2021, 87th Leg., R.S., ch. 251, § 2, sec. 164.052(a), 2021 Tex. Sess. Law Serv. 528, 529–30. Neither side in this appeal has identified, nor have we found, any amendment to Section 164.052, or to any other provision of the Medical Practice Act, that affects our determination of whether a private right of action for violation of Section 164.052 exists.

Practice Act, including "unprofessional and dishonorable conduct that is likely to deceive, defraud, or injure the public within the meaning of the Act[.]" *Id.* § 190.8(2). This non-exclusive list of "[u]nprofessional and dishonorable" conduct includes two complained-of acts against the Doctors—"providing false information to the [TMB]" and "behaving in a disruptive manner toward licensees, hospital personnel, other medical personnel, patients, family members or others that interferes with patient care or could be reasonably expected to adversely impact the quality of care rendered to a patient," *Id.* § 190.8(2)(C), (P).

The Legislature did not expressly confer a private right of action in favor of Rios in the text of either Section 164.052 of the Medical Practice Act or Section 190.8 of the Administrative Code. Nor did it imply one. As noted, Section 164.052 of the Medical Practice Act is part of the enforcement scheme carried out by the TMB, through administrative regulation and disciplinary action. *See* TEX. OCC. CODE §§ 164.001–.206. The Act defines unlawful and prohibited practices and provides TMB with the disciplinary authority to enforce Section 164.052. *See id.* §§ 164.001, 164.051–.052. It defines the grounds for revocation and suspension of a license by TMB, sets forth the charging and hearing process to be followed by TMB, and lists the methods of discipline available to TMB. *See id.* §§ 164.001–164.201. Thus, as to Section 164.052 specifically, the legislature trusted its enforcement to the TMB. *See id.* § 164.051(a) ("The *board* . . . may take disciplinary

action against a person if the person: (1) commits an act prohibited under Section 164.052[.]" (emphasis added)). The statutory framework shows the Legislature's intent to allow the TMB, a state agency, to enforce the provisions of the Act, rather than authorize enforcement through private action. *See Cole v. Huntsville Mem'l Hosp.*, 920 S.W.2d 364, 372–73 (Tex. App.—Houston [1st Dist.] 1996, writ denied), *disapproved on other grounds by Brown*, 156 S.W.3d at 567 n.40 (considering prior version of Medical Practice Act and concluding no private right of action existed because its enforcement was by criminal penalties and administrative regulation); *see also Brown*, 156 S.W.3d at 566–67 ("Modern legislatures may delegate enforcement to executive departments [and] administrative agencies, . . . as well as the criminal or civil courts; with such a myriad of tools at the Legislature's disposal, we cannot always assume that [courts] must be the hammer."). For the same reasons, the text of Section 190.8 also does not imply a private right of action in favor of Rios, as it provides guidance *to the TMB* for what constitutes violations of the Medical Practice Act. *See* 22 TEX. ADMIN. CODE § 190.8.

Urging that we must reach a different conclusion, Rios asserts that "private litigants have filed for private rights of relief based on the [] Medical Practice Act in the past, implying a private right of action." But the cases cited by Rios do not support his position. *See McCoy v. FemPartners, Inc.*, 484 S.W.3d 201 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Fite v. Emtel, Inc.*, No. 01-07-00273-CV, 2008

WL 4427676 (Tex. App.—Houston [1st Dist.] Oct. 2, 2008) (mem. op. on reh'g); *Gupta v. E. Idaho Tumor Inst., Inc.*, 140 S.W.3d 747 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). In each of the cases, the court considered whether certain conduct violated the statute for a different purpose. The courts did not determine whether the statute gives rise to a private cause of action.

For instance, in *Gupta*, our sister court in Houston considered whether a joint venture agreement between a physician and a corporate entity was unenforceable because it violated the Medical Practice Act's prohibition against the corporate practice of medicine. *See* 140 S.W.3d at 751–52 (explaining that, "when a corporation comprised of lay persons employs licensed physicians to treat patients and the corporation receives the fee, the corporation is unlawfully engaged in the practice of medicine," under TEX. OCC. CODE § 164.052(a)(17)); *see also* TEX. OCC. CODE § 164.052(a)(17) ("A physician . . . commits a prohibited practice if that person . . . directly or indirectly aids or abets the practice of medicine by a person, partnership, association, or corporation that is not licensed to practice medicine by the board[.]"). Accordingly, the statute was raised as a defense to the enforceability of the joint venture agreement based on illegality, not as a private cause of action. *See Gupta*, 140 S.W.3d at 751, 753–56 ("As a general rule, a contract to do a thing which cannot be performed without a violation of law is unenforceable.").

Similarly, in *Fite*, this Court considered whether a court order, rather than a contract, violated the prohibition against the corporate practice of medicine, not whether a private right of action existed. *See* 2008 WL 4427676, at *6. This Court was asked whether the appointment of a non-physician as the receiver of BEPA, a professional association formed to provide hospitals with physicians for their emergency care facilities, violated the Medical Practice Act's prohibition against the corporate practice of medicine. *See id.* at *6–7 (considering TEX. OCC. CODE § 164.052(a)(17)). This Court held the appointment was not erroneous because the trial court's order empowered the non-physician receiver to oversee only BEPA's business operations, leaving matters concerning the practice of medicine to BEPA's physician president. *Id.* at *7. Thus, in *Fite* too, this Court considered only whether certain conduct violated the Medical Practice Act, not whether an individual may hold physicians liable for a violation thereof in a private action. *See id.*

McCoy, a medical negligence case brought by an incapacitated patient's spouse against the patient's physician and the physician's employer, is equally unavailing. 448 S.W.3d at 202–03. There, the appellate court analyzed certain Medical Practice Act provisions to determine the viability of the plaintiff's veil-piercing theory against the physician's employer. *Id.* at 206. Specifically, the issue was whether the alleged corporate fiction should be disregarded for purposes of

liability if the corporate fiction was used to circumvent the Medical Practice Act's prohibition against the corporate practice of medicine. *See id.*

In sum, considering the text of Section 164.052 of the Medical Practice Act and Section 190.8(2)(C) and (P) of the Administrative Code, we conclude these provisions do not clearly express a legislative intent to create a private right of action in favor of Rios against the Doctors. In the absence of a private right of action in his favor, Rios lacks standing to pursue his claim against the Doctors under these statutory provisions. *See Brown*, 156 S.W.3d at 569. We note Rios's objection that he has not had an opportunity to amend his pleading as ordered by the trial court, but Rios's lack of standing is not a pleading deficiency that can be cured by amendment. His claim alleging violations of Section 164.052 of the Medical Practice Act and Section 190.8(2)(C) and (P) of the Administrative Code is incurably defective under our construction of the statutes. *See Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839 (Tex. 2007) (plaintiff should be given opportunity to amend to cure jurisdictional defect, "unless the pleadings are incurably defective"); *Miranda*, 133 S.W.3d at 228 (plaintiff's suit should be dismissed when pleadings demonstrate incurable jurisdictional defect). Consequently, we hold the trial court erred by failing to dismiss Rios's claim alleging violations of Section 164.052 of the Texas Medical Practice Act and Section 190.8(2)(C) and (P) of the Administrative Code.

We sustain the Doctors' first issue as to Rios's claim based on the Doctors' alleged statutory violations.

Doctors' Immunity from Suit for Free-speech Retaliation Claim

In his remaining claim, Rios alleges that the Doctors' retaliated against the exercise of his rights of free speech under the federal and state constitutions by withdrawing his reappointment to the fellowship program. When, as here, a plaintiff sues to vindicate a constitutional right, a governmental defendant's "immunity from suit is not waived if the constitutional claims are facially invalid." *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015); *City of Hous. v. Johnson*, 353 S.W.3d 499, 504 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (trial court must grant jurisdictional plea if governmental defendant remains immune from suit because constitutional claims are facially invalid). In part of their second issue, the Doctors argue that the trial court erred by denying their plea to the jurisdiction and motion for summary judgment as to Rios's free-speech retaliation claims for several reasons, including because the jurisdictional evidence established as a matter of law that Rios spoke as a governmental employee, not as a citizen, and therefore his speech is not constitutionally protected. We agree.

A. Applicable Law

Rios asserts that his speech is constitutionally protected under the First Amendment to the United States Constitution and Article I, Section 8 of the Texas

Constitution. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech[.]"); TEX. CONST. art. I, § 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."). Neither side has argued that the elements of a free-speech retaliation claim under the Texas Constitution differ from the elements of a First Amendment retaliation claim. Consequently, we may use state and federal constitutional precedent in analyzing Rios's claim. *See Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002) ("Where, as here, the parties have not argued that differences in state and federal constitutional guarantees are material to the case, and none is apparent, we limit our analysis to the First Amendment and simply assume that its concerns are congruent with those of article I, section 8."); *Caleb v. Carranza*, 518 S.W.3d 537, 543 (Tex. App.—Houston [1st Dist.] 2017, no pet) (when plaintiff does not argue that Texas Constitution provides any greater protection than First Amendment, courts "may rely upon persuasive authorities applying free-speech protections under both the federal and Texas constitutions").

In certain circumstances, the First Amendment protects a public employee's right "to speak as a citizen addressing matters of public concern," but not all speech by public employees is constitutionally protected. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 691 (5th Cir.

2007) (per curiam) ("Public employees do not surrender all their free speech rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen on matters of public concern."); *Caleb*, 518 S.W.3d at 544 ("A governmental employee's speech may be entitled to constitutional protections."). To prevail on a constitutional free-speech retaliation claim, Rios must establish that: (1) he suffered an adverse employment action; (2) his speech involved a matter of public concern; (3) his interest in commenting on matters of public concern outweighed his employer's interest in promoting efficiency; and (4) his speech motivated the employer's adverse action. *Modica v. Taylor*, 465 F.3d 174, 179–80 (5th Cir. 2006); *see also Caleb*, 518 S.W.3d at 544 (requiring showing of same elements on free-speech retaliation claim under Texas Constitution). Because Rios was employed by a state agency at the time of the speech at issue, he must also establish that he spoke as a private citizen, rather than as a public employee under his official duties. *Caleb*, 518 S.W.3d at 544.

When "public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. But the mere fact that the speech at issue concerns information acquired by virtue of public employment "does not transform that speech into employee—rather than citizen—speech." *Lane v. Franks*, 573 U.S. 228,

240 (2014). The critical question is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.*

For this inquiry, we focus not on the speech's content, but rather "the role the speaker occupied when he said it." *Davis v. McKinney*, 518 F.3d 304, 312 (5th Cir. 2008). In addition, we review several factors, including the internal versus external nature of the speech, the employee's formal job description, whether the employee spoke on the subject matter of his or her employment, and whether the speech resulted from special knowledge gained as an employee. *Williams*, 480 F.3d at 692.

Foundational federal authorities are instructive in illustrating the distinction between a speaker acting in his role as a "citizen" and in his role as an "employee." In *Garcetti*, the seminal case on "citizen" versus "employee" speech, a deputy district attorney for the Los Angeles County District Attorney's Office drafted a memorandum to his supervisors about inaccuracies in an affidavit used to procure a warrant and suggesting the office refrain from prosecuting the case for which the warrant was obtained. 547 U.S. at 413–14. The deputy brought a First Amendment retaliation claim contending that in response to his memorandum, he was subjected to a series of retaliatory events. *Id.* at 415. The United States Supreme Court held that the deputy's statements in the memoranda were not protected speech because they were made "pursuant to his duties as a calendar deputy," specifically, the

fulfillment of his "responsibility to advise his supervisor about how best to proceed with a pending case." *Id.* at 421. The Court reached its holding using a two-step inquiry:

> The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.

Id. at 418 (citations omitted). And the Court reasoned, "'Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421–22.

In *Williams*, the Fifth Circuit analyzed *Garcetti* and determined that its holding, at minimum, demonstrates that "[j]ob-required speech is not protected." 480 F.3d at 693. But the Fifth Circuit went on to "determine the extent to which, under *Garcetti*, a public employee is protected by the First Amendment if his speech is not necessarily required by . . . but nevertheless is related to his job duties." *Id.* In *Williams*, a high school athletic director was removed from his position after he wrote several memoranda to school officials, including the principal, questioning the school's handling of its athletic fund. *Id.* at 690–91. Although the memoranda were

not required as part of Williams's job duties, the Fifth Circuit nevertheless found that Williams wrote the memoranda while performing his job because he needed accounting information from the school principal and office manager to perform his duties as athletic director. *Id*. at 694.

B. Analysis

Assuming without deciding that Rios's speech related to patient care and medical training in a public hospital involved a matter of public concern, Rios's free-speech retaliation claim against the Doctors fails because the jurisdictional evidence establishes as a matter of law that he was speaking as public employee. It is undisputed that Rios was a clinical fellow in UTHealth's cardiovascular disease fellowship program when he reported his concerns about overnight patient care and the leadership of the fellowship program to UTHealth's compliance office. By his own admission, Rios reported his concerns about the matters he learned during overnight shifts at UTHealth to an exclusively internal audience and in accordance with the instructions on UTHealth's compliance website, with a goal of both "protect[ing] and defend[ing] [him]self from perceived wrongdoings" and "improv[ing] the fellowship experience, and ultimately . . . patient care." He described his internal report as a matter of professional responsibility, considering his duties as a physician and his resulting obligation to report "illegal, unprofessional, or unethical conduct" in patient care. Rios asked that his complaint

"remain[] confidential unless absolutely necessary." In short, Rios's pleadings and evidence emphasize that the speech in question was necessarily related to his professional responsibilities as a physician.

Rios attempts to distinguish his speech from speech held in other cases to be unprotected "employee" speech on the ground that his report was not "required" by his specific job duties as a clinical fellow at UTHealth. In support, he cites *Lane* and the Supreme Court's warning therein that "*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment." *Lane*, 573 U.S. at 239. Specifically, Rios points to *Lane*'s instruction that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* at 240.

We are not persuaded that *Lane* controls. Although Rios emphasizes that his speech was not "required" by his job duties, he stops short of alleging that his speech was not "related" to his job duties. Even if Rios was not ordered to make the complaint, his observations regarded patients in his care. It is reasonable to conclude that his responsibilities as a clinical fellow at UTHealth would include the provision of care to his patients in accordance with medical standards. And his position as a

clinical fellow gave him the special knowledge and the opportunity to recognize, identify, and report the perceived deficiencies in patient care up the chain of command to UTHealth's compliance office. *See Williams*, 480 F.3d at 694 (holding speech made in course of performing job duties where athletic director's criticism of school principal was possible because of special knowledge and experience with athletic procedures); *Gentilello v. Rege*, No. 3:07-CV-1564-L, 2008 WL 2627685, at *5 (N.D. Tex. June 30, 2008) (physician complaint related to patient care was unprotected employee speech).

We therefore conclude the jurisdictional evidence establishes as a matter of law that Rios spoke as a public employee and not a citizen when he complained to the UTHealth's compliance office. Accordingly, Rios's speech is not entitled to constitutional protection and does not satisfy the elements of a free-speech retaliation claim. *See Caleb*, 518 S.W.3d at 544 (requiring government employee to establish he spoke as private citizen, rather than as public employee under his official duties). Again, we note Rios's objection that he has not had the opportunity to amend his pleading as ordered by the trial court, but our conclusion on his free-speech retaliation claim does not rest on a pleading deficiency. The trial court was required to grant the Doctors' plea to the jurisdiction and motion for summary judgment on Rios's free-speech retaliation claim because there is no question of fact on the jurisdictional issue. *See Heinrich*, 284 S.W.3d at 378 ("If there is no question of fact

as to the jurisdictional issue, the trial court must rule on the plea to the jurisdiction as a matter of law."). We hold the trial court erred by failing to do so.

We sustain the Doctors' second issue as to Rios's claim for free-speech retaliation under the federal and state constitutions.

Conclusion

Based on our holdings requiring the dismissal of Rios's claims for violations of the statutes regulating the practice of medicine in Texas and free-speech retaliation under the federal and state constitutions,[5] we reverse the trial court's order denying the Doctors' plea to the jurisdiction and motion for summary judgment and render judgment dismissing Rios's claims against the Doctors.

Amparo Guerra
Justice

Panel consists of Justices Landau, Guerra, and Farris.

[5] These holdings are dispositive of this appeal. Consequently, we need not reach the remainder of the Doctors' issues. *See* TEX. R. APP. P. 47.1.